
(2008) 07 AP CK 0080
In the Andhra Pradesh High Court
Case No : CRP No. 117 of 2008

Mohd. Mahboob Ali Khan Afsar	Vs	APPELLANT
Najeebunnisa and Others		RESPONDENT

Date of Decision : 11-07-2008

Acts Referred:

Civil Procedure Code, 1882 — Section 583
Civil Procedure Code, 1908 (CPC) — Section 144, 144(1), 151

Citation : (2008) 5 ALD 96 : (2008) 5 ALT 297

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : Rajender Deshmukh, for the Appellant; Mir Masood Khan and Basith Ali Yavar, for the Respondent

Final Decision : Allowed

Judgement

P.S. Narayana, J.—The petitioner/defendant filed the present civil revision petition being aggrieved of the order made in I.A. No. 124/2007 in O.S. No. 373/04 on the file of IX Additional Senior Civil Judge, City Civil Court, Hyderabad. The said application was filed by the petitioner u/s 144 of the CPC (hereinafter in short referred to as Code for the purpose of convenience) to direct the Bailiff to re-deliver possession of flat bearing No. 407, 3rd floor, Wan Residency, bearing Municipal No. 11-5-454/1 at Red Hills, Hyderabad. The learned DC Additional Senior Civil Judge, City Civil Court, Hyderabad in the light of the respective stands taken by the parties having framed the Point for consideration at Para 8 recorded reasons and came to the conclusion that the relief prayed for by the petitioner cannot be granted and ultimately dismissed the application as premature without costs. Aggrieved by the same, the present civil revision petition had been preferred.

2. Sri Rajender Deshmukh, the learned Counsel representing the revision petitioner had explained the historical background of the litigation, the respective stands taken by the parties and the nature of the order which had been made by

the learned IX Additional Senior Civil Judge, City Civil Court, Hyderabad and also had further drawn the attention of this Court to the portions of the order made by this Court in C.R.P. No. 6659/2006 and would maintain that this is just a clear abuse of process of Court having obtained a decree under the circumstances which had been already specified in the application to set aside ex parte decree and inasmuch as the said decree was set aside and being unsuccessful the respondents thought of defeating the rights of the petitioner/defendant and had inducted a third party into possession of the subject-matter. The learned Counsel also would maintain that it is no doubt true that the said third party instituted a suit not to disturb the possession except in accordance with law and obtained an order of status quo impleading the present petitioner also as a party. But however, inasmuch as the petitioner is requesting for restitution in the light of the fact that by virtue of an ex parte decree by process of Court the petitioner had been dispossessed and in the light of the clear findings recorded even by this Court in C.R.P. No. 6659/2006 it is clear that the ex parte decree was obtained under peculiar circumstances and the same was set aside. When that being so, in the interest of justice, status quo ante to be restored i.e., the petitioner/defendant to be inducted into possession and the parties may be permitted to contest the litigation further continuing the said status quo ante as it existed as on the date of institution of the suit. The Counsel would maintain that this would be just and proper in the facts and circumstances of the present case. The learned Counsel also placed reliance on certain decisions to substantiate his submissions.

3. On the contrary, Sri Mir Masud Khan, the learned Counsel representing the 2nd respondent would maintain that as can be seen from the factual controversy there are several disputed questions and controversial questions to be decided between the parties. The learned Counsel also had taken this Court through the respective stands taken by the parties and would maintain that these questions are to be decided while deciding the main suit. The learned Counsel while further elaborating his submissions would maintain that it is not as though there was any restraint order prohibiting the real owner from inducting a third party when the third party was inducted into possession. When lawfully such party had been inducted into possession and when such party, a statutory tenant, approached the Court, instituted the suit and obtained interim order, in the absence of such party it would not be just and proper to order restitution. Even otherwise, the learned Counsel would maintain that it is not as though without following due process, the possession had been taken. May be that the ex parte decree might have been set aside on the same ground, the improper service of notice or otherwise. But however, since several merits and demerits concerned with the main suit may have to be gone into at the appropriate stage, it would not be just and proper to order restitution u/s 144 of the Code at this stage. The Counsel also would maintain that in the light of the facts and circumstances, instead of disturbing the status quo it would be just and proper to issue suitable directions for the early disposal of the suit itself.

4. Sri Basith Ali Yavar, the learned Counsel representing the 3rd respondent would maintain that it is a settled principle of law that the Courts are not expected to make conflicting orders. The learned Counsel also laid emphasis on the principle of comity and also placed reliance on certain decisions to substantiate his submissions that normally conflicting orders not to be passed by the Courts.

5. Heard the Counsel.

6. At the outset it may be stated that when the Court is satisfied on the facts and circumstances that restitution to be ordered, even if Section 144 of the Code strictly may not be applicable, such power can be exercised u/s 151 of the Code and the possession can be restored. Be that as it may, in the present case, the civil revision petition is filed by the revision petitioner/defendant who had been deprived of possession of the property in pursuance of an ex parte decree which was set aside. The findings recorded while setting aside the ex parte decree being self-explanatory, the same need not be elaborately discussed.

7. The petitioner/defendant in O.S. No. 373/2004 filed I.A. No. 396/2005 to set aside ex parte decree obtained by the respondent/plaintiff and the said application was allowed and it appears the same was challenged by way of C.R.P. No. 6659/2006 wherein this Court recorded elaborate reasons and ultimately dismissed the said civil revision petition. It is also not in serious controversy that in pursuance of the ex parte decree, the subject-matter of the suit, the plaint schedule flat, the possession had been obtained and since the decree was set aside the said E.P. was closed. The specific stand taken by the petitioner is that inasmuch as in pursuance of an ex parte decree the possession had been taken in view of the fact that the ex parte decree was set aside, the possession to be restored to the petitioner and the suit may be further continued. The said application for restitution filed u/s 144 of the Code was resisted on the ground that the same is not maintainable and after obtaining ex parte decree from the Court, as the owner of the property she had let out the plaint schedule flat to Nasreen Hassan Mahmooda under agreement dated 21.10.2005 on a monthly rent of Rs. 3,500/- and since then the said tenant is in occupation of the said flat. Further, specific stand had been taken that as on that date, there was no order of stay or injunction from the Court and I.A. No. 396/2006 was allowed on 31.7.2006. It is also stated that the tenant also filed I.A. No. 147/2006 for getting herself impleaded. The said third party being a statutory tenant, had filed the suit O.S. No. 2048/2006 on the file of III Junior Civil Judge, Hyderabad not only against the petitioner but also against others and the III Junior Civil Judge, City Civil Court, Hyderabad in I.A. No. 611/2006 made an order granting status quo directing the respondents and the petitioner not to dispossess the tenant/petitioner in I.A. No. 147/2006. Thus, inasmuch as the third party who was inducted into possession as a tenant is in possession of the property and unless such tenant is evicted by due process of law till then the possession not to be disturbed by ordering restitution.

8. The learned LX Additional Senior Civil Judge, City Civil Court, Hyderabad after framing the Point for consideration at Para 5, recorded the respective stands at Paras 6 and 7 and further recorded reasons at Paras 8 and 9 and came to the conclusion that the petitioner is not entitled to the relief prayed for and refused to order restitution or restoration as prayed for in the said application.

9. Sri Rajender Deshmukh, the learned Counsel representing the revision petitioner placed strong reliance on B. Yamuna Bai and Ors. v. Lade Venkoba Rao AIR 1976 SC 46, wherein the Division Bench of this Court at Paras 7 to 10 observed:

Section 144, CPC is based upon a doctrine which recognizes as one of the highest duties of a Court to take care that its acts do not injure any of the suitors and if any injury is caused, it is the duty of the Court to undo the wrong. An order of restitution as contemplated u/s 144, CPC would be consistent with the principles of doctrine of restitution which is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and it is the duty of the Court to enforce that obligation unless restitution would be contrary to the real justice of the case. These principles have been very succinctly laid down by the Supreme Court in the case of Lal Bhagwant Singh Vs. Rai Sahib Lala Sri Kishen Das, . Earlier, the Privy Council in AIR 1935 12 (Privy Council) , relying on the decision in Rodger v. Comptoir D'Escompte De Paris (1871) 3 PC 465 held:

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.

This principle was incorporated in Section 583 of the CPC 1882. Section 144(1) of the present Code (Code of Civil Procedure, 1908) is the corresponding section which incorporates this rule of restitution. The Privy Council in Jai Berham v. Kedar Nath AIR 1922 PC 269, held that such a power is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. In the case of Guram Ditta v. T.R. Ditta (supra), advertent to the powers of the Court. Lord Arkin had stated that the observations in Rodger v. Comptoir D'Escompte De Paris (supra), have grounded as "practice in India". Therefore whether as a matter of practice or as a matter of inherent jurisdiction as a doctrine of restitution. Courts in India have always considered that it is one of the sacred duties of theirs to see that their acts cause no injury to the suitors and while considering the principles of restitution, the Supreme Court in the case referred to earlier, has observed restitution is based upon to cause real justice to the parties."

Under Section 144, CPC before any restitution is ordered, the following conditions must be satisfied (1) That the applicant must be a party to the litigation which has terminated according to law; (2) that he has either lost something or been deprived of something by reason of the decree or order which

has been subsequently varied or reversed; (3) that on the final pronouncement of his rights, he is entitled to the benefit or restitution.

The argument of Mr. Babulreddy, is that the 1st defendant did not carry the matter by way of an appeal and, therefore, he is not entitled to restitution. In *Gurunath Khandappagouda Patil Vs. Venkatesh Lingo Patil*, , a similar argument was advanced before Ranganekar, J., and the learned Judge observed:

Therefore, if there is an appeal from a decree, even though that appeal is made by one party in which some other party equally interested is not joined, but if the appeal is on the ground common to both of them, then the reversal or the variation in the decree in favour of the appellant would operate for the benefit of the other party, and in that way, therefore, he would be entitled to contend that he was a party to the suit entitled to benefit by way of restitution.

In fact, in 1908, in *Guzza Prasad v. Brojo Nath Das* 12 CWN 642, a case which arose under 1882, Civil Procedure Code, the Privy Council observed the expression "any party" is not confined to parties to the appeal in which the decree has been reversed or modified:

It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal, provided the appeal is in effect and substance in favour of such person.

Therefore, in India, since 1871, all along for a period of 100 years as practice and as a matter of inherent jurisdiction. Courts have understood that even if the suitor filed no appeal he is entitled to the benefit for reversal of the decree.

In the circumstances of the case, which we have elaborated earlier, the alienation in favour of the 1st defendant was considered as only voidable and not void, and therefore, he is entitled to the benefit of the reversal of the decree and the 1st defendant should be restituted possession of the property till such time the alienation in his favour is avoided by proceedings known in law. In fact we are informed that such a suit is pending between the parties. Therefore, we have no hesitation in holding that till such time the above transaction is avoided, the 1st defendant is entitled to possession.

10. Further strong reliance was placed on the decision of the Division Bench of this Court in *Ganesh Parshad Vs. Adi Hindu Social Service League*, , wherein it was observed at Paras 14, 15 and 16 as hereunder:

The doctrine of restitution is based upon the cardinal principle of law that the acts of Courts should not be allowed to work injury on the suitors. Section 144 C.P.C. 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 partly, reversed or varied in other proceedings. In such a case, the law raises an obligation on the party, who receives the benefit of such erroneous judgment, to deliver back the property to the person who had lost it.

Section 144 C.P.C. is a statutory provision of law, and in order that this section may apply to a case, three conditions are necessary to be satisfied. They are : (i) the restitution sought must be in respect of a decree or order which has been varied or reversed; (ii) the party applying for restitution must be entitled to the benefit under a reversing decree or order and (iii) the relief claimed must be properly consequential on the reversal or variation of the decree or order.

If those conditions are satisfied, it gives no choice or discretion to the Court, and the only course it has to follow is to order restitution to the party which had suffered loss on account of the erroneous decree or order.

11. In *Padanathil Rugmini Amma Vs. P.K. Abdulla*, , the Apex Court while dealing with Section 144 of the Code held that an assignee from decree holder auction purchaser cannot be equated with stranger purchaser at Court auction and the assignee from decree holder auction purchaser is liable to restitute on reversal of decree.

12. It is no doubt true that here is a case where an ex parte decree was set aside. It is no doubt not a case where the decree was reversed either by an appellate Court or a revisional Court, as the case may be. No doubt it is contended that the stranger is also related to the party. This Court is not inclined to express any opinion relating to the said aspect. But however, specific stand had been taken that the stranger who is not shown as a party and who had already approached a competent Civil Court and obtained an order of status quo impleading the revision petitioner also as a party, such party cannot be dispossessed even by process of Court by ordering restitution since it would amount to passing of conflicting orders. Reliance was placed on the order made by a learned Judge of this Court in C.R.P. No. 2019/89 dated 19.8.1989 wherein it was observed that Civil Courts are expected to respect the orders passed by each other and not to act in conflict with each other. There cannot be any doubt or controversy relating to the said principle of law.

13. This Court having gone through the orders made by both the Courts of first instance and also the Revisional Court setting aside the ex parte decree is satisfied that here is a party who had obtained the ex parte decree and in pursuance thereof having obtained possession intends to defeat the rights of the revision petitioner who got the ex parte decree set aside by appropriate proceedings. The reasons recorded in the said order if carefully examined would go to show that this method had been adopted most probably to deprive the petitioner of possession of the property and successfully the same had been taken to its logical end by taking possession of the property in pursuance of the said ex parte decree. It is also pertinent to note that with a view to further defeat, a third party had been inducted on the ground that the said third party is the tenant and the statutory rights of such tenant would be affected, certain submissions are being advanced before this Court in this regard. The status quo order made by the Court already referred to supra would not be in any way conflicting with the order of restitution which would be made by this Court and

when the other party who was deprived of possession had been successful in getting the ex parte decree set aside, in the peculiar facts and circumstances, this Court is thoroughly satisfied that the possession to be restored to such party. This Court is expressing this opinion in the light of the findings recorded in CRP No. 6659/2006.

14. It is made clear that the parties should not be permitted to adopt such methods so as to over-reach the process of the Court. This Court is making this observation in the light of what had been observed in the order made by this Court already specified supra. Hence, this Court is of the considered opinion that the order of status quo under which shelter had been taken by the opposite parties may not be of any consequence at all and it is a fit case where restitution to be ordered though not strictly falling u/s 144 of the Code, but definitely by invoking the powers u/s 151 of the Code.

15. Hence, the impugned order is hereby set aside and the civil revision petition is allowed, with costs.