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Smt. Sabita Dutta and Another Vs Someswar Pandey and Others

Appeal from Original Decree No. 202 of 1979

Court: Calcutta High Court

Date of Decision: April 3, 1991

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 97, 11, 144

Citation: (1992) 1 CALLT 137

Hon'ble Judges: Monoranjan Mallick, J; Manabendra Nath Roy, J

Bench: Division Bench

Advocate: Swapan Kumar Mallick, Mridula Das Gupta and Madan Gopal Basu, for the Appellant; S.P. Roy Choudhury, Mrinal kanti Roy, Susanta Palodhy and Nanda Lal Prodhan, for the Respondent

Judgement

Monoranjan Mallick, J.
This is an appeal against the Order dated 14th September, 1978 passed by the learned Judge, 9th Bench, City

Civil Court at Calcutta in Misc. Case No. 368/78.

2. Facts may be briefly stated as follows :-

The predecessor-in-interest of the present appellants was a premises-tenant under the respondent No. 1 in respect of a portion of the premises

No. 1A, Goabagan Street, Calcutta-6. The respondent No. 1 without serving any Summons upon the original tenant, Bejoy Kumar Dutta obtained

an ex parte decree and on the basis of such ex parte decree delivery of possession was taken by the respondent No. 1 on 21.3.71 with police

help.

3. Bejoy Kumar Dutta thereafter filed an application under Order 9 Rule 13 C.P. Code on 26.3.71 and the decree was set aside on the ground

that the same was obtained without serving any Summons upon the tenant, Bejoy Kumar Dutta. Late Bejoy Kumar Dutta thereafter filed an

application u/s 144 C.P. Code for restoration of possession and the learned Judge, 9th Bench, City Civil Court at Calcutta by his Order dated

16.6.73 directed restoration of possession of the suit property in favour of Bejoy Kumar Dutta from which he was possessed in execution of the

ex parte decree passed in the Ejectment Suit No. 1515/69 on 22.3.71.

4. Thereafter, an execution case was filed for obtaining delivery of possession in terms of the above Order. As the delivery of possession was

resisted by the O.P. No. 3, the application under Order 21 Rule 97 C.P. Code has been filed before the Ld. Trial Judge being Misc. Case No.

368/78 for obtaining possession with police help. It was alleged that the O.P. No. 3 having no right to resist the delivery of possession doing it in

collusion with the landlord and being set up by him.

5. The O.P. No. 3 alone contested the application claiming his independent right in the suit property that is the tenancy right under one Subhas

Dhar. The Ld. Trial Judge by his Order impugned in this appeal has held that the resistor having offered the resistance for just cause and in a bona

fide claim of right as owner the present appellants who are the successors-in-interest of the original applicant are not entitled to take possession

through police help after evicting the resistor. Being aggrieved the present appeal has been preferred.

6. On behalf of the appellant it is submitted that the Ld. Trial Judge committed a great illegality in refusing the prayer of the appellant to deliver

possession of the suit premises in execution of the Order passed by the .Ld. Judge, 9th Bench, City Civil Court at Calcutta dated 16.6.73 that the

O.P. No. 3 in view of the contradiction between the pleading and the proof could not be held to be occupying the suit premises by virtue of his

independent title and that the facts and circumstances would clearly reveal that he was set up by the Judgment-Debtor in order to frustrate the

recovery of possession in execution of the Order passed by the Ld. Judge u/s 144 C.P. Code. It is also contended that even if it be conceded that

he was a tenant then he is bound by the decree and he is liable to deliver-up possession as he should be treated to be in possession for and on

behalf of the Judgment-Debtor

7. On behalf of the respondent No. 3 it is contended that it is well-settled that restitution can only be ordered against the Judgment-Debtor and not

against a stranger, that the respondent No. 3 being a stranger he cannot be directed in a petition under Order 21 Rule 97 C.P. Code to be evicted

from the premises and whatever be the nature of his possession the fact that he is a stranger and is in possession is sufficient for the Court to refuse

delivery of possession as against him. It is also contended that he be a sub-tenant he cannot be evicted except by due course of law and not by

virtue of an Order u/s 144 C.P. Code passed against the superior landlord.

8. There is no doubt that in several decisions different High Courts had held that the restitution can only be allowed against the Judgment-Debtor

and not against the stranger. Reference may be made to the Division Bench decision in S. Chokalingam Asari Vs. N.S. Krishna Iyer and Others,

Rajjabali Khan Talukdar and Others Vs. Faku Bibi and Others, and Ujagar Singh Vs. Likha Singh and Another, . Mr. Roy Chowdhury has also

referred to us a Division Bench Judgment of Delhi High Court reported in Sham Lal Dhingra Vs. Jaswant Kaur and Another, in which it has been

held that where on eviction of a tenant in execution of an ex pane decree for eviction, another tenant, who was unaware of the litigation was

inducted and the earlier decree for eviction was subsequently reversed the evicted tenant could not be granted possession when the tenant

subsequently inducted opposed it and such a new tenant would be entitled to protection u/s 14 of the Delhi Rent Control Act. It has further been

observed by the Division Bench that to such a case Section 144 C.P. Code was not applicable.

9. Mr. Roy Chowdhury draws our attention to the provision of Section 144 C.P. Code as it stood prior to its amendment in 1976 and he points

out that there may be circumstances as is clear from the said provision that the restitution may not possible even if the decree or order by virtue of

which the possession has been taken has been reversed and the person from whom the possession has been taken is entitled u/s 144 C.P. Code to

be restored to possession as a result of reversal of such decree or order. He, therefore, submits that when in this case the restitution cannot be

ordered against the stranger then the Court may award compensation. In Lal Bhagwant Singh Vs. Rai Sahib Lala Sri Kishen Das, the Supreme

Court has observed that the Court acting u/s 144 retains jurisdiction to refuse to direct restitution and pass some other order which appears to him

equitable and just.

10. Mr. Mullick appearing for the appellant, on the contrary, contends that the restitution has already been ordered by directing the delivery of

possession of the suit premises in favour of predecessor-in-interest of the present appellants, that thereafter this execution petition under Order 21

Rule 35 C.P. Code has been filed after the appeal filed by the respondent No. 1 against the order of restitution has been dismissed by the Division

Bench of High Court and that when the execution has been resisted at the time when the possession was sought to be taken through Bailiff then the

present appellants have filed an application under Order 21 Rule 97 C.P. Code, that in the meantime the 1976 amendment of the C.P. Code has

come into force and the Court in a proceeding under Order 21 Rule 97 C.P. Code has to decide all questions of light title or interest in the

property by the resistor and that when in this case the respondent No. 3 appears to have obtained possession of the property after the appellants"

predecessor filed the application under Order 9 Rule 13 C.P. Code and regard being had to the fact that he has failed to establish his independent

title in the premises-in-suit, he must be held to be bound by the order of restitution and his alleged possession is clearly hit by Section 52 of the

Transfer of Property Act. It is also submitted that the Respondent No. 3 in collusion with Respondent Nos. 1 and 2 is resisting possession and

they should get possession through police help.

11. On considering the facts and circumstances disclosed in this case we are of the view that in this present proceeding we are not at all concerned

as to whether the restitution can be ordered against the stranger or not. The order of restitution has already been passed by the Ld. Trial Judge by

the Order No. 22 dated 16.6.73 in Misc. Case No. 246/72 filed by Bejoy Kumar Dutta, the predecessor-in-interest of the present appellants. A

copy of the order which is in pages 4-5 of the Paper Book shows that the O.P.s in the said Misc. Case did not contest the application after a

previous order was passed by the Ld. Trial Judge and the Ld. Trial Judge having been found that the possession taken by the O.Ps. on the basis of

the exparte decree dated 15.6.73 has been set aside in a petition under Order 9 Rule 13 C.P. Code dated 30.3.72 on a finding that the Summons

was not duly served upon the petitioner of the said Misc. Case the petitioner was entitled to restitution of possession and the O.Ps. were liable to

restore possession. That is why the Ld. Judge ordered restoration of the possession of the suit property from which the petitioner, Bejoy Kumar

Dutta was dispossessed in execution of the exparte decree passed in Ejectment Suit No, 1515/69 on 20.3.71. It is gathered that within a few days

from the date of delivery of possession in. execution of the exparte decree the application under Order 9 Rule 13 C.P. Code was filed by Bejoy

Kumar Dutta on 26,3.71, which was ultimately allowed on contest on 20.3.72. We agree with Mr. Mullick that in a proceeding under Order 21

Rule 97 C.P. Code, we are not considering as to whether the restitution u/s 144 C.P. Code should be allowed to the present appellants or not

because long prior to the present proceeding the restoration of possession has already been ordered in Misc. Case No. 246/72. Therefore, the

said order has reached its finality after the appeal against it has been, dismissed by the Division Bench of this Court.

12. The Supreme Court has clearly held in Mahjibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai and Others, and Maqbool Alam Khan Vs.

Mst. Khodaija and Others, that a proceeding for restitution is a proceeding in execution. After the order of restitution has been passed by a

competent Court of Law a separate execution case has been filed by the present appellants praying for delivery of possession under Order 21

Rule 35 C.P. Code. The appellants sought for possession through Bailiff but on 25.2.78 when the Bailiff accompanied by the appellant No. 1 went

to deliver possession in execution of writ of delivery of possession when only the respondent No. 3 resisted such delivery of possession.

Thereafter, the present proceeding under Order 21 Rule 97 C.P. Code has been filed. When this petition under Order 21 Rule 97 C.P. Code has

been filed, the C.P. Code has been amended by 1976 Amendment and the said amended provision has already come into force. As a result of

such amendment, in view of Order 21 Rule 101 in such a proceeding all questions (including question relating to right, title or interest in the

property) arising between the parties to a proceeding on an application under Rule 97 or their representatives as are relevant to the adjudication of

the application shall be determined by the Court dealing with the application and not by a separate suit. In view of this clear provision the alleged

right title or interest of the respondent No. 3 claiming independent title in the property has to be determined by the Court and the above amended

provisions have clearly barred a separate suit for that purpose. Therefore, it is the duty of the Court to decide as to whether the respondent No. 3

has acquired such independent title in the property which would prevent the Court from ordering execution against him if necessary, by using police

force.

13. It is, therefore, necessary to decide as to whether the respondent No. 3 was successful before the Ld. Trial Judge in proving such bona fide

independent title in the property for the Trial Judge to dismiss the order under Order 21 Rule 97 C.P. Code.

14. Mr. Mullick has drawn our attention that the respondent No. 3 sought to make out a case of sub-tenancy in the objection filed before the Ld.

Trial Judge but at the time of the trial has given a complete go-by to such claim of sub-tenancy and has made out a different case altogether. It is

also submitted that regard being had to the fact that he is admittedly a relative of Someshwar Panday was sufficient for the Ld. Trial Judge to come

to the finding that his story of independent right in the property was a myth and he was nothing but a person set up by Someshwar Panday to

frustrate a valid order of restitution obtained by the predecessor-in-interest of the present appellants. The respondent No. 3 in his objection

petition in paragraph 4 has stated that the tenant-Judgment Debtor left the suit premises before he became a sub-tenant at No. 1A, Goabagan

Street, Calcutta in August, 1971, that he had been living in the suit premises as a lawful sub-tenant which fact has been intimated to the landlord by

Sri Subhas Dhar, the Lessee-tenant, that he is a bona fide sub-tenant and has no information and knowledge of the litigation between the landlords

and tenant and that he has been occupying a portion of the ground floor of 1A, Goabagan Street paying monthly rent @ Rs. 150/- per month and

he had paid all his rents upto March, 1978 and that as sub-tenant he resisted the execution of the writ of possession obtained by suppression of the

fact that he had been, occupying the suit premises as a lawful sub-tenant since 1971.

15. In paragraph 5 he has sought to make out a different case by stating the premises of his sub-tenancy is not identical with the premises of

restitution order of delivery of possession.

16. This para 5 appears to be very fatal for the case of the respondent No. 3 that he has any right of sub-tenancy in respect of the premises for

which the restoration is ordered if the premises in which he claimed as subtenant were not identical with the premises for which the delivery of

possession was sought to be taken.

17. However, Anjan Kumar Dutta in his evidence has stated that the respondent No. 3 was found to be in possession of the premises in suit when

the Bailiff went to deliver possession to him. So it cannot be disputed that he was in possession of the premises for which the possession was

sought to be taken under writ of possession issued by the Court.

18. But the case made out in the Affidavit-in-Opposition has been given a complete go-by the respondent No. 3, Prabir Kumar Chakraborty in his

evidence. He claims that he was inducted by the decree-holder, Subhas Kumar Dhar whom he knew to be the owner of the house and that his

father was a friend of Subhas Kumar Dhar. In cross-examination he has conceded that he does not know the relationship between Someshwar

Panday and Subhas Dhar and that he did not know if Someshwar Pandey granted any receipt to Subhas Dhar.

19. It is, therefore, clear from his evidence that he was in occupation of the premises in suit claiming Subhas Dhar to be the owner of the premises

and the decree-holder. But Subhas Dhar was not a decree-holder who took delivery of possession of the suit premises in execution of the exparte

ejectment decree. It was Someshwar Panday and another who took such possession. The order of restitution was passed against them. Subhas

Dhar was admittedly not the owner of the suit premises. Therefore, the respondent No. 3 cannot acquire any lawful tenancy right from Subhas

Dhar by taking tenancy from him treating him to be the owner of the property. It is found from the order passed by the Ld. Trial Judge that in the

proceeding under Order 9 Rule 13 C.P. Code the present respondent Nos. 1 and 2 as O.Ps. tried to make out a case that immediately after the

taking of delivery of possession he inducted Subhas Dhar even prior to Bejoy Dutta filing the Order under Order 9 Rule 13 C.P. Code. The said

order clearly shows that the Ld. Judge disposing of the petition under Order 9 Rule 13 C.P. Code did not accept the said contention. But in this

particular case we are not concerned as to whether Subhas Dhar was inducted as a tenant by Someshwar Panday immediately after the taking of

delivery of possession or not because no such case had been made out by the O.P. No. 3 in evidence. The O.P. No. 3 even though sought to

make out a case of sub-tenancy in the Affidavit-in-Opposition gave a complete go-by to that story by making out an altogether different case that

Subhas Dhar, the decree-holder was the owner of the premises and he took tenancy from Subhas Dhar in August, 1971. But the alleged sub-

tenancy was also admittedly after the proceeding under Order 9 Rule 13 C.P. Code was filed. The case which respondent No. 3 seeks to make

out in evidence does not make out his case of a bona fide tenant but the evidence disclosed by him clearly reveals that Subhas Dhar was a friend of

his father. He has also admitted in cross-examination that the son of Someshwar is married with one of his cousin sisters but his subsequent to the

tenancy taken by him. He also concedes that his father was intimate with Someshwar for the last 3/4 years.

20. In view of the above facts and circumstances we are satisfied that the respondent No. 3 did not have any bona fide tenancy right in the

premises in suit and subsequent to the proceeding initiated under Order 9 Rule 13 C.P, Code the present respondent No. 3 was given in

possession of the property by the. decree-holder to frustrate the lawful order of restitution passed against Someshwar Panday and another. The

evidence clearly reveals that the respondent No. 3 was set up by the respondent nos. 1 and 2 and he did not have any independent and lawful

tenancy right in the premises in suit. If such a lawful tenancy right could have been proved by the respondent No. 3 without any knowledge

whatsoever about the setting aside the exparte decree or the order of restitution then we could have protected his interest. But the evidence clearly

reveals that he did not have any bona fide claim in the property. He being a close relative of Someshwar had been set up by him and the Ld. Trial

Judge even though treated his possession to be suspicious ought not to have dismissed the petition by holding erroneously that the respondent No.

3 had acquired independent right in the property. The appeal is, therefore, allowed. The order passed by the Ld. Trial Judge is hereby set aside.

The application under Order 21 Rule 97 C.P. Code is allowed on contest against the respondent No. 3 and ex parte against the rest and the

possession of the suit premises be delivered to the present appellants with appropriate police help. In the circumstances, however, we allow the

present parties to bear the respective costs of this appeal themselves.

21. Later on.

On the prayer of the respondents it is ordered that the certified copy of this Judgment, if applied for, may be given to them urgently.

Preparation of formal decree is dispensed with. The Lower Court Records-be sent down immediately to the learned trial Judge.

M. N. Roy, J.

22. I agree.