

MADHYA PRADESH HIGH COURT

Choudhary Hariram

Vs.

Pooransingh

Misc. Second Appeal No. 165 of 1958, 7.12.1959, from order of Addl. Dist. J.,
Narsimhapur
(S.B. Sen, J.)

8.11.1958 7.12.1959

JUDGMENT

S.B. Sen, J.

1. The facts of the case are very simple. The appellants had agreed to sell -/12/- share in the village for a consideration of Rs. 2100/-, out of which Rs. 1900/- remained to be paid. As there was no sale, a suit for specific performance was filed, by the respondent. That suit (Civil Suit No.31-A of 1949) was decreed. It was ordered that the plaintiff should deposit Rs. 1900/- and on the deposit being made, the defendants should execute the sale deed and deliver possession of the property agreed to be sold. The amount was deposited by the plaintiff-respondent on 22-12-1949. As the appellants did not execute the sale deed, the Court executed it and registered it on 30-11-1950. In the meantime, another suit was filed by the sons of the appellants, which was Civil Suit No.62-A of 1949. In that suit, a declaration was sought by the sons of the appellants that the appellants had no right to sell -/9/6 share of the village. That suit was decreed. By that time, on 31-3-1951, the M.P. Abolition of Proprietary Rights Act came into force and the property in the village share vested in the State. The result was that the respondent could not get possession of the property.

2. An application was, therefore, filed by the respondent on 25-2-1954 for refund of the amount of Rs. 1900/-. This application was dismissed in default on 24-6-1954. Another application was filed on 27-4-1957 and on 19-9-1957, this application was dismissed on merits. It was held that the respondent could not file an application under

section 144, Civil Procedure Code, and the Court had no power to refund the amount. In appeal, filed by the respondent, the appellate Court held that the application may be treated as an application under section 144, Civil Procedure Code. It amounted to an application for restitution and the respondent was entitled to the refund of Rs. 1900/-. Against this order, the present appeal has been filed.

3. The first point that has been argued is that no application under section 144, Civil Procedure Code, would lie. Counsel for the appellants relied on *Narayan v. Mst. Radhabai*,¹ in which Bose, J., (as he then was) observed as follows:

"A decision in a subsequent suit does not necessarily have the effect of varying or reversing the original decree, though it may affect the rights of the parties, and the decree-holder has a right to execute the decree unless it has been expressly varied or reversed."

On the basis of the above observations, the appellants contend that as the original decree was not varied or reversed by the subsequent decree, it should be executed as it was. This contention appears to be wrong. From the decision in the case cited above, it does not appear that Bose, J., (as he then was) has decided exactly in the way the appellants contend. It was observed in that case that "most of the argument before me was confined to the question of restitution under section 144, Civil Procedure Code, but the real question is whether the plaintiffs had a right to execute that decree for costs". Further on, his Lordship observed that a decision in a subsequent suit does not necessarily have the effect of varying or reversing the original decree. It may affect the right of the parties. In my opinion, his Lordship continued it would be a startling innovation to hold that rights and liabilities which have been finally decided to another suit are impliedly affected by a subsequent decision which makes no reference whatever to them and about which the parties, were never at issue.

4. In the instant case, there is a definite reference made to the previous suit. In fact, the subsequent suit was by the sons of the appellants who challenged the alienation of the father on the basis of which a decree for specific performance was passed. In fact, in the subsequent suit (62-A of 1949), it was held that -/9/8th share of the village could not be transferred. In ILR (1937) Nag 153: AIR 1937 Nagpur 151 (supra), his Lordship has further observed –

It is different when the subsequent suit reverses or varies the previous decree in some way permitted by law."

These remarks are significant, it is clear that a subsequent suit can vary or reverse the previous decree and in the present case, the decree has been varied. In *Vindhyachal v. Board of Revenue*,² their Lordships have observed –

"Section 144 applies to all cases in which a decree or order is varied or reversed. A decree or order may be varied in appeal or in revision or in some other proceedings. It may be varied or reversed in a separate suit. It may be varied or reversed by subsequent legislation."

In *Ramaswami v. Chidambaram*,³ a similar point arose. There was a decree for specific performance, but before the decree could be executed, there was abolition of proprietary rights. A similar application was made for the refund of the consideration that was deposited in the Court. Their Lordships held that the application could be treated as an application under section 144, Civil Procedure Code. I fully agree with the views of their Lordships in that case.

5. The next objection that was taken was that already an application was dismissed and, therefore, no subsequent application would lie. The previous application, as is clear, was dismissed in default and this being a matter which relates to execution of the decree, the previous dismissal certainly cannot have the effect of a bar of *res judicata*. The appellants have brought to my notice a case reported in *Simhadri Sahu v. Balaji Padhi*,⁴ wherein, it has been held that –

"Where an objection petition under section 47 Civil Procedure Code of the judgment-debtor is dismissed for his default in the presence of the decree-holder, a subsequent petition on the self-same ground is barred by the principle of *res judicata* underlying the provisions of section 11, Explanation V, Civil Procedure Code."

The facts of that case were quite different. In that case, the objection was about attaching certain property and in fact those properties were not attachable. It was held that the subsequent petition is barred. I cannot agree with that view. This being a matter in execution, the petition, which has been dismissed merely in default, cannot

operate as *res judicata* to the subsequent application.

6. The result is that the appeal is dismissed with costs.
Appeal dismissed.

Cases Referred.

1. ILR (1937) Nag 153: AIR 1937 Nag 151
2. AIR 1956 All 663
3. AIR 1954 Mad 1040
4. AIR 1955 Ori 81