
(1987) 08 AHC CK 0042
In the Allahabad High Court
Case No : Writ Petition No. 5721 of 1986

Sarvajit Singh

APPELLANT

Vs

III Additional District Judge and Others

RESPONDENT

Date of Decision : 27-08-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 144

Citation : (1987) 08 AHC CK 0042

Hon'ble Judges : Ravi S. Dhavan, J

Bench : Single Bench

Advocate : N.K. Pandey, for the Appellant; T.P. Asthana and S.C., for the Respondent

Final Decision : Dismissed

Judgement

Ravi S. Dhavan, J.—One aspect of this writ petition needs to be set on record at the outset. The Petitioner Sarvajit Singh, Respondent No. 3 Ram Lagan Singh and Respondent No. 4 Ram Ugrah Singh are brothers ; all sons of Ram Sewak Singh. The issue is, thus, between the brothers.

2. Sarvajit Singh, Petitioner, alleges that his brother Ram Gagan Singh, Respondent No. 3 is a trespasser on a shop upon which the Petitioner is a tenant of Sahakari Ganna Vikas Samiti. Apparently, there must have been differences between the brothers that occasioned an action by way of a suit by Sarvajit Singh, Petitioner seeking possession of the shop with the relief that possession may either be delivered to him or Ram Ugrah Singh, Respondent No. 4 who had been arrayed as Defendant No. 2 in the suit. In effect, it comes down to this: that the two brothers desired possession of the shop by seeking eviction of the other brother Ram Lagan Singh, Respondent No. 3.

3. In the suit which had been filed by the Petitioner, an exparte decree dated 27th March 1987 was obtained. The possession of the premises was wrested from Ram Lagan Singh, on the execution of the exparte decree.

4. Ram Lagan Singh, Respondent No. 3, Defendant No. 1 in the suit resisted the exparte decree and moved an application under Order IX Rule 13 of the CPC , hereinafter referred to as the Code, in effect, taking a plea that the judgment which occasioned the exparte decree was obtained by fraud and collusion. The Munsif set aside the exparte decree by his judgment of 19th November 1985. This is Annexure 2 to the Writ petition. The Petitioner moved the District Judge, Ghaziabad in revision, being dissatisfied that the exparte decree which he had obtained, had been recalled. The revision was heard by the 6th Additional District Judge, who, by his order of 18th December 1985 affirmed the judgment of the Munsif, in effect, holding that the exparte decree had rightly been recalled. The exparte decree having been recalled and the order of the trial court being confirmed in revision, Ram Lagan Singh, Respondent No. 3 and Defendant No. 1 in the suit sought restitution u/s 144 of the Code, by seeking possession of the premises in controversy in the suit.

5. The Petitioner as Plaintiff filed objections upon the restitution sought. After hearing the parties the Munsif by his order of 3 February 1986, granted restitution. The Petitioner-Plaintiff challenged the order granted restitution before the District Judge, Ghaziabad, in appeal. The appeal was heard by the 3rd Additional District Judge, who by order dated 25 April 1986 affirmed the Munsif's order by which restitution u/s 144 of the Code had been permitted.

6. Against the order, in effect, permitting restitution, the present writ petition has been filed though, the Petitioner has challenged all the orders, passed against him by which the exparte order was recalled and restitution ordered.

7. The genesis of the restitution which had been permitted in the proceeding is the recall of the exparte decree. Thus what is to be seen by this Court is whether the recall of the exparte decree and the consequential restitution, are in accord with law and whether justice has, in effect, been done. The exparte decree, it has now come on record, had been occasioned by fraud and collusion. In reference to this the undisputed facts as noticed by the VI Additional District Judge, Ghaziabad in Small Cause Court revision No. 205 of 1985 while affirming the judgment of the Munsif that the exparte decree had been rightly recalled have been noticed. The observations of the aforesaid court are:

From the evidence of the parties, it is revealed that the Respondent had denied the refusal of service by postman and the process server. He has categorically stated that no service was effected on him, as against this the revisionist produced postman Sohan Lai who has stated that he had taken the registered post to the revisionist who had asked him to send back the registered post by refusal. He has never presented the registered post to Ram Lakhan. Similarly the process server Raghuvir has also stated that Sarvajeet Singh introduced him that two persons naming Ram Lakhan and Ram Ugra Singh but they were not the persons out of Respondents. In this way, from the evidence of revisionist it was very much clear that the service was never effected on Respondent and he had never refused to accept the service therefore, in these circumstances the learned

lower court had rightly held that no service was ever effected or refused by the Respondent. The burden of proof lies upon the revisionist to show that the service was actually effected after the Respondent had denied the service. In this way, I feel that the revisionist had failed to discharge his burden.

8. Thus, unless the Petitioner can shake the findings of fraud and collusion as affirmed by the 6th Additional District Judge, Ghaziabad in revision, no other aspect needs to be examined. It has been fairly contended on behalf of the learned Counsel for the Petitioner that it is difficult to resist the findings returned by the 6th Additional District Judge, Ghaziabad.

9. The controversy now rests on a solitary question of law. If any order has been obtained by fraud or collusion then the party against whom such an order has been occasioned is entitled to take an equitable plea resting on Section 144 of the Evidence Act of 1872 CPC 1908). Fraud or collusion vitiates any order or judgment. This case is no exception.

10. Thus there has been no infirmity, illegality, error of jurisdiction, manifest, apparent or otherwise when the trial court recalled the ex parte decree and as a consequence thereof directed restitution u/s 144 of the Code. All that will happen now is, that the parties betwixt themselves will be at issue on merits. None of the orders which have been impugned suffer from any defect, as alleged. The writ petition is, accordingly, dismissed with costs.