

Raghuvir Singh Vs. Ivth Additional District Judge and ors.

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SooperKanoon Citation : sooperkanoon.com/459783

Court : Allahabad

Decided On : Jan-23-2009

Reported in : 2009(2)AWC1580

Judge : Sunil Ambwani, J.

Appellant : Raghuvir Singh

Respondent : ivth Additional District Judge and ors.

Disposition : Petition allowed

Judgement :

Sunil Ambwani, J.

1. Heard Shri Salil Kumar Rai for the petitioner. Shri P. N. Saxena, senior advocate appears for the respondents.

2. The plaintiff-petitioner filed Original Suit No. 451 of 1993, Raghuvir Singh v. Smt. Prabhawati Devi and Ors. for permanent injunction restraining the defendant, first set, from interfering in his rights on the suit property given at the foot of the plaint, on the allegations that he had purchased 3/4th portion of plot No. 2602 area 0-7-1 dhoor and plot No. 2603 area 0-6-14 and plot No. 2849 situate at Mauja Basti Khas Tappa Haveli Pargana Basti from Abdul Rauf son of Sardar Khan; Rais Ahmad son of Abdul Majid and Ashiq Ali son of Mohd. Saleem by a sale deed

dated 22.2.1985 and was given possession of the property. He is continuing in possession since, thereafter. The defendant third set namely Manuddin and others (defendant Nos. 7 to 12) have sold their 1/4th portion in the same property in favour of Smt. Prabhawati, Heera Lal and Shravan Kumar, the defendant-first set. It was stated that after purchasing the land the plaintiff constructed the boundary wall and two rooms after getting the shallow land of the plot filled up by earth work. The defendant first set made an attempt to interfere in his rights giving rise to the cause of action to the plaintiff on 9.5.1993 to file the suit.

3. The trial court issued notice and granted an interim injunction on 10.5.1993 directing the defendants to maintain status quo and restraining them to demolish the construction or to dispossess the plaintiff except in accordance with law. The plaintiff was required to comply with the provisions of Order XXXIX, Rule 3 of C.P.C. within 24 hours.

4. It is alleged that in the garb of the interim order the plaintiff, who was not in possession of the property took possession with the connivance of the police officers. The respondent-defendant put in appearance in the suit on 2.7.1993 but did not file objections. The defendants sought adjournments on 9.7.1993; 20.7.1993 and on 15.9.1993. On 25.10.1993, the defendant first set filed an application for restitution of possession on the property on the allegations that the plaintiff, after having obtained the interim order dispossessed the defendant from the land in dispute.

5. On 24.4.1995, the plaintiff-petitioner filed an application on 24.4.1995 for permission to withdraw the suit. The trial court allowed the application on 25.5.1995. By the same order the trial court allowed the application for restitution and directed the plaintiff-petitioner to hand over the possession of the suit property to defendant-respondent. The plaintiff filed a Civil Revision No. 123 of 1995, which was dismissed on 23.9.1996, giving rise to this writ petition.

6. Prior to this litigation, an Original Suit No. 359 of 1983 was filed by Samsuddin and Gayasuddin against Abdul Rauf, Rais Ahmad Khan and Ashiq Ali for temporary injunction restraining the defendants from alienating the suit property. The defendants were directed to maintain status quo. The defendants, however,

sold the suit property on 5.9.1983. The plaintiff-petitioner Shri Raghuvir Singh filed an application for impleadment in this suit on 13.1.1984 and for cancellation of sale deed dated 5.9.1983, executed by Samsuddin and Gayasuddin in favour of Prabhawati Devi and others. Subsequently an agreement to sale was executed in favour of the plaintiff and that plaintiffs in Original Suit No. 359 of 1983 executed a sale deed of the property described as above in favour of the plaintiff-petitioner on 22.2.1985. The impleadment application filed by the petitioner in this suit on 17.7.1985 was allowed on 1.8.1986. A Civil Revision No. 216 of 1986 was filed against the order allowing the impleadment application. The revision was dismissed, against which a Civil Misc. Writ Petition No. 25214 of 1988 was filed in which the proceedings of the Original Suit No. 359 of 1983 were stayed. The interim order is still operative.

7. In Original Suit No. 309 of 1984 filed by Smt. Prabhawati Devi and others against the father of the plaintiff-petitioner, an injunction was sought to restrain the defendants from interfering in their possession over the suit property. The parties were directed to maintain status quo. It is stated that in this suit an Advocate Commissioner was appointed, who reported on 11.7.1984 that the suit property is a vacant land and that there are no construction on it. An impleadment application filed by the petitioner on 29.3.1985 was dismissed by the trial court on 7.10.1985. A civil appeal against the order was filed. The trial court, however, allowed the withdrawal application filed by the plaintiff in Original Suit No. 309 of 1984.

8. The parties have addressed the Court only on the question of directions issued by the trial court for restitution of the property. It is alleged by Shri Salil Kumar Rai for the plaintiff-petitioner that the suit was withdrawn as the plaintiff had filed an impleadment application in Original Suit No. 359 of 1983 to seek substantive relief. The proceedings in the suit have been stayed by the Court as there was no necessity to seek an injunction as the plaintiff-petitioner was in continuous possession and did not find any further threat to his dispossession. It is contended that the petitioner had not taken the possession, in pursuance to or in the garb of the interim order passed by the trial court on 10.5.1993 in Original Suit No. 451 of 1993. He had settled in possession after the sale deed was executed by the defendants second set in his favour and that he had made constructions on the

land. The trial court and the revisional court have wrongly held that the petitioner took possession in pursuance of the interim orders and thereafter withdrew the suit. It is contended that if the defendant first set was dispossessed in pursuance to the interim order dated 10.5.2003, he should have immediately made an application for restitution of possession. The defendants waited for five months in making an application, which was filed on 25.10.1993. They sought adjournments in the suit on 9.7.1993, 20.7.1993 and on 15.9.1993. It is further contended by Shri Salil Kumar Rai that the restitution can be allowed only if the possession was taken under an order of the Court and that an application under Section 151 of C.P.C. in such case and for prayers of restitution of possession was not maintainable.

9. Shri P. N. Saxena, on the other hand submits that the petitioner dispossessed defendants first set in pursuance to and in the garb of the injunction order with the help of the police. The defendants first set lodged an F.I.R. It is submitted that the fact that the suit was withdrawn (after taking possession) on 25.5.1995 would clearly demonstrate that the plaintiff committed gross illegality and that injustice caused to the defendant, first set has been rightly redressed by allowing the restitution application.

10. The Court is called upon to decide the question, firstly as to whether an application for restitution could be allowed under Section 144, C.P.C. or under Section 151 of C.P.C. if the possession has not been taken under an order or direction of the Court or in execution of the decree, which has been reversed and that such an application can be considered and allowed after the withdrawal of the suit, and secondly whether the restitution could be allowed in a summary manner without taking evidence, and that the defendant was required to file a suit for possession on the ground that they were wrongfully dispossessed.

11. Section 144 of the Code of Civil Procedure, 1908 provides:

144. Application for restitution.-(1) Where and insofar 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 [order] or [such party 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 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).

12. In this case, the allegations are that the possession of the suit property was taken by the plaintiff-petitioner in pursuance to the order in the garb of the interim injunction dated 10.5.1993 directing the defendant to maintain status quo and restraining them to demolish the constructions or to dispossess the plaintiff except in accordance with law. There is neither any order directing delivery of possession, nor any order or directions allowing the plaintiff-petitioner to do any overt act. The interim injunction was granted on the assertions that the plaintiff-petitioner is in possession and that has raised construction, which should not be demolished and that the plaintiff-petitioner should not be dispossessed except in accordance with law. The interim injunction order was neither varied nor reversed either in the

same proceedings or in any appeal, revision or other proceedings. The suit was withdrawn on 25.5.1995 after about two years of the grant of interim injunction. The dismissal of the suit could not be treated as a decree or an order, which varied or reversed or modified any earlier order passed by the Court.

13. The question whether the plaintiff-petitioner was in possession over the suit property on the day on which the suit was filed and that he had taken possession of the property with the connivance of the police on the same day, when the injunction was granted, is a question of fact, which could not be decided summarily. It required evidence to be taken by the Court to decide the question whether the plaintiff-petitioner was in possession on the date of filing of the suit. The trial court did not take oral evidence of the fact in issue or for proving the documents filed by the parties. The restitution application was decided only on the affidavits. The entire findings of the trial court is based upon the documents for proving that the defendants were in possession and that the plaintiff taking advantage of the injunction order took possession of the suit property with the help of the police.

14. The trial court by a common order decided both the applications to withdraw the suit and the application for restitution of possession. The trial court further committed an error of law in relying upon enquiry report of the Sub-Divisional Magistrate, which was based upon the report of the Lekhpal and on the statements of Kalam and Ali Akbar. The Nailb Tehsildar in the report dated 16.6.1993 had reported to the Sub-Divisional Magistrate that the possession was taken with the help of the Station Officer forcibly at 9.00 a.m. on 10.5.1993. Further the trial court placed reliance upon the charge-sheet in the criminal case filed by the police after investigation stating that the sufficient proof was not available against the Station Officer Shri Janardan Singh. From these proceedings initiated by the police an inference was drawn that the defendant had taken timely steps in the matter of his forcible eviction against the police.

15. Where a question as to who was in possession on the date of the order is an issue in proceedings for restitution of possession, the matter should not be decided by the civil court summarily on the basis of documents and the reports

submitted by the executive authorities and on the basis of affidavits. In such case, it was necessary to allow the parties to adduce evidence as the findings recorded by the trial court on the issue of possession would attain finality on such question between the parties.

16. In *Mrs. Kavita Trehan and Anr. v. Balsara Hygiene Products* : AIR 1995 SC441 , it was held that restitutionary claims are to be found in equity as well as at law. Section 144 of C.P.C. incorporates only a part of the general law of restitution. It is not exhaustive. The jurisdiction to make restitution is inherent in every Court and will be exercised, wherever the justice of the case demands. It will be exercised under inherent powers, where the case did not strictly fall within the ambit of Section 144.

17. In *Meera Chauhan v. Harsh Bishnoi and Ors.* JT 2007 (1) SC 458 : 2007 (1) AWC 469 (SC), the Supreme Court held that although for deciding an application for restitution under Section 151 it would not be proper to allow the parties to adduce oral evidence in view of the peculiar circumstances of the case, the trial court ought to have directed the parties to adduce oral evidence alongwith documentary evidence and to consider the facts of the pendency of the suits. In this case Smt. Vimla Bishnoi bequeathed the properties to Shri Anil Bishnoi. He applied for mutation, which was rejected. A suit was filed in the Court of Civil Judge (S.D.) Lucknow by Shri Harsh Bishnoi praying also for permanent injunction. An ex parte injunction was issued restraining the defendant from transferring, alienating or encumbering the suit property. When the injunction order was enforced, Meera Chauhan purchased the property and was put into possession on the same day. A writ petition was filed against the State and army authorities as well as Meera Chauhan claiming thereby forcible dispossession during the absence of the petitioner and praying for restoration of the possession. A suit under Section 6 of the Specific Relief Act was filed by Shri Harsh Bishnoi for restoration of possession. An application for restoration of possession was filed by him under Section 151 of the Code of Civil Procedure alleging that he was dispossessed during the pendency of the suit, when the interim order of injunction was enforced. The application was rejected. More than a year, thereafter, an application was made for withdrawing the suit on the ground that the writ petition

was pending in the High Court. The Civil Judge allowed the plaintiff to withdraw the suit. After the withdrawal was allowed Smt. Meera Chauhan made an application for impleadment, which was allowed with observation that Smt. Meera Chauhan did not have any knowledge of any interim orders. The civil revision was allowed by the High Court and while setting aside the order the High Court directed the trial court to decide the matter on merits after hearing the parties. After the remand the application under Section 151 was heard. The trial court allowed the application and directed restoration of possession of the suit property. The revision against the order was dismissed. The Supreme Court held that an application under Section 151 confers wide powers on the Court to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the Court. The question, however, as to who was in possession, though it would not be proper to permit the parties to adduce oral evidence under Section 151, in the peculiar facts and circumstances of the case required the parties to adduce oral evidence alongwith documentary evidences and to consider the fact of the pendency of the suit.

18. In this case it was alleged that the possession was taken on 10.5.1993 in the garb of the order of interim injunction directing the parties to maintain status quo. The application for restitution was, however, filed after five months on 25.10.1993. In the meantime, the defendants were served with the summons, and had sought adjournment on 9.7.1993, 20.7.1993 and 15.9.1993. The application for withdrawing the suit was filed on 24.4.1995 after almost two years of the pendency of the restitution application. This circumstances, in my opinion were sufficient to reject the application for restitution of possession, when the defendant had made complaints to the police, he should have explained the circumstances to have waited for almost five months before making an application for restitution of possession. This long period was sufficient to reject the application and allowed the complainant to file a suit for possession over the disputed property.

19. Further I find substance in the explanation given by Shri Salil Kumar Rai that after filing an application for impleadment in Original Suit No. 359 of 1983 by Samsuddin and Gayasuddin against Abdul Rauf, Rais Ahmad Khan and Ashiq Ali, the predecessor in interest of the disputants, the plaintiff petitioner rightly took the

advice of withdrawing the suit filed for temporary injunction. The claim for restitution is both in equity as well as at law. Even if the application was not directly maintainable under Section 144 of C.P.C. as there was no decree or order in pursuance to which the possession was given, it could be considered under Section 151 of C.P.C. to serve the ends of justice or to prevent the abuse of the process of the Court. In either case the defendant had to prove that he was in possession and was dispossessed in pursuance to the order of the Court. The pendency of the suit between predecessor-in-interest, and the dispute on the question of possession, should have been considered in the light of delay in making the application. The trial court erred in law in entertaining the application after such a long time and thereafter directing restitution of possession on the material, which was subject-matter of the criminal case. In the present case since the parties were already litigating and that Original Suit No. 359 of 1983 was pending in which predecessor-in-interest of the parties had joined issues for cancellation of sale deed. In the circumstances the findings recorded by the trial court affirmed by the revisional court, suffer from serious error of law.

20. The writ petition is allowed. The judgment and orders dated 23.9.1996 and 25.5.1995, passed by the IVth Addl. District Judge, Basti and Civil Judge (J.D.)/Munsif, Basti respectively are set aside, so far as they have decided the restitution application of respondent Nos. 3 to 5. There shall be no order as to costs.