
(2013) 09 DEL CK 0286

In the Delhi High Court

Case No : EFA (OS) 17 of 2013 and CM. 13561 of 2013

BSES Yamuna Power Limited

APPELLANT

Vs

Shyam Bihari Singhal

RESPONDENT

Date of Decision : 24-09-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Citation : (2013) 9 AD 537 : (2013) 138 DRJ 525

Hon'ble Judges : S. Ravindra Bhat, J;Najmi Waziri, J

Bench : Division Bench

Advocate : Deepak Kumar Vijay, for the Appellant; Fanish K. Jain, for the Respondent

Final Decision : Dismissed

Judgement

S. Ravindra Bhat, J.—This is an appeal from the order of a learned Single Judge in an application u/s 144 of the CPC (hereafter referred to as "the CPC"), seeking restitution on behalf of the decree holder. In this case, the respondent (hereafter referred to as "the decree holder") instituted a suit against the appellant ("BSES") for cancellation of a bill issued by the latter for the amount of Rs. 48,83,927/-. During the course of that proceeding, the Civil Judge directed (in an order dated 03.08.1999) the decree holder to deposit Rs. 6,00,000/- to the BSES as a precondition to restrain disconnection of electricity supply to his premises. Later, the plaint was returned by the Civil Judge, and the suit was filed before this Court, upon which time the same interim order was made by the Court, in an order dated 24.07.2006. Accordingly, the decree holder paid the amount to the BSES in two equal instalments of Rs. 3 lakhs each on 12.08.1999 and 6.09.1999.

2. The suit was decreed on 16.03.2011. Thus, the impugned bill of Rs. 48,83,927 was set aside, and the Rs. 6 lakhs was ordered to be refunded within 8 weeks. To recover this amount, the decree-holder filed an execution petition. In those proceedings, it was contended by him that apart from the amount of Rs. 6 lakhs, he was entitled to interest at 18% per annum from the date of deposit till its

actual realization. Contrary to this, the BSES argued that the judgment and decree dated 16.03.2011 in the underlying matter was clear in that only payment of Rs. 6 lakhs was to be made, and that the payment of interest over and above that amount would amount to an impermissible exercise of adding to the decree.

3. The learned Single Judge, in the impugned order, held that:

...in view of the principles of restitution as stated u/s 144 CPC, the decree holder is entitled to restitution. Judgment debtor has enjoyed the sum of rupees six lac, pursuant to an interim order passed by this Court. Decree holder shall be entitled to interest from the date of deposit of the sum of Rs. 6 lac till its refund. In my opinion, the rate of interest @ 12 p.a. simple is appropriate and in order. Hence, the present application is allowed. It is ordered that the decree holder shall be entitled to interest @ 12% simple interest on the sum of Rs. 6 lac w.e.f. the date of deposits i.e. 12.08.1999 for the sum of Rs. 3 lac and 06.09.1999 for the balance of Rs. 3 lac, till the date payment was received by the decree holder....

4. In reaching this conclusion, the learned Single Judge returned three findings: first, an application for restitution can be taken to be an application for execution of a decree; secondly, that restitution u/s 144 of the CPC comes into play from the date when the Court passed judgment, and thus the interim relief came to an end; finally, the Single Judge rejected BSES's plea that since the decree holder himself sought an interim order from the Court (i.e. the decree holder himself had asked for it), the concept of restitution would not apply.

5. Aggrieved by the impugned order, learned counsel for BSES argued that the learned Single Judge, in effect, went behind the decree by ordering recovery of an amount greater than the trial court itself. It was argued that the impugned order contravenes the judgment and order dated 16.3.2011. Concurring with the learned Single Judge's reasoning, thus, would be tantamount to allowing a modification of the decree through Section 144 CPC, which is impermissible and unknown to law.

6. Learned counsel also argued several other issues raised before the Single Judge: that the application of Section 144 CPC is limited to cases where due to the fault of defaulting party, the other party has suffered, and in that case the aggrieved party can seek restitution. It is argued that this is not the case here, as it was the decree holder who proposed the payment of Rs. 6 lakhs into Court, rather than a demand put forward by BSES. In support of these arguments, learned counsel argues that the reliance placed by the Single Judge on the decisions of the Supreme Court in Mahjibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai and Others, and South Eastern Coalfields Ltd. Vs. State of M.P. and Others, are misplaced since the facts of those cases can be distinguished from the present matter. The above mentioned cases are concerned with immovable properties where the original order was set aside by the appellate court and it was in that context that the applications u/s 144 CPC were held to be

maintainable as execution petitions. Finally, on the question of the quantum of interest awarded, learned counsel argued that the reasonable rate of interest awarded by banks on fixed deposits from 1999 is not more than 12%, and thus, a greater interest would amount to a penalty, rather than a restitutionary relief to the decree holder.

7. Addressing these submissions, and the issues presented in this case, it is helpful to extract Section 144, CPC, which reads as follows:

144. Application for restitution.- (1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall, on the application of any party entitled in 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 order or such part thereof as has been varied, reversed, set aside or modified 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 property consequential on such variation; reversal, setting aside or modification of the decree of the decree or order.

Explanation: For the purposes of sub-section (1), the expression "Court which passed the decree or order" shall be deemed to include,--

(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance;

(b) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order;

(c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

8. The first question that arises is whether the application before the Single Judge, operating under the umbrella of Section 144 CPC, can be properly considered as an execution application. Section 144 codifies the principle of restitution, i.e. of making parties whole consequent to a wrongdoing or an act of unjust enrichment. The Section lays down the substantive and general rule that parties must be returned, post litigation, to their original position. Indeed, as the Supreme Court noted in *Mahjibhai* (supra):

26. ...The section does not either expressly or by necessary implication change the nature of the proceedings. Its object is limited. It seeks to avoid the conflict

and to make the scope of the restitution clear and unambiguous. It does not say that an application for restitution, which till the new Procedure Code was enacted, was an application for execution, should be treated as an original petition. Whether an application is one for execution of a decree or is an original application depends upon the nature of the application and the relief asked for. When a party, who lost his property in execution of a decree, seeks to recover the same by reason of the appellate decree in his favour, he is not initiating any original proceeding, but he is only concerned with the working out of the appellate decree in his favour. The application flows from the appellate decree and is filed to implement or enforce the same. He is entitled to the relief of restitution, because the appellate decree enables him to obtain that relief, either expressly or by necessary implication. He is recovering the fruits of the appellate decree. Prima facie therefore, having regard to the history of the section, there is no reason why such an application shall not be treated as one for the execution of the appellate decree.

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27....Therefore, an execution application for restitution would be governed by section 144 of the Code of Civil Procedure. If the argument of the learned counsel for the appellant be accepted, it will lead to inconsistent positions depending upon whether the appellate decree gave a direction for restitution or it did not. If it did not, the application would become an original petition; if it did, it would be an execution application.

9. Accordingly, approaching the Court u/s 144 CPC does not affect the characterization of the application as one for restitution as distinct from one for execution. Neither does this exercise translate into going behind the decree. In this case, the decree stated: "25. The amount of Rs. 6 lakhs which the plaintiff had deposited in compliance of the interim order dated 3rd August, 1999 shall be refunded back to him within 8 weeks." The decree, thus, entitled the decree holder to a return of the money value of Rs. 6 lakhs deposited in 1999, rather than a static sum.

10. A claim for restitution encompasses a return of the principal amount and the related money value that the decree holder was deprived of from the use of that principal amount. Crucially, this is not an independent claim that goes beyond the decree, but rather, one that ensures that the return ordered in the decree itself makes the parties whole. Indeed, as the Supreme Court noted in *Secretary, Irrigation Department, Government of Orissa and others Vs. G.C. Roy, ,*

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(i) [a] person deprived of the use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name.

11. This claim for the "time value of money" was also recognized in *Sempra Metal Limited v. Her Majesty's Commissioners of Inland Revenue and Another,*

[2007] UKHL 34) as an archetypal restitutionary claim, which the Supreme Court has also recognized and labelled as "unjust impoverishment" in *South Eastern Coalfields*, (supra)]. This claim, thus, flows naturally and inevitably from the claim for the principal amount, and is not distinct from it.

12. The BSES's argument that a claim for restitution is limited to instances when the defaulting party requests for the interim relief is incorrect. Restitution, either u/s 144 CPC or generally, operates objectively, irrespective of the cause. What is important is that a benefit has resulted to one of the parties from an act of the Court, irrespective of how that order came about. As the Supreme Court noted in *South Eastern Coalfields* (supra):

25. ...Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the Court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing, wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

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27. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is the real and substantial justice.

13. In this case, BSES had the benefit of utilizing the amount of Rs. 6 lakhs (equally, the decree holder was deprived of the benefit of its use, till the final judgment) by virtue of the interim order of this court on 24.07.2006. Accordingly, the decree holder is entitled to the value represented by that money kept by BSES since the payment of the two instalments. A contrario, if the interim order of this Court had not mandated the transfer of Rs. 6 lakhs, the decree holder would have benefited from that amount along with the interest that would accrue from it.

14. Here, learned counsel for the BSES has argued that the reliance placed on the above judgments is incorrect, since they concerned alteration of decrees by the appellate courts, and not applications in execution proceedings. However, this factual distinction has no bearing on the principles to be culled out from those decisions. As the Supreme Court itself noted in *South Eastern Coalfields* (supra), Section 144 is "not the fountain of the source of restitution", but rather, statutory recognition of a pre-existing principle worked by the Courts to ensure that parties are made whole, especially when the imbalance has resulted from an act of the Court itself. What is important, thus, for the principle of restitution to operate (and it does operate so generally as between parties) is that parties be

restored to their original position, rather than the stage of the appeals process or the characterization of the legal proceedings before the Court. This Court is also mindful of the dicta of the Supreme Court in *Mrs. Kavita Trehan and another Vs. Balsara Hygiene Products Ltd.*, where it was recognized that the law of restitution is not confined to the four corners of Section 144 of the CPC:

15. Section 144 CPC incorporates only a part of the general law of restitution. It is not exhaustive. (See *Gangadhar and Others Vs. Raghubar Dayal and Others, and State Govt. of Andhra Pradesh Vs. Manickchand Jeevraj and Co., Bombay, .*

The jurisdiction to make restitution is inherent in every Court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words "Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose,...". The instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court.

15. In *Mrs. Kavita Trehan (supra)*, the Supreme Court also approved the rulings in *Alexander Rozer Charles Carnie v. The Comptoir D'Escompte De Paris [1869-71] 3 AC 465* to the effect that:

14....one of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the Suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.

16. Further, the ruling in *AIR 1922 269 (Privy Council)* was cited; the Privy Council had then held that:

12....it is the duty of the Court u/s 144 of the CPC to "place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed." Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. ...

17. Nomenclatures can never be determinative, especially when the power of the Court to do justice is involved. Instances where inherent powers exercised by Courts, even when there is express power in regard to such matters, have been upheld by the Supreme Court whenever another larger power is discerned to further the cause of justice (see, *Indian Bank Vs. M/s. Satyam Fibres (India) Pvt. Ltd., ; Budhia Swain and Others Vs. Gopinath Deb and Others, .*). The present case clearly falls within that category and the Court had the power to make a

restitutionary order of the kind impugned in the present appeal. Finally, the Court notes that the Single Judge has ordered 12% simple interest, as is claimed by the BSES, and accordingly, no dispute arises on the question of the quantum of interest payable. This Court finds no infirmity in the approach or the order of the learned Single Judge. In view of the above discussion, the Court finds no reason to interfere with the impugned order. The appeal is accordingly dismissed with costs quantified at Rs. 25,000 (Rupees twenty five thousand only).