

(1985) 07 OHC CK 0001

In the Orissa High Court

Case No : Civil Revision No. 323 of 1982

Mst. Dukhi Pradhani and Another

APPELLANT

Vs

Shyam Sundar Sahu and Others

RESPONDENT

Date of Decision : 05-07-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Citation : (1985) 60 CLT 172 : (1985) 2 OLR 148

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : M. Patra, B. Dagara, D. Deo and B. Brahmachari, for the Appellant;
R.K. Mohapatra, K.C. Panda, B. Routray and A.N. Misra, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—In this Civil Revision petitioners have challenged the order dated 15.4.1982 of the trial Court finding that the appeal against the decree having abated, the further petition u/s 144, C. P. C. arising out of the suit in the execution proceeding also abates and it would not be competent in view of the restriction imposed u/s 4 of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act, 1972 (hereinafter referred to as "the Act") to pass any further order as prayed for by the petitioners.

2. Executing a decree for recovery of possession of 11. 47 acres of land from the petitioners, plaintiffs obtained delivery of possession on 23.11.1978 through Court. After the delivery of possession, the judgment-debtors (petitioners) filed an application u/s 47, C. P. C. challenging the execution. This application was registered as Misc. Case No. 167 of 1978 in the Executing Court.

3. The petitioners had preferred an appeal in this Court against the decree. When the Misc. Case was pending, this Court passed an order on 13.5. 1980 u/s 4(4) of the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act that the appeal and the suit have abated in view of the notification u/s 3(1)

of the Act and consequently it vacated the judgment and decree of the trial Court.

4. The judgment-debtors thereafter filed a petition on 24. 11. 1980 for amendment of their application u/s 47, C. P. C. On refusal of the prayer for amendment, petitioners challenged the order in Civil Revision No. 250 of 1981. The Civil Revision was disposed of in the following terms :

"Heard Mr. Dagara.

I hardly see any justification in admitting this revision. The short facts are that a proceeding u/s 144, C. P. C. is pending to take back possession of the property on the allegation that the decree has been vacated on account of abatement under the Orissa Consolidation of Holdings and Prevention of Fragmentation of Land Act. Once the certified copy is produced and the result of the litigation is known, the Executing Court is bound to give effect to the decree even if subsequent facts are not pleaded. The rejection of the petition for amendment hardly prejudices the petitioner."

The Executing Court on the basis of the order treated the application for amendment as an application u/s 144, C. P. C. and directed restitution of the property to the petitioners by its order dated 19.9. 1981. The opposite parties not having challenged the order, it has become final.

5. On 15.12.1981, the petitioners filed an application in the Title Suit for getting delivery of possession of the disputed lands. The trial Court passed the order on 21. 1. 1982 to issue process for delivery of possession. It reads as follows :

"Advocate for the defendants files hazira. In view of the order passed by this Court for restoration of land u/s 144, C. P. C, let a process be issued to re-deliver the lands in favour of the petitioner, .as required under Order 21, Rule 35, C. P. C. Steps by 12. 1. 1982."

The order was, however, recalled on the petition of the plaintiffs and after hearing the parties thereafter the impugned order was passed on 15. 4. 1982.

6. It is contended on behalf of the opposite parties that in an application for amendment of the petition u/s 47, C. P. C. the Executing Court could not have granted restitution u/s 144, C. P. C . In view of the order in Civil Revision treating the application for amendment as an application u/s 144, C. P. C. and the subsequent order of restitution, this question is no longer open to be agitated in this Civil Revision.

7. After direction to "restore back possession to the defendant?, it is not open to the Court to ignore the same on the ground that the appeal and the suit having abated and the consolidation operation having continued, the possession cannot be restored by the Civil Court. An application for restitution u/s 144, C. P. C. is not a proceeding for declaration of any right or interest in any land. The jurisdiction of the Civil Court is not ousted specifically under the Act to exercise power u/s 144, C. P. C. It is also not impliedly ousted. The refusal of the trial

Court not to proceed further for delivery of the property to the petitioners on the basis that the application has abated is the failure of the Court to exercise jurisdiction vested in it

8. It is submitted on behalf of the opposite parties that the delivery of possession can be directed only in the Execution Case and not in the suit. In reply on behalf of the petitioners it is submitted that Section 144, C. P. C, Explanation makes it clear that the application is to be filed in the Court of first instance which is the trial Court and the application was accordingly filed in that Court. In support of the submission a decision reported in *State Bank of Saurashtra Vs. Chitranjan Rangnath Raja and Another*, has been cited.

9. Section 144, C. P. C has been amended in 1976. Prior to the amendment the section envisaged that "the Court which passed the decree or order" is to cause restitution. By amendment it is provided that "the Court of first instance" is to cause restitution. Considering the two phrases in paragraph 23 of the decision in *A. I. R. 1680 S. C. 1523 (supra)*, it was held : "

"...Prior to Amendment Act, 1976, an application for restitution u/s 144 in all cases had to be made to the Court of first instance. Even since the amendment the substituted expression "the Court which passed the decree or order" would as per Clause (a) of the Explanation, mean the Court of first instance because the expression "the Court which passed the decree or order" has been deemed to include where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction the Court of first instance.

Thus, according to the Supreme Court, the application for restitution is not to be filed in the forum which set aside or varied the decree, but in the Court of first instance.

10. This Court has held that an application u/s 144, C. P. C. is an application in execution. See 39(1973) C. L. T. 1031 (*Kusun Samal v. Banamali Rout*) and *Mst. Anar Bai and Others Vs. Muralidhar Modi and Others*, . In I. L. R. 1965 Cutt. 469 (*Ganesh Prasad Bhagat v. Anugrahananda Sahu*) it was held that an application for restitution is entertainable in the Executing Court as the application for restitution is an application in execution. In that view, "the Court of first instance" would be the Executing Court where the order, for restitution has already been passed without any demur. Only the follow up action has been left. Once the trial Court took note of the order of restitution in its order dated 21.1.1982 it should have dealt with the application in the Execution Case and not in the suit itself, even though the petitioners in the cause title mentioned the application to be in the suit.

11. It was next submitted on behalf of the opposite parties that the Court of first instance being the Executing Court, an application for delivery of possession in the trial Court is not maintainable. In the present case, the trial Court is the Executing Court. Once it came to its knowledge that there is already an order for restitution, it should have given an opportunity to the defendants to file the

application for delivery of possession in the Execution Case. Instead, it entertained the application and rejected the same on the grounds not sustainable in law. This is exercise of the jurisdiction with material irregularity and the same would be prejudicial to the petitioners inasmuch as with the findings on record, it will no more be possible for the petitioners to move the Executing Court which passed the order for restitution.

12. In view of what has been stated above, the petitioners shall move the Executing Court for delivery of possession of the disputed property which shall dispose of the matter in accordance with law.

13. In the result, the Civil Revision is allowed. No costs.