

(1950) 11 KL CK 0020
In the High Court Of Kerala
Case No : A.S. No. 403 of 1124 (T)

Jacob Syriac Nidhiri and Others

APPELLANT

Vs

Nagendra Prabhu Krishna Prabhu and Another

RESPONDENT

Date of Decision : 13-11-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 108, 144

Citation : AIR 1950 Ker 226

Hon'ble Judges : Gangadhara Menon, J;G. Kumara Pillai, J

Bench : Division Bench

Advocate : N.K. Narayana Pillai, for the Appellant; N. Devaresa Kammath, for the Respondent

Judgement

Govinda Pillai, J.—The pltf. is the applt. He had filed the suit for a declaration of his right to possession of the plaint scheduled property & for an injunction restraining the deft, from entering upon the property. The suit was decreed by the trial Ct. but that decree was revsd. in appeal by the H. C. so that his suit was dismissed. After the H. C. decision, the deft, filed a petn. that the pltf. got into possession of the plaint property under cover of the trial Ct. decree & restitution should, therefore, be ordered. There was no delivery of possession through ct. & the nature of the decree passed by the trial Ct. was only a declaratory one so that possession through Ct. was also not contemplated by the decree. The defence case, that the pltf. secured possession under cover of the decree has therefore to be scrutinised by the Ct. below before ordering re-delivery of possession. It is u/s 108, C. P. C., that restitution is claimed by the deft. It is now settled law that it is not necessary for the appln. of this section that possession of property should have been obtained in execution of the decree which was subsequently reversed. Vide Hara Chandra v. Chintamoni 21 I. C. 84 (Cal.), Sheodihal Sahu v. Bhawani 29 ALL 348 : 4 A. L. J. 188 and Salehon Sha v. Zawar Hussain AIR 1941 Lah. 343 : 197 I. C. 574. The section would therefore apply even if possession of the property was taken otherwise than by execution provided it was obtained under cover of or in consequence of the decree. The

ruling in Salehon Sha v. Zawar Hussain AIR 1941 Lah. 343 : 197 I. C. 574 had even gone to the extent of holding that restitution of possession of immovable property could be ordered under this section, but where possession is obtained by the D.H. independent of & in opposition to the decree this section will not apply. The ruling in Periaswamy v. Karuthiah AIR 1918 Mad. 1293 : 39 I. C. 933 and Govinda v. Muni swami AIR 1937 Mad. 315 : 168 I. C. 926 are in support of this position. So before ordering restitution the Ct. has to consider whether the pltf's". present possession of the property is under cover of the decree obtained by him in the trial Ct. or not.

2. Thus besides the issues raised by the Ct. below we raise an additional issue whether the pltf. entered into possession of the property after the date of the trial Ct. decree & it so when he obtained such possession. A finding on this issue is very material for the purpose of invoking CPC (CPC) - Section 108 to give possession to the deft. We would therefore in modification of the order of the lower Ct. direct the same to consider this question after taking evidence if necessary before final orders are passed on the deft."s petn. The case will be sent back immediately to the Ct. below for enquiry & disposal in the light of the observations made above. The parties will suffer their costs of this petn.