
(2013) 07 DEL CK 0203

In the Delhi High Court

Case No : Ex. Application (OS) 14 of 2012 in Ex. P. 3 of 2012

Shyam Bihari Singhal

APPELLANT

Vs

BSES Yamuna Power Ltd.

RESPONDENT

Date of Decision : 30-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 144(1), 144(2)

Citation : (2013) 07 DEL CK 0203

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Fanish K. Jain, for the Appellant; Manish Srivastava, for the Respondent

Final Decision : Disposed Off

Judgement

Jayant Nath, J.

Ex. Appl. (OS) 14/2012 & EX. P. 3/2012

1. This is an application u/s 144 of the Code of Civil Procedure, seeking restitution on behalf of the decree holder. The brief facts of the case are that the plaintiff is carrying on its business at its premises in Jhilmil Industrial Area, Shahdara, Delhi, and is using the connection installed by the defendant. The present suit was filed seeking decree of declaration declaring the inspection reports and the MTD report dated 14.7.1999 and the bill as null and void and a decree of permanent injunction be passed in favour of the plaintiff restraining the defendant from disconnecting the electricity supply on the basis of nonpayment of the impugned bill of Rs. 48,83,927/-. The suit was filed in the court of learned Civil Judge, Delhi and the learned Civil Judge vide order dated 03.08.1999 directed the decree holder to deposit Rs. 6 lac out of the impugned bill for restraining the judgment debtor from disconnecting the electricity supply to the premises of the decree holder. Thereafter the plaint was returned on account of the jurisdictional value and the same was presented to this Court. This Court on

24.07.2006, reiterated the interim order dated 03.08.1999 passed by the learned Civil Judge. The decree holder in terms of the order dated 03.08.1999 deposited a sum of Rs. 6 lac in two instalments. The first instalment of Rs. 3 lac was deposited by the decree holder on 12.08.1999 and the second instalment of Rs. 3 lac was deposited on 06.09.1999.

2. Subsequently, the suit of the plaintiff was decreed vide order dated 16.03.2011. The impugned bill of Rs. 48,83,927/- was quashed and the sum of Rs. 6 lac which had been deposited was ordered to be refunded back within eight weeks.

3. It was in this background that the present execution petition was filed. On 06.01.2012, the counsel for the judgment debtor submitted that just a day before, the judgment debtor had paid the sum of Rs. 6 lac to the decree holder and thereafter the decree stands satisfied. In the present Execution Application, the notice was issued to the judgment debtor.

4. By the present application, it is the contention of the decree holder that in terms of the interim order passed by the Court, the decree holder had deposited Rs. 6 lac with the judgment debtor. In view of the judgment and decree of this Court dated 16.03.2011, it is submitted that the decree holder is entitled to complete restitution. Hence, it is stated that apart from the refund of Rs. 6 lac, the decree holder is entitled to interest @ 18% per annum with monthly rests from the date of deposit till its actual realisation. It is stated that 18% is the usual rate of interest which the judgment debtor is presently charging from its consumers.

5. The judgment debtor has filed his reply. In the reply, it is stated that the application is not maintainable as it is in contravention of judgment and decree dated 16.03.2011. It is stated that by the judgment and decree dated 16.03.2011, the judgment debtor was directed to refund only Rs. 6 lac and hence the present application does not lie. It is further stated that the present Court being the executing court cannot go behind the decree and pass any order as sought for.

6. Learned counsel for the judgment debtor has reiterated the aforesaid contention as contained in its reply. He further submitted that it was the plaintiff who approached this Court and persuaded the Court to pass an interim order and hence Section 144 CPC would not be applicable. According to him, Section 144 CPC is applicable only where the party had requested for interim order and subsequently if the interim orders are vacated, the other party namely the defendant can then ask for restitution.

Learned counsel appearing for the decree holder in response to the contentions of the judgment debtor relies upon the Constitution Bench Judgment in the case of Mahjibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai and Others, where it was held that such an application should be treated as application for execution. He further submits that similar view has been taken by this Court in the case of

Jagdish Lal Vs. M.E. Periera etc.,

7. On the issue of restitution and the principle thereof, he relies on the judgment of the Supreme Court in the case of South Eastern Coalfields Ltd. Vs. State of M.P. and Others,

8. In the context of above submissions of the parties, reference may first be had to Section 144 of CPC which reads as under:

144. Application for restitution.- (1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the court which passed the decree or order 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, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified and, for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation; reversal, setting aside or modification of the decree of the decree or order.

Explanation: For the purposes of sub-section (1), the expression "court which passed the decree or order" shall be deemed to include,-

(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the court of first instance;

(b) where the decree or order has been set aside by a separate suit, the court of first instance which passed such decree or order;

(c) where the court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

9. As far as the first objection of the judgment debtor is concerned namely that the present application would not lie in the present execution proceedings, I think one can usefully refer to the judgment of the Hon'ble Supreme Court in the case of Mahijibhai Mohanbhai Barot v. Patel Manibhai Gokalbhai (supra). The majority view in that case held as follows:

The section, to avoid the earlier conflict, prescribes the procedure, defines the powers of the Court and expressly bars the maintainability of a suit in respect of a relief obtainable under this section. The section does not either expressly or by necessary implication change the nature of the proceedings. Its object is limited. It seeks to avoid the conflict and to make the scope of the restitution clear and unambiguous. It does not say that an application for restitution, which till the

new Procedure Code was enacted, was an application for execution, should be treated as an original petition. Whether an application is one for execution of a decree or is an original application depends upon the nature of the application and the relief asked for. When a party, who lost his property in execution of a decree, seeks to recover the same by reason of the appellate decree in his favour, he is not initiating any original proceeding, but he is only concerned with the working out of the appellate decree in his favour. The application flows from the appellate decree and is filed to implement or enforce the same. He is entitled to the relief of restitution, because the appellate decree enables him to obtain that relief, either expressly or by necessary implication. He is recovering the fruits of the appellate decree. Prima facie therefore, having regard to the history of the section, there is no reason why such an application shall not be treated as one for the execution of the appellate decree.

10. A perusal of Sec. 144(2) CPC would show that no suit can be instituted for the purpose of obtaining restitution or other relief which could be obtained by an application u/s 144(1) CPC. The above judgment in Mahijibhai Mohanbhai Barot v. Patel Manibhai Gokalbhai (supra) specifically provides that when an application for restitution is filed, the party who files an application is not initiating any original proceedings but he is only concerned with the working of the decree in his favour and hence such an application has to be treated as an execution of the decree. It further held that an application for restitution is an application for execution of a decree.

In view of the said legal position, the present application in the execution petition would be maintainable.

11. The other argument of the judgment debtor is answered by the judgment of the Hon'ble Supreme Court in the case of South Eastern Coalfields Ltd. v. State of M.P. (supra). The Hon'ble Supreme Court in para 24 on the issue of restitution, held as follows:

The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 of the C.P.C. speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the

case, the restitution would far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the Court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing, wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

12. Regarding power of restitution, the Court further held in para 25 as follows:

Section 144 of the C.P.C. is not the fountain source of restitution; it is rather a statutory recognition of a preexisting rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In *Jai Berham and others V. Kedar Nath Marwari and others*, 49 Indian Appeals 351 their Lordships of the Privy council said: "It is the duty of the Court u/s 144 of the CPC to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. Cairns, L.C., said in *Rodger v. Comptoir d'Escompte de Paris*, (1871) L.R. 3 P.C. : "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression, the act of the Court is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case". This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it, *A. Arunagiri Vs. S.P. Rathinasami*, In the exercise of such inherent power the Courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.

The above observations of Hon"ble Supreme Court are a complete answer to all the objections of judgment debtor. It has to be taken note of that the issue of restitution arises only after the interim order has been vacated or has merged into a final order. The above observations of the Hon"ble Supreme Court in the case of *South Eastern Coalfields Ltd. (supra)*, clearly provide that unless and otherwise ordered by the Court, the successful party at the end would be justified in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. Hence, an application for restitution only would normally, unless there is something specifically said by the Court, be filed after the final order. Hence, in this case there is no bar in filing the present application after the interim order was vacated by the Court.

In this case, the interim order was passed on 03.08.1999. The order came to an end when the Court passed a judgment and decree on 06.03.2011. It is only after that, that the decree holder could ask for restitution. As long as order dated 03.08.1999 was not set aside, the question of applying to the Court for restitution would not arise. Hence the contention of the judgment debtor that this Court cannot go behind a decree is a contention without merit in the background of this case. The present application is not an attempt to go behind the decree.

I now come to the next contention of the judgment debtor. It was contended by the learned counsel for the judgment debtor that principles of restitution would not apply in this case. It was the decree holder who sought an interim order from the Court and that the interim order having been granted on the request of the decree holder, the concept of restitution would not apply. In my view this submission is again completely without merits. Reference may be had to the judgment of the Supreme Court in the case of South Eastern Coalfields Ltd. (supra), The Court, as stated above, held that Section 144 CPC is not the fountain source of restitution and that even otherwise apart from Section 144 the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In the same judgment in para 24, the court held as follows:

In "law, the term "restitution" is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, Seventh Edition, P. 1315). The Law of Contracts by John D. Calamari & Joseph M. Perlillo has been quoted by Black to say that "restitution" is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done. "Often, the result in either meaning of the term would be the same....Unjust impoverishment as well as unjust enrichment is a ground for restitution.

The defendant enjoyed benefit of deposit of Rs. 6 lac pursuant to interim orders passed by this Court. The interim order was passed to protect the rights of the defendant as it had raised a bill of Rs. 48,83,927/- on the decree holder which was under challenge in the suit. As the bill of Rs. 48,83,927/- was quashed by the decree of this Court, it is obvious that the judgment debtor has enjoyed benefit of deposit of Rs. 6 lac due to the interim order passed by this Court. Hence, it is not possible to accept the contention of the judgment debtor that the plaintiff who seeks interim order, cannot seek restitution after decree is passed in favour of the plaintiff whereby the interim order merges into the final order. Such a proposition is contrary to the principles of restitution as elaborated by the Supreme Court in the aforesaid judgment.

In view of the above, in view of the principles of restitution as stated u/s 144 CPC, the decree holder is entitled to restitution. Judgment debtor has enjoyed the sum of rupees six lac, pursuant to an interim order passed by this Court.

Decree holder shall be entitled to interest from the date of deposit of the sum of Rs. 6 lac till its refund. In my opinion, the rate of interest @ 12% p.a. simple is appropriate and in order. Hence, the present application is allowed. It is ordered that the decree holder shall be entitled to interest @ 12% simple interest on the sum of Rs. 6 lac w.e.f. the date of deposits i.e. 12.08.1999 for the sum of Rs. 3 lac and 06.09.1999 for the balance of Rs. 3 lac, till the date payment was received by the decree holder. It is ordered accordingly. The application and the Petition stand disposed of.