

**(1993) 12 PAT CK 0039**  
**In the Patna High Court**  
**Case No : A.O. No. 276 of 1979**

|                                     |            |
|-------------------------------------|------------|
| Chowdhary Dinanath Singh and Others | APPELLANT  |
| Vs                                  |            |
| Bhawani Dayal Gupta and Others      | RESPONDENT |

**Date of Decision :** 24-12-1993

**Acts Referred:**

Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 — Section 14, 3(1), 4  
Civil Procedure Code, 1908 (CPC) — Section 144, 144(1)  
Constitution of India, 1950 — Article 136(1)  
Criminal Procedure Code, 1973 (CrPC) — Section 145

**Citation :** (1994) 2 PLJR 765

**Hon'ble Judges :** Shamimul Hoda, J; Gurusharan Sharma, J

**Bench :** Division Bench

**Advocate :** Sushil Kumar Mazumdar and Achhaibat Singh, for the Appellant;  
Dinesh Charan and Amresh Kumar Lal, for the Respondent

**Final Decision :** Dismissed

## **Judgement**

Gurusharan Sharma, J.—This appeal is directed against the order dated 21st December, 1978 passed by the Subordinate Judge, Bhabhua u/s 144 of the CPC in Miscellaneous Case No. 128 of 2078, arising out of Execution Case No. 9 of 1965, whereby and whereunder the Respondents 1st set herein have been held to be entitled to restitution.

2. Tulsi Prasad Singh, father of Appellant No. 1 and others filed Title Suit No. 56 of 1961 in the Court of the Subordinate Judge, Sasaram for declaration of title and recovery of possession and also for mesne profits with respect to 23.70 acres land described in Schedule 1 to the plaint. Further, he also prayed for recovery of a sum of Rs. 2700/-, the amount of bid money collected in course of the proceeding u/s 145 of the Code of Criminal Procedure.

3. By judgment and decree dated 12.12.1964, the suit was decreed. Against that the Defendants 1st set preferred First Appeal No. 41 of 1965 in this Court. In the

meantime, the Plaintiffs-decree holders levied Execution Case No. 9 of 1965, in which writ of delivery of possession was issued and on 27.5.1965 possession of the suit land was delivered to the. Plaintiffs-decree holders.

4. Subsequently by order dated 4.11.1977 passed by this Court the aforesaid First Appeal as well as the connected suit were held to have abated under the provisions of Section 4(c) of the Bihar Consolidation of Holdings and Prevention of Fragmentation Act, 1956 (hereinafter referred to as "the Consolidation Act").

5. Against the order of abatement, the said Defendants-Appellants filed Supreme Court Appeal No. 171 of 1977 in this Court under Article 136(1) of the Constitution of India for grant of leave to file appeal before the Supreme Court but this Court did not grant leave to file appeal in the Supreme Court and the said case was rejected on 26.4.1979.

6. In the meantime, on 14.7.1978, after this Court passed orders with respect to abatement of the Appeal as well as the suit, the Defendants 1st party-judgment debtors filed an application u/s 144 of the CPC (for short, "the Code") for restitution, i.e. for being put in possession over the lands from which they were dispossessed on 27.5.1965 under the processes of the court in Execution Case No. 9 of 1965. It was registered as Miscellaneous Case No. 128 of 1978 before the Sub-ordinate Judge, Bhabhua.

7. The Plaintiffs-decree holders raised a preliminary objection regarding maintainability of the said miscellaneous case. According to them the application u/s 144 of the Code was hit by the provisions of Section 4(b) and (c) of the Consolidation Act. By order dated 21.9.1978, the learned Subordinate Judge decided the question of maintainability and held that the provisions of Section 4(b) and (c) of the Consolidation Act were not applicable to a proceeding u/s 144 of the Code and application for restitution was maintainable.

8. Against the said order dated 21.9.1978, the Plaintiffs-decree holders preferred Civil Revision No. 2200 of 1978 in this Court which was dismissed in limine on 8.11.1978 Thereafter the Plaintiffs-decree holders preferred SLP (Civil) No. 171 of 1979 in the Supreme Court of India against the said order dated, 8.11.1978, which was heard and dismissed on 26.2.1979.

9. The said Miscellaneous Case No. 128 of 1978 was heard on merit and was disposed of by order dated 21.12.78 and thereby prayer of restitution was allowed.

10. The Plaintiffs-decree holders preferred FA No. 5 of 1979 in this Court against the order dated 21.12.1972 allowing restitution which was later on converted into a Miscellaneous Appeal and accordingly the present MA No. 276 of 1979 was registered. The learned Single Judge before whom the instant Appeal was put up for hearing by order dated 15.3.1982 was pleased to refer it to be heard by a Division Bench.

11. In the meantime after the aforesaid Supreme Court Appeal No. 171 of 1977

was rejected by this Court on 26.4.1979 that Plaintiff decree holders preferred Writ Petition No. 795 of 1979 before the Supreme Court of India challenging the order of abatement dated 4.11.77 passed by this Court in FA No. 41 of 1965 as well as the impugned order under the present appeal dated 21.12.1978, whereby restitution was allowed by the Court below. The Subordinate Judge, Bhabhua who had passed the order of restitution was impleaded as Respondent No. 18 to the said Writ Petition. By order dated 31.7.1980 the Supreme Court of India was pleased to dismiss the said Writ Petition.

12. Mr. Sushil Kumar Mazumdar, the senior counsel appearing for the Appellants submitted that promulgation of scheme of consolidation by notification u/s 3(1) of the Consolidation Act in the area, in view of the provisions of Section 4(b) and (c) of the Consolidation Act, a proceeding for restitution u/s 144 of the Code was not maintainable in the Civil Court and as such, the impugned order allowing restitution is fit to be set aside, being wholly illegal and without jurisdiction.

13. Mr. Dinesh Charan, the Senior counsel appearing on behalf of Respondents submitted that against the impugned order allowing the restitution, the Appellants had also filed Writ Petition in Supreme Court of India bearing Writ Petition No. 795 of 1979, which was dismissed on 31.7.1980, and therefore, they are estopped to challenge the same on any ground, whatsoever, again in this Court. Mr. Dinesh Charan further submitted that provisions of Section 14(b) and (c) of the Consolidation Act are not applicable in restitution proceeding u/s 144 of the Code. Accordingly, the court below has rightly rejected the petition filed on behalf of the Appellants herein purporting to be u/s 4(b) and (c) of the Consolidation Act and has allowed restitution.

14. Section 4(b) of the Consolidation Act deals with a situation where a suit or legal proceeding is instituted after the publication of notification u/s 3(1) of the Act, whereas Section 4(c) of the Consolidation Act deals with the situation where the notification aforesaid has been issued during the pendency of the suit or proceeding. Before considering the argument it would be appropriate to read Section 4(b) and (c) of the Consolidation Act so far as they are relevant:

4. Effect of notification u/s 3(1) of the Act.--Upon the publication of the notification under Sub-section (1) of Section 3 in the official gazette, the consequence, as hereinafter set forth shall, subject to the provisions of this Act, from the date specified in the notification till the close of the consolidation operation, ensue in the area to which the notification relates, namely--

(a)

(b) No suit or other legal proceeding in respect of any land in such area shall be entertained in any court, and in calculating period of limitation applicable to such suits and proceedings such period shall not be counted:

Provided that nothing in this Clause shall apply to any proceeding u/s 48(E) of the Tenancy Act, 1885 (Act VIII of 1885) and to the proceeding relating to

recording the titles of Bataidars;

(c) Every proceeding for the correction of the records and every suits and proceeding in respect of declaration of rights or interest in any land lying in the area or for declaration or adjudication of any other right in regard to which proceedings can or ought to be taken under this Act, pending before any court or authority whether of the first instance or of appeal, reference or revision, shall, of an order being passed in that behalf by the Court or authority before whom such suit or proceeding is pending, stand abated.

15. The scheme of the Consolidation Act has been set out in the Full Bench decision of this Court in *Ram Krit Singh v. State of Bihar* 1979 BBCJ 259 : 1979 PLJR 161 as also in the case of *Subhag Sah and Ors. v. Doma Sah and Ors.* 1979 BBCJ 722 : 1980 PLJR 85. It was held by a Division Bench of this Court in the case of *Ramdhari Lath and Anr. v. Kisan Lal Agrawal and Ors.* 1985 BBCJ 256 that Section 4(c) of the Consolidation Act does not apply to an execution proceeding. Further according to the Full Bench decision of this Court in the case of *Hari Mohan Thakur v. Mahendra Narain Chand* 1987 PLJR 88, in a suit for partition, the proceedings subsequent to the preliminary decree for the preparation of the final decree, are in the nature of execution proceeding and shall, therefore, not be hit by Section 4(c) of the Consolidation Act.

16. In the present case, the question is as to whether the provisions of Section 4(b) and (c) of the Consolidation Act shall be applicable in a proceeding u/s 144 of the Code or not.

17. Section 144 of the Code provides as under:

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 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 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 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 where 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).

The principle of doctrine of restitution is that on the reversal of a judgment or order the law raises an obligation on the party to the record, who received the benefit of the erroneous judgment or order, to take restitution to the other party for what he had lost and it is the duty of the Court to enforce that obligation unless it is shown that the restitution would be clearly contrary to the interest of justice. The duty of the court is to place the parties in the position which they would have occupied but for the act of the court. An abatement of a suit of proceeding has also the effect of reversing the decree or order passed. Once a (sic) abates the parties are to be put back in the same position in which they were on the date of the suit. An application for restitution is, in fact an application for execution of decree.

18. In my opinion, once the suit has abated under law, the effect will be that everything done by the Court in the suit will have to be reversed and the parties will have to be put back to the same position in which they were on the date of the institution of the suit. The purpose of Section 144 of the Code is exactly the same. Once the suit has abated, no party can take advantage or enjoy the benefit of the decree which has been set aside with the abatement of the suit Proceedings u/s 144 of the Code follow as necessary consequence to the abatement of the suit.

19. Taking into consideration the frame work of the Consolidation Act there does not appear to be the slightest reason for thinking that the legislature intended in entertainment of such proceeding. In case, the provisions of Section 4(b) and (c) of the Consolidation Act are made applicable to a proceeding for restitution u/s 144 of the Code, it would lead to consequences which could not, in my view, be in the contemplation of the legislature. It should not be permitted to impute intention which the legislature never had and it should not be allowed to lead unjust consequences.

20. In my opinion, u/s 144 of the Code, the Court only undoes what it did on the basis of a decree which no longer remains in existence, and this can be done only by the Court which had executed the decree and not the Consolidation authorities. Further in such proceedings the rights and interests of the parties in a land would not be adjudicated upon or dealt with under any of the provisions of the Consolidation Act.

21. The Respondents have filed a cross-objection challenging the part of the findings of the court below in the impugned order, by which their prayer for payment of a sum of Rs. 6441.42 paise as also for grant of mesne profits have

been disallowed. In my opinion, since the Appellants enjoyed possession of the lands in question by virtue of a decree passed by the Civil Court and subsequently on account of abatement u/s 4(c) of the Consolidation Act, the Respondents have been allowed restitution, they are not entitled to get refund of Rs. 6441.42 paise as well as the mesne profits. The cross-objection is, therefore, dismissed.

22. Accordingly, I hold that the restitution proceeding in, respect of the land, filed either before or after the issue of notification u/s 3(1) of the Consolidation Act, are not barred and the impugned order passed by the Court below does not suffer from any error of law.

23. In the result, there is no merit in this appeal and it is accordingly dismissed, but under the circumstances without any costs.

Shamimul Hoda, J.

24. I agree.