

(1986) 04 OHC CK 0028

In the Orissa High Court

Case No : Civil Revision No. 455 of 1985

Mst. Kamroon Nisha Bibi and Others

APPELLANT

Vs

Yusuf Khan and Others

RESPONDENT

Date of Decision : 08-04-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 29, Order 39 Rule 1, Order 39 Rule 2, 151

Citation : AIR 1987 Ori 234 : (1986) 1 OLR 550

Hon'ble Judges : K.P. Mohapatra, J

Bench : Single Bench

Advocate : S.K. Dey, for the Appellant; M.M. Das, for the Respondent

Final Decision : Dismissed

Judgement

K.P. Mohapatra, J.—How at times justice eludes a party in the present justice system is best illustrated by this case in which, even though, the opposite parties obtained an order of restitution of property in Civil Revision No. 363 of 1981, decided on 24-8-1984 by this Court, have yet not been able to obtain redelivery of possession thereof.

2. A short account of, facts will be useful to adjudicate upon the present controversy, Sobhan Khan was the owner of the schedule "A" property of the plaint which consists of a house in Cuttack town. He left three sons -- Kalu, Kurban and Aju. Kurban was issueless. Petitioner No. 1 is the wife of Yunus, son of Kalu and petitioners 2 to 6 are his sons. Opposite Parties 1 to 5 are the sons of Aju and opposite parties 6 to 8 are his daughters, Kurban and Aju sold their share in the suit house in favour of Kalu by a registered sale deed dated 29-5-1952 for consideration. On the same day, Kalu executed an agreement in favour of Aju permitting him to remain in occupation of a portion of the suit house during his lifetime. Kalu sold the suit house in favour of the petitioners by a registered sale deed on 10-7-1970. The petitioners instituted Title Suit No. 4 of 1971 in the Court of the Subordinate Judge, Cuttack for declaration of their title

in respect of the suit house and recovery of possession thereof from Aju. The suit was decreed and the petitioners' title in respect of the suit house was declared, but their prayer for recovery of possession by eviction of Aju therefrom was rejected. Aju preferred Title Appeal No. 140 of 1973 in the Court of the District Judge, Cuttack which was dismissed and the judgment and the decree passed by the trial Court were confirmed. Aju did not prefer a second appeal, whereas, the petitioners preferred Second Appeal No. 122 of 1975 in this Court. During the pendency thereof, Aju died and so, on a memo being filed by the petitioners' counsel for dismissal of the second appeal as not pressed, an order of dismissal thereof was passed. The petitioners filed Execution Case No. 176 of 1978 in the Court of the Subordinate Judge, Cuttack for execution of the decree in Title Suit No. 4 of 1971 and prayed for delivery of possession of the suit house. In execution of the decree, possession of the suit house was delivered in their favour on 18-2-1979. Thereafter, the opposite parties filed Misc. Case No. 76 of 1979 in the executing Court under Sections 144 and 151 read with Order 21, Rules 99 and 106 of the CPC ("Code" for short). The Misc. Case was allowed. The petitioners preferred Civil Revision No. 363 of 1981 in this Court which was dismissed with the following observation : --

" From the aforesaid discussions conclusion is irresistible that the petitioners who were the decree-holders took delivery of possession through police help by evicting the judgment-debtors in excessive execution of a decree, which did not grant the relief of recovery of possession, by false assertion in the execution application thereby abusing the process of the Court. Hence, the application for restoration of possession is to be treated as an application u/s 47 of the CPC and the order for delivery of possession is set aside. As a necessary incident thereof, the judgment-debtors are to be restored possession in exercise of the inherent powers of the Court though Section 144, C.P.C. is not strictly applicable to the case. For these reasons, the order of the learned trial Court is affirmed."

Finding themselves in a peculiar humiliating position, culminating in parting with the suit house in favour of the opposite parties by order of this Court, the petitioners instituted Title Suit No. 327 of 1984 in the Court of the Subordinate Judge, Cuttack praying for recovery of possession of the suit house in case they are dispossessed therefrom by the opposite parties. During the pendency of the suit, they filed a petition (registered as Misc. Case No. 419 of 1984) u/s 151 read with Order 21, Rule 29 and Order 39, Rules 1 and 2 of the Code for stay of the order of restitution in favour of the opposite parties passed in Misc. Case No. 76 of 1979. Be it stated that the opposite parties were evicted from the suit house in execution of the decree on 18-2-1979. The order of restitution was passed on 1-5-1981. Despite the order passed by this Court on 24-8-1984 directing restoration of possession of the suit house, the opposite Parties have not yet obtained redelivery of possession thereof.

3. The defence of the opposite parties, inter alia, is that they have acquired permanent tenancy rights in respect of the suit house and the appurtenant

homestead and are unequivocal. On the other hand, their dispossession therefrom was high-handed and illegal. By virtue of the orders passed by the Subordinate Judge, as well as this Court, they are entitled to restitution of the suit house.

4. In 61 (1986) CLT 114, *Rauf Khan v. Sara Bibi*, reliance was placed on *Judhistir Jena Vs. Surendra Mohanty and Another*, and AIR 1976 Gau 39, *Quazi Toufiqur Rahman v. Mst. Nurbanu Bibi*, and in interpreting Order 21, Rule 29 of the Code it was held that no hard and fast rule can be laid down as to in what cases stay would be granted or refused. But, a rigorous test is to be applied and in most of the cases prayer for stay is bound to be refused. When a lawful decree has been obtained by a party, he should not be deprived of the fruits of that decree except for good and cogent reasons. So long as the decree is not set aside, by a competent Court, it stands good and effective and should not be lightly dealt with so as to deprive the holder of the decree of its benefits for the reason that a suit has subsequently been filed for setting aside that decree. In the present case, the opposite parties have obtained an order of restoration of possession of the suit house by way of restitution in Misc. Case No. 76 of 1979 and the said order was confirmed in Civil Revision No. 363 of 1981 of this Court. The order, which for the purpose of this case can be equated to a decree, stands good and effective and until it so remains, the opposite parties shall not be deprived of the fruits thereof for the simple reason that a subsequent suit has, been instituted by the petitioners for eviction. Therefore, on the principle referred to above, the petitioners' prayer for stay of restoration of possession and for that matter to render the orders passed in Misc. Case No. 76 of 1979 and Civil Revision No. 363 of 1981 ineffective cannot be allowed.

5. It is not the spirit of Order 39, Rules 1 and 2 of the Code to grant temporary injunction to restrain a party from enjoying the fruits of a lawful decree or order. If a lawful and enforceable decree or order has been passed in favour of a party it must be held that he has a prima facie case, balance of convenience is in his favour and he will be put to irreparable loss, if he is prevented by way of injunction from enjoying the fruits and benefits thereof. The opposite parties having secured an order for restoration of possession of the suit house are fortified with the aforesaid ingredients and so by way of temporary injunction they cannot be deprived of the fruits and the benefits thereof. Therefore, an order of temporary injunction cannot be granted against them. For the selfsame reasons, the inherent powers u/s 151 of the Code cannot also be exercised against their interest.

6. Viewed from any angle, I find absolutely no reasons to interfere with the impugned order. On the other hand, I would go to the extent of observing that the executing Court has erred on the side of leniency in not giving effect to the order of redelivery of possession in Misc. Case No. 76 of 1979 affirmed in Civil Revision No. 363 of 1981. Law Courts should remember that it is their duty to implement lawful orders as expeditiously as possible so as to secure the ends of

justice. This touchstone of imparting justice was not kept in view in this case and by effecting delay over years the opposite parties have been denied the fruits of the order passed in their favour. Therefore, without any further delay the orders referred to above should be implemented.

7. In the result, subject to the observations made above, the civil revision is dismissed with costs. Advocate's fee is at Rs. 100/-.