

(2014) 01 DEL CK 0358

In the Delhi High Court

Case No : Regular Second Appeal No. 212 of 2010 and CM No. 20606 of 2010

North Delhi Power Ltd.

APPELLANT

Vs

Wheels Polymers Pvt. Ltd. and Another

RESPONDENT

Date of Decision : 10-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 114 144 151 96

Citation : (2014) 141 DRJ 390 : (2014) 173 PLR 29

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : K. Datta and Mr. Manish Srivastava, for the Appellant; Pankaj Nagpal and Mr. Rajat Bhalla, for the Respondent

Final Decision : Allowed

Judgement

Valmiki J Mehta, J.—This regular second appeal is filed against the judgment of the appellate court dated 7.7.2010 which allowed the appeal of the present respondent no. 1 and who was the applicant in the application u/s 144 read with Section 151 CPC filed in the trial court. The appellate court allowed the appeal of the respondent herein and who was the appellant in the appellate court. Trial court by its judgment dated 20.11.2002 had dismissed the application, and against which judgment the respondent herein had filed the appeal, and in which appeal the respondent-applicant was successful. Hence the present appeal by the non-applicant in the trial court and the respondent in the appellate court. The facts of the case are that the respondent herein as a plaintiff filed a suit against the appellant herein for permanent and mandatory injunction questioning the charge of fraudulent abstraction of energy from the electricity connection. In this suit, the respondent-plaintiff had filed an interim application for restoration of electricity supply and which application was disposed of with the direction that respondent-plaintiff will pay the amount claimed by the appellant herein (defendant in the suit) by means of installments. On the amount being paid by the plaintiff in the suit and the respondent herein, electricity connection was

restored. The suit filed by the respondent-plaintiff was however dismissed by the judgment dated 6.9.1999. Whereas issue no. 2 was held in favour of the respondent-plaintiff that there was no valid inspection report dated 24.4.1996, the suit was however dismissed in view of the finding in issue no. 4 that the respondent-plaintiff was not a registered consumer. Therefore the final position which emerges was that the suit of the respondent-plaintiff stood dismissed. None of the parties challenged the judgment dated 6.9.1999, much less the respondent-plaintiff, who is the applicant in the application under Sections 144 and 151 CPC. I am doubtful as to whether the appellant herein and who was the defendant in the trial court could have challenged the decree because the suit against the appellant-defendant was dismissed, and such a defendant cannot u/s 96 CPC file an appeal only with respect to one issue against the defendant, although the suit of the plaintiff was dismissed vide Deva Ram and Another Vs. Ishwar Chand and Another,

2. Respondent-plaintiff after the dismissal of the suit filed the subject application claiming that the applicant-plaintiff is entitled to restitution on account of the fact that the issue no. 2 was held in favour of respondent-plaintiff and that since the respondent-plaintiff had paid amount under interim orders of the court in installments for restoration of the electricity connection, the respondent-plaintiff should be restituted by direction for refund of the amount paid by the respondent-plaintiff to the appellant-defendant.

3. Trial court by its judgment dated 20.11.2002 dismissed the application by making the following observations:-

Defendant on the other hand states that it was not the defendant who was enriched by the interim order. Rather, plaintiff was enriched by the interim order and ultimately it was found that plaintiff has no locus standi to file the present suit. Since plaintiff was not having any locus standi to file the suit the present applicant/plaintiff has also no locus standi to file the present application.

I have seen the file the judgment of the Ld. predecessor court, ruling cited by the plaintiff and application. I feel that the argument on behalf of defendant is correct. If the main suit has been dismissed as plaintiff was having no locus standi then there is no locus standi of the applicant/plaintiff in the present application. I also feel and agree with the Adv of defendant that it was not defendant who was enriched by the interim order as his electricity was restored which cannot be reverted back. I feel that the ruling cited by the plaintiff cannot favour the plaintiff as it is reverse the case. The suit was ultimately dismissed.

I find no substance in the application U/s. 114 CPC read with Section 151 CPC and the same is dismissed. Main file alongwith the miscellaneous application be consigned to RECORD ROOM.

4. The appellate court by the impugned judgment dated 7.7.2010 set aside the order of the trial court dated 20.11.2002 by making the following observations:-

4. Vide judgment dated 06.09.1999, the suit of the appellant was dismissed on the ground that there was no privity of contract between the appellant and the respondent. However, all the other issues were decided in favour of the appellant and against the respondent. While deciding issue No. 2, it was also held by the learned Trial Court that the plaintiff discharged his onus in proving that no theft was committed by the appellant but as the defendant failed to discharge its onus, issue No. 2 is decided in favour of plaintiff and against the defendant. As no appeal was preferred by either party thus the aforesaid judgment dated 06.09.1999 attained finality.

5. Since the appellant had deposited the amount of Rs. 3,84,712/- in installments against the alleged FAE bill raised by the respondent, in view of the finding given by the learned Trial Court with respect to inspection report on the basis of which the FAE bill was raised as illegal, the appellant preferred an application before the learned Trial Court u/s. 144 read with section 151 CPC to refund the aforesaid amount. The said application of the appellant was dismissed holding that

If the main suit has been dismissed as plaintiff was having no locus-standi, then there is no locus-standi of the applicant/plaintiff in the present application. I also feel and agree with the advocate of defendant that it was not defendant who was enriched by the interim order as his electricity was restored which cannot be reverted back. I find no substance in the application u/s. 114 CPC read with section 151 CPC and the same is dismissed.

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11. Learned counsel for the respondent also placed reliance on a judgment of the Delhi High Court title as DTC Vs. International Avenues,). The aforesaid judgment does not in any manner help the case of the respondent. Rather, it reiterates the principle of restitution. It was held therein

The principle of law is well established that where proceedings filed by any person have come to an end whether by withdrawal or by the same being dismissed then such person is bound to reconstitute the benefit which he has received under interim orders which he was successful in seeking during the pendency of the proceedings. This principle is unexceptionable because otherwise a person would simply take benefit of interim orders and thereafter no pursue either the interim proceedings or the final proceedings till its conclusion because the same may go against him and consequently he may prefer to quietly withdraw the proceedings and pocket the benefit derived out of interim orders which he had obtained in his favour. In fact, even if, proceedings are not withdrawn but are ultimately unsuccessful i.e., the same are dismissed, even then the principle of restitution will govern the parties.

12. Not only it has been held that if as a result of an interim order passed by the court, certain payment is made and utilised, then in the event of ultimate success, the party will be entitled to recover not only the entire dues but also

interest thereon. In support of his contentions that the interest also ought to be paid by the respondent, learned counsel for appellant relied on a judgment reported as "1989 RLR 251 wherein it has been held that "if the party has utilised the amount to which it was not legally entitled, it is required to pay interest thereon".

13. In view of the aforesaid discussion, the finding of the learned Trial Court in the impugned order dated 20.11.2002 is set aside as perverse and based on conjectures. Accordingly, the respondent is directed to refund Rs. 3,84,712/- to the appellant alongwith simple interest @ 18% p.a., from the date of deposit till realization.

5. Since for the disposal of RSA substantial questions of law are required to be framed, I frame the following substantial questions of law:-

(i) Whether a plaintiff can seek execution of a judgment and decree which dismissed the suit of the plaintiff by filing an application under Sections 144 and 151 CPC?

(ii) Whether principle of restitution can be invoked by the respondent-plaintiff in the present case where the appellant-defendant has not taken benefit of any interim order or final judgment passed in the suit.

(iii) Whether the decision of issue no. 2 in the judgment passed in the suit dated 6.9.1999 operates as res judicata in favour of the respondent-plaintiff and against the appellant-defendant?

6. I may note that I have framed the aforesaid substantial questions of law and which would be in reformulation of the substantial question of law framed by a learned Single Judge of this Court by the order dated 8.4.2013.

7. The *raison d'être* of the principle of restitution comprised in Section 144 CPC, and with respect to which provision of Section 151 is also sometimes invoked, is that a person who has received benefit under a court order/judgment which is subsequently set aside, must reconstitute the benefit which he had received because of the interim or final order. Extending the principle of Section 144 CPC applications u/s 151 CPC are also entertained for restitution where any party to a suit takes benefit of an interim order, but thereafter the main suit proceedings themselves are either dismissed or not pursued. It is in such circumstances that a Division Bench of this Court in the case DTC Vs. International Avenues, applied the principle of restitution because petitioner who was an advertiser in that case, took benefit of an interim order by the hoardings remaining for a particular period at the licenced premises and earned revenues, but the main petition was got dismissed for non-prosecution without refunding/restituting the benefit of interim orders which were taken by the petitioner in that case. In such circumstances, the observations were made by the Division Bench (and to which I am a party) and which have been relied upon by the appellate court in para 11 of its judgment which I have reproduced above.

8. In the present case, admittedly, the principle of restitution does not apply as per language of Section 144 because it is not as if that any party to the suit took benefit of a final judgment of a court which has been set aside by the appellate court and consequently restitution is prayed for. There is also no benefit which is taken of an interim order by the appellant-defendant herein, because it is not that the appellant-defendant, had approached the court for an interim order by filing of an interim application inasmuch as it was the respondent-plaintiff who sought an interim order for restoration of the electricity supply and which was allowed subject to the payment of the amount by the respondent-plaintiff in installments. Really therefore, it is the respondent-plaintiff, who got benefit of the interim order and it is not as if that the appellant-defendant got benefit of interim order which benefit has to be restituted on disposal of the proceedings. Even if I assume that the interim order was in favour of the appellant-defendant, but the fact of the matter is that suit itself was dismissed, and therefore, in such a case where the main suit itself is dismissed there does not arise any issue of restitution in favour of the plaintiff-respondent and which amounts to execution of a finding in a judgment by which the suit is in fact dismissed.

9. In view of the above, substantial questions of law stated above are answered in favour of the appellant-defendant and against the respondent-plaintiff by observing that the appellate court in fact by its judgment allowed execution of a judgment and decree in favour of the plaintiff where the suit itself had been dismissed. It is also observed that there cannot be execution merely because one issue has been decided in favour of the respondent/plaintiff/applicant although the main suit itself has been dismissed because no appeal lies u/s 96 CPC by a defendant against a judgment by which a suit is dismissed simply because one of the issues is decided in favour of the plaintiff and against the defendant. In view of the above, appeal is allowed. The impugned judgment of the appellate court dated 7.7.2010 is set aside. Parties are left to bear their own costs.