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Court : Andhra Pradesh

Decided On : Aug-23-1974

Reported in : AIR1975AP310

Judge : Sambasiva Rao and ;Sriramulu, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 144

Appeal No. : Letters Patent Appeal No. 8 of 1973

Appellant : Ganesh Parshad

Respondent : Adi Hindu Social Service League Represented by Its Hony. Secretary M.S. Goutom

Advocate for Def. : B.V. Subbarayudu, Adv.

Advocate for Pet/Ap. : Peri Subba Rao, Adv.

Disposition : Appeal allowed

Judgement :

Sriramulu, J.

1. This Letters Patent Appeal is directed against the judgment of our learned brother, Madhava Reddy J. in A. A. A. O. No. 16 of 1971, allowing the appeal and setting aside the judgments and decrees of the lower courts.

2. The material facts are : The respondent Society, called 'Adi Hindu Social Service League' is a society registered under the Hyderabad Societies Registration Act. The respondent-Society runs a girls' school in the main building bearing No. 480 at Esamiah Bazar, Hyderabad; adjacent to the main building there is an open plot of land measuring about 81 sq. yards. After executing a rental agreement, the appellant herein obtained the said open plot of land, bearing Municipal No. 4-7-1081 from the then Secretary of the respondent-Society on a monthly rent of Rs. 7. The appellant put up a thatched hut in the said vacant land. The appellant agreed to remove the hut when he vacates the plot of land.

3. Since the appellant herein failed to pay rents in respect of the said plot of land from July, 1953 onwards, the respondent-Society filed small cause suit No. 449 of 1965 against the appellant for the recovery of arrears of rent. The appellant herein resisted the said suit on the ground that he is the true owner of the said plot of land; that, he had obtained the suit land from his brother who, in his turn, got the said land by way of gift from one Johandrunnissa Begum and that he has perfected his title to the said land by being in long, open continuous and uninterrupted possession of the same for over 34 years. He further denied that he was a tenant of the respondent, or that he had, at any time, paid the rents.

4. Later on, the small cause suit was transferred to the court of the IV Additional Judge City Civil Court, Hyderabad. By his judgment dated 17-11-1966, the IV Additional Judge. City Civil Court, Hyderabad held that the tenancy and the rental agreement were proved and that, the arrears of rent were due, but dismissed the suit on the ground that, since the tenancy had been terminated by the plaintiff, the suit should have been only for compensation or damages for use and occupation and that, such a suit was outside the cognizance of the Small Causes Court.

5. Since the respondent's suit for arrears of rent against the appellant was dismissed, for want of jurisdiction, the respondent filed O. S. No. 22 of 1968 in the Court of the II Asst. Judge, City Civil Court, Hyderabad, for the eviction of the

appellant from the suit plot of land. The appellant raised the same defences in the suit as he had raised in the small cause suit which was filed against him for the recovery of arrears of rent. In his written statement, the appellant herein had also stated that on 9-2-1968 he had sold away the said plot of land to one Krumari Anupameswari Bai through her father and natural guardian, Kailash Prashad and that, she was a necessary party to the suit. Since the said purchaser was not made a party to the suit, the suit was bad for non-joinder of necessary parties. The eviction suit O. S. No. 22 of 1968, was heard and decreed ex parte on 2-8-1969. In execution of the ex parte decree, the respondent obtained the possession of the said vacant plot of land from the appellant.

6. The appellant then filed an appeal against the ex parte decree in the court of the Chief Judge, City Civil Court at Hyderabad. The Chief Judge, City Civil Court, by his judgment dated 15-10-1969, allowed the appeal and set aside the ex parte decree. The appellant herein then filed E. A, No. 11 of 1969 for restitution of the suit property which was taken from him by the respondent in execution of the ex parte decree.

7. The IV Asst. Judge, City Civil Court Hyderabad, allowed the said E. A. and directed the restitution of the suit property to the appellant. On appeal, the order of restitution was upheld by the Chief Judge, City Civil Court subject to the direction that the stair-case constructed in the premises by the respondent, during the pendency of the appeal against the ex parte decree, should be maintained, as far as possible, in the same conditions as it was at the time of delivery of possession to the respondent. The appellant was, however, allowed to open a 10' door in front, in the suit plot of land.

8. Aggrieved by the above judgment and decree of the Chief Judge City Civil Court, Hyderabad granting restitution of the suit property to the appellant, the respondent-Society filed A. A. A. O. No. 16 of 1971 in this court. Our learned brother, Madhava Reddy, J. by his order dated 24-8-1972 allowed the respondent's appeal and set aside the concurrent order of the courts below. Hence this Letters Patent Appeal by the appellant.

9. The learned counsel, Sri Peri Subba Rao, appearing for the appellant, contended that Section 144 of the Code of Civil Procedure is mandatory and leaves no discretion to the court to grant or refuse to grant restitution in case of the variation or the reversal of the decree and that, it is obligatory on the part of the court to order restitution. The grounds on which Madhava Reddy, J. refused to uphold restitution are irrelevant and not sound. The learned Judge refused to allow restitution on three grounds viz. (i) restitution is not an invariable rule of universal application without exception; (ii) balance of convenience was in favour of the respondent herein; and (iii) the appellant sold away the said plot of land to Kumari Anupameswari Bai and has been carrying on his business elsewhere and has, therefore, no interest in praesenti in the suit property and he would, therefore, suffer no loss if restitution is not ordered. The learned counsel for the appellant submitted that all these grounds are not sound, and are irrelevant for the purposes of granting restitution. In support of these arguments, the learned counsel relied upon the decision in State Govt. of Andhra Pradesh v. Manickchand Jeevraj & Co., : AIR 1973 AP27 , Binayak Swain v. Rameshchandra, : [1966]3SCR24 and Mahijibhai v. Manibhai, : [1965]2SCR436 .

10. The learned counsel Sri Sub-barayudu appearing for the respondent-Society on the other hand, supported the judgment of our learned brother, Madhava Reddy J. by relying upon the reasons given by him in his order. He further submitted that the 'possession of the suit property was obtained by the respondent-Society from Kumari Anupameswari Bai and not from the appellant herein. The appellant is a stranger and cannot therefore, claim restitution. The learned counsel also invited our attention to the decisions in S.N. Banerji v. K.L. & S. Co. Ltd. (AIR 1941 PC 128) and Laxmichand v. Sundrabai (AIR 1952 Nag 275); and Bhagwant Singh v. Sri Kishen Das, : [1953]4SCR559 .

11. Before we enter upon a discussion on the question of law as to whether the appellant is entitled to the restitution of the suit property it is necessary for us to record a finding on the question as to whether the respondent herein received the possession of the suit property from the appellant, or from Kumari Anupameswari Bai,

12. E. P. No. 11 of 1969 in O. S. No. 22 of 1968 was filed by the respondent (decree-holder) against the appellant Ganesh Pershad. In pursuance of that E. P. a warrant for delivery of possession was issued by the executing Court and, in execution of that warrant, the bailiff delivered the possession of the suit property to the respondent, before the Panchas. The relevant portion of the Panchanama reads thus:--

'..... We the panch members were called for to hold the panchanama in the above case do hereby certify that the bailiff of the court along with the D. H. i.e., Shri M.B. Gautham, came to the J D. house situated at Esamia Bazar today the 9th August, 1969 at 8 A. M. and intimated the purpose of arrival to the J. D. Sri Ganesh Pershad: accordingly he evicted the premises and vacant possession of land admeasuring 80 sq. yards bearing Municipal No. 4-7-1081 has been handed over to the D. H. and obtained receipt from him which is enclosed herewith and the same has been produced there at the site of having delivered the possession to the D. H. after evicting the J. D. from the said premises through the peon on the beat of drum by the drummer Shanker R/o Chaderghat, Hyderabad.....'

In view of the proceedings in the E. P. and the Panchanama regarding the delivery of possession, it is incorrect or untrue to say that the respondent herein had taken the possession of the suit property from Kumari Anupameswari Bai. Our finding is that the respondent received the possession of the suit property by dispossessing the appellant from it.

13. Section 144 of the Civil Procedure Code, which provides for restitution, reads thus :

'Section 144(1): Where and in so far as a decree or an order is varied or reversed the Court of first instance 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 or reversed: 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 or reversal.

(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).'

14. The doctrine of restitution is based upon the cardinal principle of law that the acts of Courts should not be allowed to work injury on the suitors. Section 144, C.P.C. contemplates restitution in a case where the property has been received by the decree-holder under his decree and that decree is subsequently, wholly or partially, reversed or varied in other proceedings. In such a case, the law raises an obligation on the party, who receives the benefit of such erroneous judgment, to deliver back the property to the person who had lost it.

15. Section 144, C.P.C. is a salutary provision of law and, in order that this section may apply to a case, three conditions are necessary to be satisfied. They are: (i) the restitution sought must be in respect of a decree or order which had been varied or reversed; (ii) the party applying for restitution must be entitled to the benefit under a reversing decree or order and (iii) the relief claimed must be properly consequential on the reversal or variation of the decree or order.

16. If those conditions are satisfied, it gives no choice or discretion to the court, and the only course it has to follow is to order restitution to the party which had suffered loss on account of the erroneous decree or order.

17. It is in execution of the ex parte decree at the instance of the respondent (decree-holder) that the appellant herein was deprived of his possession of the suit property, and the respondent received the benefit of possession of the suit land. That very ex parte decree, under which the decree-holder derived the benefit, has been set aside by the appellant Court and in consequence of the appellate Court's judgment and decree, the appellant in this case seeks restitution.

18. We are unable to agree with the learned counsel, Sri Subbarayudu, that the appellant in this case did not suffer any loss because he had sold away the said plot of land to Kumari Anupameswari Bai and because the possession of the said property was received by the respondent from Kumari Anupameswari Bai. We have already found that the respondent herein, through the execution proceedings, received the possession of the suit property from the appellant

herein. Even if the property had been sold in the meanwhile, by the appellant to Kumari Anupameswari Bai, still he had to deliver possession of the same to her; otherwise, he would be liable in damages to Kumari Anupameswari Bai. Therefore, by deprivation of his possession, the appellant must, undoubtedly, be held to have suffered loss. To such a case, Section 144, C.P.C. is attracted and the appellant is entitled for the restitution of the suit property. Section 144, C.P.C. imposes no limitations on the rights of the judgment-debtor to get back the benefit, to which he is entitled under the appellate Court's decree, which has reversed or varied the trial Court's decree. On a perusal of Section 144, it is obvious that the question whether the balance of convenience is in his favour or not, is irrelevant for the purpose of granting restitution.

19. Let us then see whether the authorities cited by the parties before us say anything different from what we have stated.

20. In *S. N. Banerji v. K. L. & S. Co.* (AIR 1941 PC 128), the Privy Council held that

'..... where the persons who have been dispossessed are found to be trespassers and the persons in subsequent possession are lawfully in possession by virtue of a valid lease in their favour it is not necessary for the ends of justice that the trespassers should be restored to possession though they may succeed in a suit for possession.'

The Privy Council observed that the decree in that particular case was not varied but the party seeking restitution relied upon Section 151, C.P.C. The power expressed in Section 151, C.P.C. is the inherent power of the Court to make such orders as may be necessary for the ends of justice. Certainly, the ends of justice would not require delivery of possession to a trespasser as against a person who holds the property in a lawful manner. The decision in that case has no application to the facts of this case, because the appellant herein is not a trespasser. According to the respondent, the appellant was a tenant, and according to the appellant himself he was the true owner of the property. In either case, his possession would not be illegal. Nor could he be considered as a trespasser.

21. In Lal Bhagwant Singh v. Sri Kishen Das : [1953]4SCR559 the Supreme Court observed that:--

'..... In this situation it cannot be said that there was any alteration in the position of the parties by the Privy Council setting aside the compromise decree and restoring the decree passed by the Civil Judge, Sitapur, in 1936.....'

'..... It is true that it is one of the first and the highest duty of a Court to take care that its acts do not injure any of the suitors and if any injury was caused to the judgment-debtor by the sale held in February 1939, it was our duty to undo the wrong caused to him. It, however, cannot be said that in this case any wrong has been done to the judgment-debtor which we are called upon to redress. It is not possible to hold that he was under no obligation to satisfy either one or the other of the two decrees.....'

The Supreme Court further observed that:--

'.....An order of restitution in the manner asked for in the circumstances of this case would be contrary to the principles of the doctrine of restitution which is 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 that it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the real justice of the case. The decree-holder in the present case has derived no advantage to which he was not entitled and the judgment-debtor has lost nothing.'

From the observations so made, it is abundantly clear that although the appellate court had set aside the judgment of the lower court, it had not the effect of varying or reversing the lower court's decree and the judgment-debtor did not suffer any loss, and the decree-holder did not derive any benefit to which he was not entitled. On these facts, the Supreme Court did not grant restitution, It must therefore, be held that in the facts of that case, the Supreme Court up-held the refusal of restitution.

22. In *Laxmichand v. Sundrabai* (AIR 1952 Nag 275), the Nagpur High Court held that :

'.....The Court has no jurisdiction to order restitution at the instance of a stranger. The functions of the Court under Section 144 require the presence of those parties who are affected by the variation or reversal of the decree. Where the applying party is not the one to whom the benefit of the variation or reversal of the decree goes, and the party against whom such variation or reversal of the decree has been ordered is absent, the Court in effect tries the matter in the absence of any of the parties to the dispute. Such a case, according to the well-accepted principles of jurisdiction would be no case at all, the initial jurisdiction of the Court must be taken to be entirely absent.....'

23. In the instant case, the appellant was not a stranger to those proceedings and, therefore the decision of the Nagpur High Court does not help the respondent.

24. In *Mahijibhai v. Manibhai* : [1965]2SCR436 , by a Majority, the Supreme Court held that:--

'.....An application for restitution under Section 144, C.P.C. is an application for execution of a decree and therefore, such application is governed by Article 182, Limitation Act and not by Article 181 of the Limitation Act which is a residuary article of limitation.....'

We are not concerned in this case with the question whether an application for restitution is or is not an application for execution of a decree.

25. In *State Govt. of Andh. Pra. v. Manickchand Jeevraj & Company* : AIR 1973 AP27 a Division Bench of this Court observed that :--

'.....No party can take advantage of the wrongful acts or orders or decrees of any Court. The provisions of Section 144, are mandatory. The use of the word 'shall' makes it obligatory on the court on the application of any party entitled for restitution to place the parties in the position which they would have occupied but for such erroneous or illegal decree or order or any part thereof as has been varied or reversed. The Court has no discretion to refuse the application to grant

restitution if the ingredients of Section 144 are satisfied.'

26. In *Binayak Swain v. Ramesh Chandra* : [1966]3SCR24 the question that came up for consideration before the Supreme Court was, whether the appellant was entitled to restitution of his properties purchased by the decree-holder in execution of the decree passed by the District Judge on the ground that the decree was set aside by the High Court and the suit was remanded for rehearing and fresh disposal under the provisions of Section 144 of the C.P.C. The facts in that case are that the properties of the appellant were sold in execution, at the instance of the respondent who was executing the ex parte decree .passed by the District Judge on March 9, 1943. In execution of that decree, the properties of the appellant were sold and the respondent got delivery of possession of those properties on May 17, 1946. The suit was eventually decreed, after remand, on August 27, 1954 by the judgment of the High Court. The Supreme Court refused to accept the argument of the respondents that the execution of the sale-deed under the previous ex parte decree, which was set aside by the High Court, was varied by the passing of the subsequent decree and, therefore, the appellant was not entitled to any restitution. The Supreme Court laid down that :

'..... We are of the opinion that the appellant is entitled to restitution notwithstanding anything which happened subsequently as the right to claim restitution is based upon the existence or otherwise of a decree in favour of the plaintiff at the time when the application for restitution was made. The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree; and the court in making restitution is bound to restore the parties, so far as they can be restored to the same position they were in at the time when the court by its erroneous action had displaced them from.'

27. The decision in *Binayak Swain v. Ramesh Chandar* : [1966]3SCR24 is on all fours with the facts of this case. In execution of the ex parte decree, the

respondent herein received possession of the suit property from the appellant and that ex parte decree has been reversed and set aside by the appellate court which remanded the matter for fresh disposal. The suit is now pending disposal and has not come to an end. The truth or otherwise of the averments of the respondent and the defences raised by the appellant have to be gone into by the court, and a final decision has to be given thereon. Before a final decision is given after a consideration of the evidence on those points, it is not possible to say that the defences raised by the appellant in that suit are all false or untenable and that, the appellant did not suffer any loss when he was dispossessed of the suit property. Both on the date of execution of the warrant of delivery of possession and also on the date on which he applied for restitution, the appellant had a subsisting interest in the suit property. It is not, therefore, necessary in this case to decide whether or not an applicant, for getting the relief of restitution, should possess interest in praesenti in the suit property. Certainly the appellant in this case is entitled to the restitution of the property which he had lost in execution of the erroneous decree.

28. All the three requirements of Section 144, C.P.C. have been satisfied in this case and the reasons on which the learned Judge has set aside the concurrent orders of the Courts below are, in our opinion irrelevant for the purpose of grant of restitution to the appellant. We, therefore, allow the appeal, set aside the order of our learned brother, Madhava Reddy, J, and direct the restitution of the suit property to the appellant herein,

29. However, in order to safeguard and protect the interests of both the parties, it is necessary to order that both the parties shall not make any new additions or alterations in the existing structures. The staircase constructed by the respondent for the use of the girl students to go to the school building shall remain in the same condition in which it is on the date of this order, and shall continue to be so till the final disposal of the suit. We, accordingly order, the appellant shall not open the door of 10' in the front as permitted by the lower appellate Court. In the circumstances of this case, each party shall bear its own costs.