
(1995) 05 CAL CK 0045
In the Calcutta High Court

Kedar Nath Shaw

APPELLANT

Vs

Sultan Sheik alias Sultan Ahmed

RESPONDENT

Date of Decision : 18-05-1995

Acts Referred:

Calcutta Presidency Small Causes Court Rules — Rule 1(6)
Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 115, 144, 144(1), 151
Presidency Small Cause Courts Act, 1882 — Section 47, 47, 48

Citation : (1995) 2 CALLT 265

Hon'ble Judges : Bijitendra Mohan Mitra, J

Bench : Single Bench

Advocate : S.P. Roy Chowdhury and S.P. Sharma, for the Appellant; Priyabrata Mukherjee and Majibar Rahaman for Caveator, for the Respondent

Final Decision : Dismissed

Judgement

Bijitendra Mohan Mitra, J.—The present revisional application is directed against an order dated 19th July, 1994 passed by the learned 5th Bench, Court of Small Causes of Calcutta in Suit No. 178 of 1989. By the impugned order, an application u/s 144 of the CPC was allowed on contest. The case that has been made out in the proceeding u/s 144 of the CPC is that the plaintiff/petitioner managed to obtain an ex parte decree in respect of the suit property from the Bench of the Registrar, Small Causes Court, on 11th August, 1989 and ultimately got delivery of possession of the same on 1st December, 1989 through the Bailiff with the help of the police. Thereafter, on 22nd June, 1992, the defendant got the ex parte order set aside on contest by filing a petition under Order 9, Rule 13 read with Section 151 of the Code of Civil Procedure. The said proceeding under Order 9, Rule 13 was allowed and consequent thereto the suit was restored to its original file. In the circumstances, the defendant pressed for restitution of the property in suit intending to contest the suit as otherwise the very purpose of the same would be defeated.

2. The plaintiff resisted the defendant's application by filing a written Statement

questioning the maintainability of the application on various grounds. The specific abjection is that after taking possession of the suit premises, the character of the same has been changed by completely demolishing a portion of the room being a part of the suit premises.

3. At the time of hearing of the present revisional application, number of contentious issues have been attempted to be raised including that of maintainability of the revisional application as it has been attempted to be contended as to whether the revision would lie against the impugned order. There has been further contentions raised at the time of hearing of this revisional application that since the *ex parte* degree and/or order was passed by the Registrar and Section 144 proceeding being a contested one, the Registrar of the Small Causes Court is divested of any jurisdiction to be in seisin of the contested proceedings. The argument is centred round the proposition that in terms of the language of Section 144 of the Code of Civil Procedure, it is a Court of the first instance or the Court which passed the initial degree should only be competent to take up the matter u/s 144 and no other Court can deal with the same. In the event of the Court of first instance or the Court of the initial Court which passed the degree if not available or if it cannot take up the matter, then the party will be required to be driven to a separate suit for obtaining the said relief.

4. It is salient to mention in this context that though the impugned order is an order u/s 144 of the CPC but the present proceeding and/or the subsisting is that one of the Section 47 of the Presidency Small Causes Court Act, 1882. At the threshold of the hearing a doubt seems to have been looming large in the conspectus of controversy as to whether the impugned order is open to revision or the remedy lies by way of an appeal. This Court feels inclined to clear the controversy at the threshold of scrutiny of the matter in question. Proceedings under Chapter VII of the Presidency Small Causes Courts Act, 1882 being not in nature of suit, orders passed are not in nature of decrees. Any suit u/s 47 of the said Act, only certain issues can arise and certain points can be agitated. In Chapter VII the legislature has provided summary remedy to landlord to obtain possession from his tenant but the legislature has also accorded protection to the tenant to the effect that the order passed by Presidency Small Cause Court is not a conclusive order. Accordingly, it is contended by Mr. Roy Chowdhury, appearing for the petitioner, that when an order passed u/s 47 of the Act is not open to appeal and order which is passed for restitution of the same u/s 144 of the Code of Civil Procedure, cannot be also open to appeal. The analogy drawn from Section 144 of the CPC should not apply where an order passed under the said section will be deemed to be treated as a decree because of the exclusive provisions contained in Section 47 of the Presidency Small Cause Courts Act. According to Mr. Roy Chowdhury, if no appeal lies from final order then the same is not open to the remedy of appeal from the interim order. According to Mr. Roy Chowdhury, if the final order passed in a pending suit, cannot be moved up in appeal but at the same time an interim order cannot be amenable to be cured in appeal which will lead to an anomalous situation. In aid of submissions Mr. Roy

Chowdhury has referred to number of decisions starting from Badiur Baharnan and Others Vs. Mokram Ali and Others, . Mr. Roy Chowdhury has also led special stress on a decision of the Madras High Court, reported in C. Kalahasti Vs. P.C. Munuswami Chetti, There is, of course, a conflicting decision flowing from a judgment of a Single Bench passed by this High Court which was delivered by Samir Mukherjee, J. being reported in 1988(1) CLJ 389. The ratio of that decision has not been followed in a subsequent decision of contemporaneous period by S. N. Mallick, J. reported in Murari Kumar Saraf Vs. Sri Jagannath Shaw, . The descending judgment of a Single Bench of Calcutta High Court reported in 1988 (1) CLJ 389 has been held to have suffered from the mischief of the principle of per incuriam. This Court after giving anxious consideration to the salient provisions of the Act in question and the Rules framed thereunder is of the view that restoration of an order passed in a proceeding u/s 47 of the Presidency Small Cause Courts Act shall not be open to appeal but revision from the instant order should be held to be maintainable.

5. In aid of the main thrust of Mr. Roy Chowdhury's argument, he has referred to the provisions of Section 144 of the CPC and he has strongly and seriously contended that the Court which passed the decree or order which is to be restituted, must refer to Court of first instance. In aid of his submissions, Mr. Roy Chowdhury has referred to the explanation being super-added to Section 144 itself of the CPC by CPC Amendment Act, 1976 for the words (varied or reversed. . .). According to Mr. Roy Chowdhury, since the exparte decree has been passed by the Registrar of Small Causes Court and Registrar can pass orders and/or adjudicate upon uncontested proceedings and he has no jurisdiction to try the contested proceedings. The proceeding u/s 144 of the CPC was a contested proceedings and as such, Registrar was divested of the jurisdiction and the matter was referred to the learned Judge, 5th Bench of the Small Causes Courts, Calcutta. According to Mr. Roy Chowdhury, in view of the explanation being super-added to Section 144 itself, it is the self-same authority which passed the original exparte decree can only be an authority to issue effective orders for restitution and no other authority can usurp the power as it will then cease to be a Court of first instance. Mr. Roy Chowdhury has also referred to Clause "C of explanation to Section 144 of the CPC and has contended that the remedy which lies to the aggrieved party is by way of a separate suit and not by way of initiation of a proceeding u/s 144 of the CPC as Registrar of the Small Causes Court cannot have any jurisdiction to entertain contested proceeding. There is no doubt about statutory powers of the Registrar of Small Causes Court, Calcutta and it is also well-known that beyond matters above pecuniary limit of jurisdiction which are proceedings of contested nature, the Registrar is divested of any jurisdiction to be in seisin of the said controversy. Mr. Roy Chowdhury, in the said context, has referred to a contemporaneous decision of the Supreme Court in the Case of Neelathupara Kummi Seethi Koya Phangal (dead) by L.Rs. Vs. Montharapalla Padippua Attakoya and others, . The Apex Court while construing Court of first instance, competent to restitute opines

that it means the Court which passed the decree or order and even the transferee executing Court to whom the decree is transferred to facilitate execution thereof is not competent to entertain application for restitution. According to Mr. Roy Chowdhury that in terms of the; said decision and the ratio of law expounded therein it is held that Sub Section 1 of Section 144 of the CPC clearly indicates that it is a Court of first instance in which the proceedings in the suit had been initiated and the decree was passed or suit was dismissed. The Court of first instance should therefore mean the Court which passed the decree or order.

Therefore the Court which is competent to entertain the application for restitution is the Court of first instance that decreed the suit. A bare reading of Sub Section 1 of Section 144 of the CPC accordingly thus indicate that application for restitution would lie when the decree executed is reversed or varied or modified. The doctrine of restitution is based upon the high cardinal principle that the acts of the Courts should not be allowed to cause any injury or injustice to the party in suit. Law enjoins an obligation on the party that receives the benefit of a reversed judgment to restitute the property to the person who had lost. There cannot be any two opinions about the proposition of law laid down by the Apex Court about the Court of first instance which has been made clear by insertion of amendment super-added to Section 144 of the Code of Civil Procedure. The relevant provision as contained in Section 48 of the Presidency Small Cause Courts Act provides that except as otherwise provided in the Act itself, the Small Cause Court shall follow the CPC as a Court of first instance. Therefore it is clear from the reading of Section 48 that any order passed by the Small Cause Court will be deemed as an act of the original Court and unless otherwise provided, CPC will be applicable. Therefore it is to be seen as to whether the present act or the rules framed thereunder provide for any other provision inhered in the self-contained statute by way of modification of the provisions of Code of Civil Procedure. The Rules of the Presidency Small Cause Courts provide as per definition that the expression "The Court" means the "Court of Small Causes of Calcutta". It is further relevant to keep in mind that by way of modifications introduced in the Presidency Small Cause Court Rules of Calcutta, the germane expression "of the first instance" has been omitted. The said omission when introduced brings about a complete change of the texture of the expression "Court which passed the decree or order" and in view of specific omission of the expression of the "first instance" it becomes Court as contemplated in terms of Rule 1(6) of the Rules of practice of the Court of Small Cause of Calcutta. The contention of Mr. Roy Chowdhury may have some force in the domain of CPC but that Section 144 gives a truncated projection after omission of the word of first instance as inserted by modifications which has effected a basic change. In the backdrop of such change being introduced by the deliberate omission injected by the Rules and deletion of the expression "first instance", The Court remains "Court" in terms of the definition as aforesaid which cannot but mean the Court of Small Causes of Calcutta. Accordingly, Mr.

Roy Chowdhury's submission suffers from misplaced emphasis on CPC but there is no parity of analogy in between the Presidency Small Causes Courts Act which projects a picture of restitution on some different projection from Code of Civil Procedure. If there is any repugnancy in between the two, it is undoubtedly made clear in terms of Section 48 that unless otherwise provided the similar procedure as prescribed under the CPC will apply. Here a dissimilar procedure has been forecast under the Rules framed under the Act and as such Mr. Roy Chowdhury's thrust of submission on Court of first instance loses its significance.

6. The impugned order is based on the footing that since the exparte decree has been set aside in a proceedings under Order 9, Rule 13 of the Code of Civil Procedure, the party is entitled to lift the benefit of restitution. On the basis of a non-existent exparte decree, the party has been perpetuating its possession in suit property. There is another controversy attempted to be raised as to the existence of the suit property and the Court finds on a fact finding scrutiny that the suit property has not been totally demolished as claimed by the plaintiff in its Written Objection. The Court found that the suit property is capable of being restored by putting the partition wall as it was previously there as otherwise the physical existence of the suit property remained the same. The said finding of fact is not open to be assailed in the revisional forum and as such the same does not call for interference. The impugned order is thus allowed to stand and the revisional application is hereby dismissed on contest.

There shall however be no order as to costs.