

M/S L. B. Ghosh & Sons

Vs

Ashok Kumar Saraf

Civil Appeal No. 677(N) of 1980

(A. C. Gupta, V. D. Tulzapurkar JJ)

18.04.1980

JUDGMENT

GUPTA, J. –

1. This appeal arises out of a proceeding for restitution under Section 144 of the Code of Civil Procedure. The respondent obtained a decree for eviction against M/s L.B. Ghosh & Sons, appellant before us. This decree was ultimately set aside by the High Court in appeal. In the decree that was passed the appellant who was the defendant in the suit was described as "M/s L.B. Ghosh & Sons" and it was not stated whether this was a partnership firm or a proprietary concern or a Hindu joint family business. Before the decree was set aside, the decree-holder respondent succeeded in recovering possession of the disputed premises in execution of the decree. After the decree was set aside, the appellant applied for restitution under Section 144 of the Code of Civil Procedure describing themselves just as they were described in the decree, "M/s L.B. Ghosh & Sons". An objection was taken as to the maintainability of the application for restitution on the ground that the applicant for restitution was not the defendant from whom possession had been recovered by the decree-holder. It may be stated here that there was some dispute in the suit as to whether the defendant was a proprietary concern or a partnership firm but, as stated already, in the decree the defendant was described only as M/s L.B. Ghosh & Sons. The City Civil Court at Calcutta hearing the miscellaneous case arising out of the application for restitution found no substance in the objection. On appeal the High Court at Calcutta however upheld the objection, held that the application for restitution as framed was not maintainable, and left it open to the "original judgment-debtor or anyone representing the said judgment-debtor", "entitled to the benefit of restitution", "to make a fresh application for restitution". The description of the petitioner in the application for restitution is the same as in the decree. We do not see any reason why the court giving effect to the order of restitution cannot take the decree as it stands. It may be stated here that in the suit the defendant had appeared through one Jatindra Mohan Ghosh and after his death which took place in the course of the ejectment proceedings, through one of his sons Ajit Kumar Ghosh. The application of restitution has also been filed through the said Ajit Kumar Ghosh. In these circumstances we do not think we should be justified in forcing the appellant before us to make another application for restitution thereby opening yet another chapter in the litigation between the parties which has gone on for quite some time now.

2. The appeal is allowed, the impugned order of the High Court dated April 20, 1978 is set aside and that of the City Civil Court made on March 23, 1978 in Miscellaneous Case No. 400 of 1978 is restored. There will be no order as to costs.

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