

RAJASTHAN HIGH COURT

Purshottam Singh Narooka

Vs.

Purshottam Sharma

Civil First Appeal No. 151 of 2003

(A.C. Goyal, J.)

05.03.2004

JUDGEMENT

A. C. Goyal, J.

1. The appellant-decree holder vide this first appeal has challenged the order passed by the learned District Judge, Tonk on 11-9-2002 whereby the application under Section 144, Civil Procedure Code filed by the respondent- judgment debtor in Execution Case No. 19/1995 was allowed.
2. The relevant facts in brief are that the appellant-plaintiff (hereinafter to be referred as the plaintiff) filed a civil suit on 4-7-1994 against the respondent-defendant (hereinafter to be referred as the defendant) with the averments that one temple of Sh. Thakur JiSitaramJi is situated in the Fort of the plaintiff. The defendant was appointed as a Pujari of this temple and on account of that the defendant is in possession of the said temple shown in the site plan marked ABCD. Since the defendant is serving at Kota and thus not performing Seva-Pooja, hence it was prayed that a decree for removal of the defendant as Pujari and for delivery of the possession of the temple along with Pooja articles be passed in favor of the plaintiff.
3. Ex-parte decree was passed on 31-3-1995 in favor of the plaintiff and the same was not aside by this Court in Civil Misc. Appeal No. 866/999 vide order dated 22-9-2000.
4. The defendant on 24-10-2000 filed an application under Section 144, Civil Procedure Code in execution proceedings with a prayer that the plaintiff has got the possession of the temple on 21-12-1995 in execution of the ex-parte decree in absence of the defendant. The defendant being hereditary Pujari and since the *ex parte* decree has already been set aside, the defendant is entitled to restoration. The plaintiff

contested this application by filing reply.

5. The learned District Judge vide impugned order allowed this application and ordered for restoration of the temple along with articles.

6. Before advertng to the rival submissions, Section 144 Civil Procedure Code is reproduced as under:-

144. Application for restitution.- (1) Where and insofar as a decree (or an order) is (varied or reversed in any appeal, revision of other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order) shall, on the application of any party entitled in 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 order) or (such part thereof as has been varied, reversed, set aside or modified); and, for this purpose, he 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 properly (consequential on such variation, reversal, setting aside or modification of the decree or order.)

(Explanation.- For the purposes of sub-section (1) the expression "Court which passed the decree or order" shall be deemed to include,-

(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance;

(b) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order;

(c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.)

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

7. Learned counsel for the plaintiff contended that the ground of restoration as provided under Section 144, Civil Procedure Code has not been pleaded, rather it was pleaded that the defendant being hereditary Pujari is entitled to restoration of the temple and the trial Court did not record any finding on this point. Learned counsel for

the defendant contended that the question whether the defendant is hereditary Pujari or not would be decided in the suit itself. The submission made by learned counsel for the defendant appears to be justified as it is case of the defendant that being hereditary Pujari he cannot be removed. This is a question of fact to be decided after the trial. It is not correct to say that the ground for restoration as provided under Section 144, Civil Procedure Code is not taken in para 3 of the application as contended by learned counsel for the plaintiff. It has been specifically pleaded that since the ex-parte decree has already been set aside by the High Court, the defendant is entitled to the restoration. It was next submitted by learned counsel for the plaintiff that the restoration is an equitable relief and since the defendant has not come with clean hands, the impugned order is liable to be set aside; that the defendant could not establish what loss has been sustained by him because of the dispossession, hence he was not entitled to any relief under Section 144, Civil Procedure Code that some of the articles of the temple had already been stolen, hence the same position as in existence on the date of delivery of the possession to the plaintiff on 21-12-1995 cannot be restored; that the prayer of the respondent to restore the possession as existed on 31-5-1995 was contrary to Section 144, Civil Procedure Code and none of all the three conditions were satisfied, hence the impugned order is liable to be quashed. It was also contended that the defendant had been living in Kota for the last 28 years and thus he never performed Pooja in this temple; that it was not proved that the plaintiff has derived any advantage out of this ex-parte decree and thus the said order should be set aside. He placed reliance upon *Ganesh Parshad v. Adi Hindu Social Service League*,¹ wherein it was held that to apply Section 144, Civil Procedure Code three conditions are necessary to be satisfied. They are (i) the restitution sought must be in respect of a decree or order which had been varied or reversed; (ii) the party applying for restitution must be entitled to the benefit under a reversing decree or order and (iii) the relief claimed must be properly consequential on the reversal or variation of the decree or order. If these conditions are satisfied, it given no choice or discretion to the Court and the only course it has to follow is to order restitution to the party which had suffered loss on account of the erroneous decree or order. While taking similar view in *Puni Devi Sahu v. Jagannath Mohapatra*,² it was held by Orissa High Court that the doctrine of the restitution is based on equitable principle and consequently cannot be applied in a case where it conflicts with another rule of equity. In *Ajaib Singh v. Tulsi Devi*³ the Hon'ble Apex Court while dealing with Section 16 of the Specific Relief Act, 1963 observed that the person making the averments as per convenience without regard for truth would be precluded from getting equitable relief. In *Union Carbide*

Corpn. v. Union of India, ⁴the Hon'ble Supreme Court held that Section 144, Civil Procedure Code embodying the doctrine of restitution does not confer any new substantive right to the party not already obtaining under the general law. In *Karnam Chand v. Smt. Kamlesh Kumari*, ⁵it was held that the Court may refuse restitution where it does not appear to be in consonance with the real and substantial justice of the case. In *Bag Singh v. Khiwala*, ⁶this Court held that in case party takes possession under cloak of injunction order, Sections 144 and 151, Civil Procedure Code are not attracted. In *Chellamma Ambika v. K. M. Kanikari*, ⁷the Hon'ble Supreme Court held that in case there is concurrent findings of the First Appellate Court and the High Court that original auction purchaser or plaintiff-appellant had ever come in possession of disputed land since they had been in possession they must have resisted execution when sought to be dispossessed, it is not open for the plaintiff to bring a suit for recovery of possession. In *South Eastern Coalfields Ltd. v. State of M. P.*, ⁸it was held that to apply Section 144, Civil Procedure Code the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party.

8. On the other hand, learned counsel for the defendant submitted that since the ex-parte decree was set aside by this Court and the case was remanded for trial, the impugned order was rightly passed under Section 144, Civil Procedure Code. He placed reliance upon *Binayak Swain v. Ramesh Chandra Panigrahi*, ⁹wherein it was held that the principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal on modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree and the Court in making the restitution is bound to restore the parties, so far as they can be restored, to the same position they were in at the time when the Court by its erroneous action had displaced them from.

9. I have considered the rival submissions in the light of the judgments relied upon. A bare perusal of the prayer made by the plaintiff in the prayer clause of the suit is that the defendant be removed as a Pujari and possession of the temple marked ABCD in the site plan be given to the plaintiff along with Pooja articles. It was case of the defendant that he is hereditary Pujari of this temple and this temple is now a public

temple. The ex-parte decree was set aside by this Court but prior to that the plaintiff got the possession of the temple along with Pooja articles in execution of the decree on 21-12-1995. Therefore, the submissions made by learned counsel for the plaintiff are devoid of merit that the defendant has not suffered any loss on account of dispossession or that the plaintiff has not gained any benefit out of the possession or that the defendant has failed to prove his substantive right for restitution. All the three conditions as observed by Andhra Pradesh and Orissa High Court have been satisfied in the in stant case that the decree under which the plaintiff got the possession was set aside by the High Court, that the defendant applying for restitution was entitled to the benefit of the possession of the temple and that the relief claimed vide application under Section 144, Civil Procedure Code is consequential on reversal of the ex-parte decree. Prayer to restore the possession as on 31-3-1995 was rightly observed by the trial Court as a mistake as the position as existing on 21-12-1995 was to be restored and has rightly been restored vide impugned order.

10. Consequently, this appeal, being devoid of merits, is hereby dismissed with costs.

Appeal dismissed.

Cases Referred.

1. AIR 1975 AP 310
2. AIR 1994 Orissa 240
3. (2000) 6 SCC 566: (AIR 2000 SC 2493)
4. AIR 1992 SC 248
5. AIR 1973 MP 6
6. 1959 Raj LW 43
7. 2003 (1) WLC (SC) 245
8. 2003 (7) Supreme 539: (AIR 2003 SC 4482)
9. AIR 1966 SC 948