Ranjit Singh Vs Narayan Mandal

Court: Gauhati High Court

Date of Decision: June 22, 1990

Acts Referred: Civil Procedure Code, 1908 â€" Order 21 Rule 11, 144, 144(1)
Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 11, 144, 144(1)

Citation: (1990) 2 GLJ 138 : (1991) 1 GLR 92

Hon'ble Judges: J.M.Srivastava, J

Bench: Single Bench

Advocate: J.Sharma, J.N.Sharma, G.N.Sahewalla, A.K.Goswami, Advocates appearing for Parties

Judgement

1. This revision is directed against the order dated 26.4.90 passed by the learned Sidar Munsiff, Gauhati in Misc. (J) Case No. 63 of 1987 arising

out of T. S. No. 16 of 1985.

2. The suit was filed by the plaintiff for declaration of title and khas possession over the land after removal of the defendant, the present

oppositeparty. The suit was decreed exparte on 29. 8. 86. The petitioner executed the'' decree in Title Execution No. 14 of 1986 and obtained

possession of the land and the house thereon on 30.9.86.

3. The opposite party filed application under Rule 13 of Order 9 of the Code of Civil Procedure hereafter referred as the ''Code'' which was Misc.

(J) Case No. 63 of 1986. By order dated 6.4.87 the exparte decree dated 29.8.86 was set aside. The opposite party by application under section

144 of the Code then prayed for restitution of the property which was Misc. (J) No. 67 of 1987. The learned Munsiff by order dated 6.1.88

allowed the prayer for restitution of the property. An appeal Misc. (J) No. 8 of 1''988 was filed by the petitioner which was dismissed by order

dated 13.7.89. The petitioner has filed a second appeal before this Court.

4. The opposite party prayed for issue of writ for delivery of possession, pursuant to the order dated 6.1.88 in Misc. (J) Case No. 67/87. The

petitioner filed objection which was rejected by order dated 16.4.90 which is impugned in this petition.

5. Shri J. N. Sarma, learned counsel for the petitioner has contended that the order dated 6.1.88 whereby the application under section 144 of the

Code was allowed was itself without jurisdiction because the provision of section 144 of the Code as amended in 1976, was not attracted in the

present case, that no decree having been prepared pursuant to the order dated 6.1.88 there could be no question of its execution and that no

application for execution had been made and hence the impugned order for issue of writ for delivery of possession was not correct and sustainable.

6. Shri G. N. Sahewalla, learned counsel for the opposite party has contended that the provision of section 144 of the Code were attracted and

available because the exparte decree in execution of which the petitioner had obtained possession had been set aside and the oppositeparty who

was so dispossessed was entitled to recover possession that even though the order under section 144 of the Code is a decree it was not required

that a formal decree should be drawn up before the order could be enforced and that no formal execution application was required to be filed

before the Court could execute the order for restitution.

7. I have considered the submissions for the parties.

8. In so far as the first contention for the petitioner is concerned, Shri J. N. Sarma, learned counsel appearing on his behalf has submitted that

section 144 of the Code after amendment on 1.2.77 by Code of Civil Procedure Amendment Act, 1976 does not provide for restitution, in such a

case and has relied upon Garinda Singh vs. Dhana Bai, AIR 1989 Orissa 103 where a view has been taken that after amendment of section 144 of

the Code its provisions are not available for restitution of property, of which possession has been taken in pursuance of an exparte decree after it

has been set aside.

9. Shri J. N. Sarma, learned counsel for the petitioner has also cited Gopal Paroi vs. Swarna Bewa, AIR 1931 Cal. 14 where it was held that

section 144 only applied where a decree was varied or reversed by a superior Court on appeal or revision or it may be on reference. But, if a

decree is set aside either by a proceeding in the suit itself or if it is set aside by a decree in another suit altogether or if, without being set aside by

such a decree, it is superseded these are matters which are not within the words of the section.

10. Shri G. N. Sahewalla, learned counsel for the opposite party on the other hand has cited Jagat Bandhu Shaw vs. Ram Nagina Pandey, AIR

1977 Cal. 281 in which Gopal Paroi (supra) (AIR 1931 Cal. 14) was also considered and view was expressed that ''reversed'' in section 144 of

the Code also meant''set aside'' i. e. where an exparte decree was set aside in proceeding under Rule 13 of Order 9 of the Code the decree should

be considered as reversed. The view in AIR 1931 Calcutta 14 was not approved. In Fatema Khatun vs. Swarup Singh, AIR 1984 Cal. 257 (DB)

similar view as in Jagat Bandhu Shaw (supra) were expressed and it was held that the term reversal cannot be interpreted to exclude setting aside a

decree or order in a proceeding like one under Order 9 Rule 13.

11. The relevant part of section 144 of the Code as amended in 1976 reads as under :

Ã¯Â¿Â½144. Application for restitution. (1) Where and in so far as a decree or order is varied or reversed in any appeal, revision or other proceeding

or is set aside or modified in any unit 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 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 property on such variation, reversal, setting aside or modification of the decree or order. 2) No suit shall be instituted for

the purpose of obtaining restitution or other relief which could be obtained by application under subsection (1).

12. Shri J. N. Sarma, learned counsel for the petitioner has contended that expression varied or reversed does not include and cover ''sitting aside''

and that therefore the setting aside of exparte decree by the Court which passed the decree is not contemplated in section 144 above. He has

contended that in the same provision the word ''reversed'' or ''varied'' and ''set aside'' have been used and therefore ''reversed'' could not mean and

cover ''set aside''. Shri Sarma has contended that the ''other proceeding"" contemplated was review but not Order 9 Rule 13 of the Code and

referred to the observation in Garinda Singh (supra) Orrisa case where similar view was expressed and to comments after amendment in 1976 in

Mulla"s Code of Civil Procedure where it has been said that ''other proceeding'' meant was like ''review'' proceeding. Shri Sarma submitted that

the expression *set aside'' or ''modified'' with reference to a suit instituted for the purpose, clearly meant that the provision of section 144 of the

Code was not available in the instant case.

13. The question is that whether the expressions ''reversed'' and ''other proceeding'' in subsection 1 of section 144 of the Code mean and include

''set aside'' and ''proceedings under Rule 13 of Order 9 of the Code'' respectively.

14. The principles of interpretation are that an interpretation which advances the cause of justice should be preferred to an interpretation which is

productive of injustice or arbitrary result or undesirable consequences, an interpretation in the interest of justice to the persons for whom the law

has been made should be preferred, where the meaning of a word is doubtful or is capable of more than one interpretation the reasons for change

in the law may also be considered to gather the intention of the legislature, the construction should be in light of the intention of the statute and the

purpose for which it was made. It is true that normally where language of statute is clear the aims and object and the purpose far which statute was

made do not require to be taken into consideration, but where the language of statute is not clear or is capable of more than one interpretation, or

there is controversy about the meaning and scope of word or expressions in a statute more so in an amending statute, in order to gather the

''legislative intent'' the aims and objects may be considered. The intention of the legislature may also be gathered from the purpose for which the

amendment was made.

15. It may be noted that the provisions of section 144 as it originally stood in the Code of 1908 had been amended by addition of the words ""or

order"" after the word decree in 1956. The remedy by restitution was thus made available in case an order was varied or reversed. In 1976 the

words ""varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose"" were

substituted by the Code of Civil Procedure Amendment Act, 1976 in order to resolve the controversy in judicial opinion that whether the vitiation

or reversal of a decree, by a decree passed in a subsequent suit by another Court attracted the remedy of restitution in section 144. There was

never any controversy in the view taken, in any High Court, that the word ''reversed'' included and covered ''setting aside'' of an exparte decree

under Rule 13 of Order 9 of the Code. The amendment in 1976 therefore made just to resolve the said controversy, could not have the effect of

any modification in the law as it stood, that ''varied'' included setting aside of an exparte decree in section 144 of the Code.

16. While it is true that in the same provision the word ''reversed'' and ''set aside'' have been used, it has to be remembered that ''set aside'' was

introduced by 1976 amendment and that earlier ''reversed'' was understood to mean ''set aside'' and that the plain meaning of word ''reversed'' also

is ''set aside''. In Black Law Dictionary, Fifth Edition at page 1185 ''reversed'' means ""To overthrow, vacate, set aside, make, void, annul, repeal

or revoke; as, to reverse a judgment, sentence of decree, or to change to the contrary or to a former condition."" ""To reverse a judgment means to

overthrow it by contrary decision, make it void, undo or annul it for error."" In the case of an exparte decree therefore when it is set aside it can

safely be said that it has been ''reversed''. In my opinion it shall not be reasonable or proper construction to take the view that ''reverse'' does not

mean "set aside." On the contrary it shall be reasonable to accept "reversed" means and includes "set aside".

17. The next contention that the word "proceeding" has necessarily to be confined or restricted to mean only "review" of the like, but not the

application under Order 9 Rule 13 of the Code, is not tenable. The word "proceeding" in the present context means a process and record of legal

action. An application under Order 9 Rule 13 of the Code sets in motion the process of Court action culminating in the final order made and this

process with its record of action taken by the Court, in my opinion is "proceeding". Accordingly where a decree or order is set aside i.e. reversed

by an application under Order 9 Rule 13 of the Code it should and can safely be construed as reversed in a proceeding within the meaning and

scope of section 144 (1) of the Code.

18. Moreover, it should be clear that the intention of the legisture while amending the provision of section 144 of the Code was to set at rest the

controversy with regard to a separate suit and the amendment should not be construed so as to deprive a person from the remedy of restitution in a

case like the present, where prior to amendment the provision of section 1 14 of the Code was undoubtedly considered as available for restitution,

and the intention of the legislature was not to change the law in that regard.

19. For the aforesaid reasons I am unable to accept the view taken in Garinda (supra) and the contention raised for the petitioner and hold that

provisions were available to the opposite party seeking restitution following the setting aside of the exparte decree under Rule 13 of Order 9 of the

Code and the order made for restitution was not without jurisdiction.

20. Shri J N. Sarma, learned counsel for the petitioner also argued that it is not that a party in such a case was helpless for recourse could be had

to the inherent powers of the Court under section 151 of the Code provided there was mistake or the like, on the part of the Court. In the view I

have taken, as above, it is not necessary to examine this contention,

21. The next submission for the petitioner on the basis of the definition of "Decree" in subsection 2 of section 2 of the Code, that since the order

under section 144 of the Code is a decree and since a formal decree had not been prepared, the Court below could not proceed and issue

process to affect delivery of possession to the opposite party. While under subsection 2 of section 2 of the Code "Decree" is defined to include an

order under section 144 of the Code, in my opinion, it does not mean or follow that a formal decree is necessarily to be prepared or drawn up

before the order can be given effect or enforced. In this connection reference was made to Order 0 Rule 6 A to contend that if the decree had not

been prepared, the ''Order'' could be execute on the basis of the last part of the ''Order'' which indicates the precise nature of relief granted. The

provisions of Rule 6 A of Order 20 of the Code provide for cases where decree had not been prepared and the decree holder waited to proceed

with its execution. It was, therefore provided that on the basis of the last paragraph of the judgment which generally in precise terms stated the

relief granted, the decree could be executed. It does not mean that the order of restitution, which too is to be considered as decree, a formal

decree has to be drawn up and in its absence, recourse to Rule 6 A of Order 20 of the Code may be taken. The matter adjudicated in application

under section 144 of the Code is simple, just restitution of the property obtained in execution of a decree which has been set aside and nothing

more and hence the order without any formal decree or without recourse to Rule 6 A of Order 20 of the Code can be enforced or executed. The

petitioner had obtained delivery of possession by eviction of the defendant oppositeparty in execution of the exparte decree. The said decree

having been set aside thedefendant oppositeparty is just to get back possession i. e. the oppositeparty was to be restored to the portion in which

he was, before the said exparte decree was executed. I hold accordingly and repeal the submission on behalf of the petitioner.

22. The last submission for the petitioner was that since ''execution'' was not moved the ''Order'' could not be executed and the impugned order for

issue of writ f jr delivery of possession was not competent. In. my opinion compliance with the provision of Order XXI Rule 11 of the Code which

require an application for execution of a decree should not be necessary, in the case of enforcement of order under section 144 of the Code. An

exception application is necessary for the obvious reasons,, that the execution of a decree may be commenced against all or some of the judgment

debtor, the mode of execution has to be indicated or the decree may be executed even in parts for example in a decree for recovery of money and

possession the decree holder may in the first instance execute the decree for possession only on in a decree for recovery of money the decree

holder may wish to proceed against only one judgment debtor or wish to recover money by attachment and sals of property or by arrest and

detention of a judgment debtor. It is for such and a variety of other reasons that a proper execution application with requisite information is

required so that the Court executing the decree precisely knows what is required to be done. In a matter like the present where an order of

restitution under section 144 of the Code is to be executed or enforced there being only the relief of restoration of the property which had been

taken away in execution of the decree which has been set aside, there is, in my opinion no justifiable reason to insist on an execution application

before the order can be given effect. I. therefore, hold that no formal application for execution as stipulated in Order XXI Rule 11 of the Code is

necessary to execute the order of restitution and consequently the writ for delivery of possession could be issued The submission to the contrary

for the petitioner is not correct and is rejected.

23. For the aforesaid reasons, this petition fails and is dismissed with costs to the opposite party.