

(1930) 12 CAL CK 0024
In the Calcutta High Court

Rajjabali Khan Talukdar and Others

APPELLANT

Vs

Faku Bibi and Others

RESPONDENT

Date of Decision : 17-12-1930

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Criminal Procedure Code, 1898 (CrPC) — Section 145, 15

Citation : AIR 1932 Cal 29

Judgement

1. This is an appeal from an order of the Subordinate Judge, 1st Court, Bakarganj, reversing an order of the Munsif, 3rd Court at Patuakhali, on an application made u/s 144, Civil P.C. The facts are somewhat complicated but ignoring those that are not relevant at the present stage they may be stated thus quite shortly.

2. One Khatejan Bibi and others who, for the sake of brevity may be called the petitioners in view of the application that was made by them u/s 144, Civil P.C., are holders of certain shares in a raiyati holding which was purchased in execution of a rant decree by the opposite parties Nos. 1 to 11 who are co-sharer landlords, a 12 annas share being purchased jointly by the opposite parties Nos. 1 to 10 and the remaining 4 annas share by the opposite party No. 11. After their purchase, the opposite parties Nos. 1 to 10 gave a lease of their 12 annas purchased share to one Rajjabali: Rajjabali was resisted by the petitioners in his attempt to take possession and he then instituted a Title Suit No. 105 of 1922 against the petitioners and their cosharers in the holding, and having, obtained an ex parte decree on 10th January 1923 obtained delivery of possession of the lands of the entire holding on 21st February 1923. The petitioners then applied for setting aside the ex parte decree and obtained an order for re-hearing of the suit, and eventually the suit was dismissed for default on 16th June 1925. The sale held in pursuance of the ex parte decree was also sat aside but with that we need not concern ourselves. Rajjabali had in the meantime sublet the lands to opposite parties Nos. 13 to 23. From the judgment of the Subordinate Judge it only appears that he had done so after instituting his

suit, but the appellants say, and this is not controverted, that ha had done so after obtaining possession in execution of the decree; and we shall decide the case on that footing. After the suit was dismissed as aforesaid, proceedings u/s 145, Criminal P.C., arose as the result of which the possession of opposite parties Nos. 12 to 23, that is to say, of Rajjabali and his sublessees was declared. Interim receivers had been appointed during the pendency of the said proceedings and they had taken possession under an order made by the Court.

3. In 1927, the date is not material, the petitioners made the present application for restoration of possession in the raiyati holding. They impleaded, as opposite parties to the application, opposite parties Nos. 1 to 11, the cosharer landlords, No. 12, the aforesaid Rajjabali, Nos. 13 to 23, the sublessees of the said Rajjabali and Nos. 24 to 41 their own cosharers in the holding.

4. The Munsif disallowed the application. The Subordinate Judge has reversed the Munsif's decision and has ordered that "the petitioners along with opposite parties Nos. 24 to 41 should get khas possession of the lands of the holding on eviction of opposite parties Nos. 12 to 23 therefrom and also mesne profits from them from 1330 B. S."

5. It may be mentioned here that Ashar 1330 B.S. was the time when the receivers were appointed by the criminal Court in the proceedings u/s 145, Criminal P.C.

6. Some amongst the opposite parties Nos. 12 to 23 are the appellants in this appeal, No, 12, Rajjabali, being one of them. The contentions urged in support of the appeal are four in number.

7. The first contention urged is that the application for restitution was not maintainable ax the ex parte decree in execution of which possession was obtained by Rajjabali was not reversed by a superior Court and consequently an application for restitution does not lie under Sub-section (1), Section 144. There is undoubtedly a certain amount of conflict of judicial opinion on this question as has been pointed out in a recent decision of this Court in the case of Ramanath Karmakar Vs. Sheikh Asanulla, . But after the decision of the Judicial Committee in the case of Jai Barham v. Kedar Nath Marloari AIR 1922 P.C. 269 the question is hardly of any practical importance except where a question arises under Sub-section (2), Section 144. The duty or jurisdiction of the Court in respect of restitution does not arise merely under the section, but is inherent in the general jurisdiction of the Court. The contention therefore need not be further considered.

8. The second argument is that the petitioners are not entitled to restitution inasmuch as subsequent to the delivery of possession under the ex parte decree Rajjabali and his sublessees obtained an order in their favour u/s 15, Criminal P. C, and the civil Court by making an order for restitution cannot interfere with the possession which they are enjoying under the said order u/s 145, Criminal P.C. Now, the order made by a criminal Court u/s 145, Sub-section (6), Criminal P.C., is only a declaratory order in favour of a party who is either found to be in actual

possession or is in the case of forcible and wrongful dispossession within two months before the proceedings, regarded in law as in actual possession and in the latter case the criminal Court is competent to give effect to the declaration by restoring the party dispossessed to actual possession. Nevertheless, the order lasts only until the party in whose favour it is made is evicted in due course of law. A suit for regaining possession is not in all cases necessary, and we do not see why restitution validly made by a Court should not be regarded as eviction made in due course of law. There is authority for the proposition that as regards restitution, the parties must be placed in the position in which they previously were, irrespective of any other rights accruing to any of the parties during the litigation: *Ganga Prosad v. Brojonath Das* [1908] 12 C.W.N. 642. Some argument was addressed to us to the effect that it was the interim receivers! appointed in the proceedings u/s 145, Criminal P.C. who actually dispossessed the petitioners. But the possession which the interim receivers exercised may justly be regarded as possession on behalf of the party who eventually succeeded, and that party was Rajjabali and his sub lessees: *Abinash Chandra v. Tarini Charan* AIR 1926 Cal. 782. The argument therefore does not help the appellants in any way. It was contended further that in the application which the petitioners made they put down the date of their dispossession as the date on which the interim receivers took possession; but this we cannot regard as an admission that they were not dispossessed in execution of the ex parte decree. The contentions of the appellant under - this head must be overruled.

9. Thirdly it was argued that the petitioners, not being the owners of the entire interest in the raiyati holding were not competent to maintain the application for restitution. This argument has very little substance seeing that the petitioners made their cosharers in the raiyati. holding parties to the application and the order that has been made is one granting their restitution jointly with their cosharers.

10. The fourth contention that has been raised involves a question of some importance and is one on which there is not much authority. The question is whether the petitioners were entitled to restitution as against the opposite parties 13 to 23 the sublessees inducted on the lands by Rajjabali after he had obtained possession in execution of the ex parte decree, on the setting aside of which the right of the petitioners to restitution has arisen. The words in Section 144 are:

Shall, on the application of any party entitled to any benefit by way of. restitution or otherwise, cause such restitution to be made as will, as far as may be, place the parties in the position which they would have occupied but for such decree etc.

11. Under the words of section as also under the general jurisdiction of the Court, the question is whether rights or benefits acquired by third parties, strangers to the decree or order that has been subsequently varied or reversed, can be interfered with by an order for restitution. It is clear that restitution is a

duty on the part of a Court as well as an obligation on the part of the party against whom such variation or reversal has taken place. In the case of *Abinash Chandra Chowdhury Vs. Tarini Charan Chowdhury and Others*, it was pointed out by the Judicial Committee that a Court of appeal, when it reverses a judgment of a Subordinate Court, has an inherent jurisdiction to order restitution of everything which may have been improperly taken because taken in execution of a decree. The same principle was affirmed by their Lordships in the case of *Shama Purshad v. Hurro Purshad* [1883] 10 M.I.A. 203 and has been recognized by the legislature in Section 583 of the Code of 1832 and Section 144 of the present Code. The principle has been enunciated in several decisions as being 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 not merely in the power of the Courts, but it is a duty cast upon them to enforce that obligation: *Hurro Chunder Boy Choudhury v. Shoorodhonee Delia* [1868] 9 W.R. 402 and *Dorasami Ayyar v. Annasami Ayyar* [1900] 23 Mad. 306.

12. The general trend of decisions in this country, so far as the question of restitution is concerned, has proceeded upon a consideration of this duty on the part of the Court arising from the fact that property was taken in execution of its order or decree and of the obligation on the part of the party to the record, including, of course his representatives to restore property so taken. We have not been able to find any case excepting one to which we shall presently refer in which a more extended view has been taken of this duty and this obligation. That one decision is *Dorasami Ayyar v. Annasami Ayyar* [1900] 23 Mad. 306. There, the trustees of a temple having been removed from office a suit was brought against them by the newly appointed trustees and a decree obtained restraining them from interfering with the affairs of the temple. In accordance with that decree property of the temple was taken from them by process of the Court and handed to the new trustees. On appeal to the High Court however the decree was reversed and restitution was now applied for by the survivor of the late trustees from whom the property had been taken. In the meanwhile a third party had been appointed an additional trustee to the newly appointed trustees. *Subrahmania Ayyar, J.*, in his judgment in that case observed as follows:

Passing next to the question of restitution against innocent third parties, it is hardly necessary to say that the well-recognized rule that a bona fide purchaser at a sale held under a Court's decree or order which is subsequently reversed is not affected by the reversal, is based on public policy which has special reference to judicial sales. As regards the law applicable to the case of innocent third parties in the position analogous to that said to be occupied by *Sivasami Ayyar*, I have not come across any Indian or English authority dealing with the point explicitly. *Quan Wo Chung Co. v. Laumeister* 17 Am. St. Rep. 262 an American case, is however in point and the view therein laid down seems to be worthy of being followed, having regard to the sound reasons on which it rests. There the company, resisting the claim for restitution, was not a party to the decision in

consequence of which the restitution was claimed. The company's case was that it held peaceable possession under a title derived from an independent source and adverse to both the parties to the suit and that the company was not in collusion with either. It was held that the rule that a plaintiff in an action to recover land cannot, by his writ or restitution or assistance, dispossess a stranger to the proceeding holding possession on an independent title or claim of title and not in collusion with the defendant does not apply where the party seeking to be restored to possession has been wrongfully dispossessed by the agency of a Court. The observations of the Court on the point were as follows: In support of this proposition (viz., the company was not liable to be ejected) they cited numerous cases in which it has been held that the plaintiff in an action of ejectment or other suit to recover possession of real property cannot, by his writ or restitution or assistance, dispossess a stranger to the proceeding holding the premises under an independent title or claim of title and not in collusion with the defendant.

But the cases have no application where the party seeking to be restored to the possession has been wrongfully dispossessed by the agency of the Court. He does not stand in the position of the actor in a suit who seeks the aid of a Court to regain any possession lost by his own negligence or misfortune. On the contrary he is out of possession only because the Court has wrongfully put him out, and whoever is in is there only because the Court has wrongfully made room for him to get in. All that the one has gained and all that the other has lost is due to the agency of the Court and therefore no injustice is done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession. He is in no worse position after his being put out by the Court than he would have been if the Court had never acted, and the Court cannot, without putting him out, undo its own wrong. If he has a superior right to the possession he can, after going out, assert it with the same effect as if he had never been in and he loses nothing but the advantage of holding the premises pending the litigation--an advantage to which he was never entitled.

13. That restitution such as it may be had either u/s 144, Civil P.C., or under the inherent powers of a Court is not always meant to be a complete remedy is clear from decisions in cases of what may be said to a converse type to the present one. The case of Kedar Nath Marwari v. Jai Berharm [1917] 37 I.C. 863 was one in which the purchaser at an auction sale had paid into Court the purchase money out of which Certain decree-holders were paid off and their debts discharged, and thereafter paid off two bonds secured on the property purchased. The High Court of Patna in ordering restitution disallowed the payments made on the two bonds holding that the Courts can only replace the parties in the position which they actually occupied at the time of the order reversed and that they cannot consider all" the various subsequent positions taken up voluntarily by the parties as to the remote consequences of the order. This decision was affirmed by the Judicial Committee in Jai Berham v. Kedar Nath

Marwari A.I.R 1922 P.C. 269 . Their Lordships also disallowed the payments on the two bonds, holding that they were not made under an order of the Court, and further that the purchasers had by making the payments succeeded to the security. In the case of Baikuntha Nath Chattoraj Vs. Prosannamoyi Debi, the facts were as follows: One B had applied for letters of administration to the estate of one M deceased, while one P had, on the other hand, set up a will as having been left by M. During pendency of the case before the District Judge a Commissioner appointed by the Court took certain moveables from P into his custody. The District Judge granted letters of administration and refused probate. The High Court on appeal reversed the District Judge's decision and granted probate of the will to P and dismissed the application of B for the letters of administration. On P's application the articles were made over to P. On appeal to the Judicial Committee the decision of the High Court was reversed and that of the District Judge was restored. B then applied for restitution in respect of the articles. It was held that B was not entitled to restitution and the articles were never in his possession and were not taken out of his possession by any decree or order of the Court. From these decisions the proposition may well be deduced that restitution can only be had in respect of matters done under the decree or as an immediate consequence of it. In Freeman on Judgments, Vol. 2, Section 482. the proposition has been put thus:

If it is the legal effect of a decree that is to be executed, it is no less the effect of a decree of reversal that the party, against whom the decree was given, is to have restitution of all that he has been deprived of under it.

14. So far as restitution u/s 144 of the Code is concerned we think the question is now concluded by authority. Their Lordships of the Judicial Committee in the case of Raj Raghubar Singh v. Jai Indar Bahadur Singh AIR 1919 P.C. 55 in which restitution was sought for against a surety have observed thus:

Sections 47 and 144 provide for the decision of questions relating to the execution, discharge or satisfaction of the decree, and for restitution including payment of mesne profits when a decree has been varied or reversed; and they enact that such questions shall be determined in the suit and not by a fresh suit. But these sections apply only to the parties or the representatives of the original parties and do not apply to sureties.

15. As regards restitution under the inherent powers of a Court, as a result of the considerations noticed above, it seems to us only reasonable to hold that the same principle should apply. Further-more, in proceedings relating to restitution it is only a summary inquiry that is contemplated and such an inquiry may be wholly unsuited for adjudicating upon complicated questions that may arise if the rights, which strangers may have acquired in the meantime, are to be investigated into; though of course there would be no justification on the part of the Court to refuse to investigate all questions, simple or complicated, once the case comes directly within the provisions of Section 144, Civil P.C.

16. Our conclusion therefore is that as the subleases was created by Rajjabali in favour of opposite parties Nos. 13 to 23, not under the decree nor as a direct or immediate consequence of it, and as the said defendants were strangers to the litigation and were in no sense the legal representatives of Rajjabali, no order of restitution should have been made as against them.

17. The result is that, in our opinion, the order of the Court below in so far as it is against the opposite parties Nos. 13 to 23, should be set aside, and the petitioners left to seek out their remedy, if any, in a suit properly instituted for the purpose. The appeal thus succeeds in part but there will be no order for costs.