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**(1999) 04 CAL CK 0064**

**Calcutta High Court**

**Case No:** Civil Order No. 1235 of 1993

Arun Banerjee

APPELLANT

Vs

Puspalata Banerjee

RESPONDENT

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**Date of Decision:** April 7, 1999

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 115, 151
- Constitution of India, 1950 - Article 227

**Citation:** 2 CWN 176 : (1999) 2 ILR (Cal) 56

**Hon'ble Judges:** Bhaskar Bhattacharya, J

**Bench:** Single Bench

**Advocate:** Subhro Kamal Mukherjee and Debasish Roy, for the Appellant; Nihar Ranjan Chatterjee and Naba Kumar Das, for the Respondent

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**Judgement**

Bhaskar Bhattacharya, J.

1 This revisional application u/s 115 of the CPC is at the instance of Defendants in a suit for declaration and injunction and is directed against order No. 24 dated April 16, 1993 passed by the Learned Judge", 12th Bench, City Civil Court, Calcutta in Title Suit No. 1285 of 1992.

2, The Plaintiffs/opposite parties filed the aforesaid Title Suit No. 1285 of 1992 for a decree for declaration that the Petitioners have no legal right, title or interest to interfere with the alleged peaceful possession of the opposite parties in the suit premises save and except one room of the first floor in the suit premises and also for permanent injunction.

3. In the aforesaid suit, the opposite parties filed an application for temporary injunction thereby restraining the Petitioners from making forcible entry and/or creating disturbance into the alleged peaceful possession of the opposite parties in respect of the six rooms on the ground floor of the premises.

4. On the aforesaid application, an interim order of status quo was passed by the learned trial Judge on June 30, 1992.
5. According to the Petitioners, on the same day viz, June 30, 1992 in violation of the aforesaid order of status quo they were dispossessed by the opposite parties from the part of the suit property by force, as a result of which, the Petitioners filed an application u/s 151 of the CPC for restoration of possession.
6. The said application for restoration of possession and also the main application for injunction were being heard for few days and thereafter the learned trial Judge on January 19, 1993 adjourned the matter to March 2, 1993.
7. Being dissatisfied with the order dated January 19, 1993, the Petitioners moved a revisional application under Article 227 of the Constitution of India before this Court which was disposed of by Chatterjee, J on January 29, 1993 thereby directing the learned" trial Judge to hear out the matter on the next date fixed.
8. On March 4, 1993, which was the next date fixed, after hearing the learned advocate for the opposite parties in full and after hearing the learned advocate for the Petitioners in part, the learned trial Judge fixed the matter on the next day.
9. On the next date viz. March 5, 1993 the opposite parties moved an application praying for dismissal of the suit for non-prosecution without serving a copy of the same upon the Petitioners and the learned trial Judge dismissed the suit for non-prosecution without giving any opportunity of hearing to the Petitioners.
10. Therefore, Petitioners filed an application u/s 151 of the Code for recalling order dated March 5, 1993 passed by the learned trial Judge and for fixing an early date of hearing of the application u/s 151 of the Code for restoration of possession.
11. The learned trial Judge by the order impugned dismissed the said application holding that a party rjas a right not to press his suit and as such there is no provision for recalling the said order dismissing the suit for non-prosecution. The learned trial Judge further held that if the Plaintiffs had violated the order of status quo, in such a case, a contempt petition lay and such contempt petition could be heard even after the dismissal of the suit but the order dismissing the suit for default cannot be recalled.
12. Mr. Mukherjee, the learned advocate appearing on behalf of the Petitioners contends that in view of the fact that in violation of the order of status quo passed fn the suit, his clients were dispossessed from the suit property and an application for restoration of possession was pending, the opposite parties with mala fide intention decided not to press their suit after the application for injunction and the application for restoration were heard in part pursuant to the order passed by this Court. According to Mr. Mukherjee, the opposite parties knew that they had obtained an order of status quo by practising fraud upon court and that the Petitioners were dispossessed in violation of the said order and as such

apprehending that an order of restoration will be passed, decided not to press the suit.

13. In such a circumstances, according to Mr. Mukherjee, the learned trial Judge ought not to have permitted the opposite parties to abandon their suit without passing an order of restoration.

14. Mr. Chatterjee, the learned advocate appearing on behalf of the opposite parties has, however, supported the order of the learned trial Judge and has contended that a Plaintiff has got every right to abandon his suit unconditionally and no court can stand in the way of Plaintiff. Mr. Chatterjee contends that the learned trial Judge rightly held that if there was any violation of the interim order, his clients would be guilty of contempt, in support of such contention Mr. Chatterjee has relied upon a decision of the Apex Court in the case of [Hulas Rai Baij Nath Vs. Firm K.B. Bass and Co.,](#)

15. After hearing the learned advocates for the parties and after going through the said decision, I find that there is no dispute with the proposition that ordinarily a Plaintiff is entitled to abandon his suit at any point of time. But the law is equally settled that if by taking advantage of an order passed in the suit, the Plaintiff has dispossessed the Defendant or in violation of an interim order a Defendant has been dispossessed during the pendency of the suit, in such a case, it is the duty of the court to undo the wrong done to the Defendant before actual dismissal of the suit. In the instant case undisputedly an application u/s 151 of the Code filed by the Petitioners complaining dispossession in violation of the order of status quo was pending and the same was heard on several occasions along with the application for temporary injunction. At that stage, the opposite parties prayed for dismissal of the suit for non-prosecution.

16. I do not find justification in the order of the learned trial Judge where he said that a contempt application can be heard even after the disposal of the suit. The Petitioner has not filed any application for contempt but has filed an application for restoration on the ground of alleged dispossession in violation of interim order passed in the suit. The law is now settled that if in violation of an interim order passed in the suit, a party is dispossessed, the party aggrieved without filing a fresh suit can pray for restoration before the court where the suit is already pending. Therefore, when such application was heard in part, at that stage the court ought to have adjudicated such application for restoration before permitting the Plaintiff to abandon his suit.

17. If it appears on adjudication that the Defendants were really dispossessed in violation of the order of status quo, the court should pass necessary order of restoration and after enforcing the order of restoration will permit the Plaintiffs to abandon their suit.

18. Therefore, the order impugned is set aside. The learned trial Judge is directed to dispose of the application u/s 151 of the Code filed by the Petitioners for restoration on merit and if such application is allowed, the court after enforcing the said order will permit the opposite parties to abandon the suit. Let the application for restoration be disposed of within a month from the date of communication of this order.

19. With the above observation this revisional application is allowed. I make it clear that I have not gone into the question whether the Petitioners were dispossessed in violation of the order of status quo and the learned trial Judge will adjudicate such question after taking evidence. The revisional application is disposed of.

20. No order as to costs.