

IN THE HIGH COURT OF TRIPURA
AGARTALA

CRP NO.29 OF 2015

- 1. Sri Jyotirmoy Paul,**
son of Sri Kamini Mohan Paul
 - 2. Smt Champa Paul,**
wife of Sri Jyotirmoy Paul,
- both residents of Kunjaban, P.O. Kunjaban,
P.S. East Agartala, District: West Tripura, PIN: 799006

..... Petitioners

- Vs -

- 1. Smt. Archana Rani Deb,**
wife of Sri Bijoy Debbarma,
daughter of late Prafulla Kr. Deb,
resident of Abhoynagar, P.O. Abhoynagar,
P.S. East Agartala, District: Tripura West
 - 2. Sri Kamaljit Singh,**
son of Sri Chandra Kr. Singh
 - 3. Smt. Chameli Singh,**
wife of Sri Kamaljit Singh
 - 4. Smt. Shibani Datta,**
wife of late Samir Kanti Dutta
- all are residents of Kunjaban, P.O. Kunjaban,
P.S. East Agartala, District : Tripura West

..... Respondents

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioners	:	Mr. D.R. Choudhury, Advocate Mr. D. Deb, Advocate
For the respondents	:	Mr. Samarjit Bhattacharji, Advocate
Date of hearing & order	:	22.09.2015

Yes	No
√	

Whether fit for reporting :

JUDGMENT & ORDER (ORAL)

Heard Mr. D. R. Choudhury, learned counsel appearing for the petitioner as well as Mr. Samarjit Bhattacharji, learned counsel appearing for the respondents.

2. By this application filed under Article 227 of the Constitution of India, the petitioner has questioned the legality of the order dated 03.03.2015 passed by the executing court (the Civil Judge, Senior Division, West Tripura, Agartala, Court No.1) in Misc.(J) 09 of 2014. The petitioners herein filed an application under Section 144 read with Section 151 of CPC for restitution of the land which was not part of the decreetal land but taken into possession by the decree holders, the respondents herein by the aid of the bailiff of the court. According to the petitioners, the Schedule-C land measuring 0.009 acre is also recorded under plot No.2297. The plot No.2297 is a large plot. The petitioners, the judgment-debtors, have their title over some part of the land pertained to plot No. 2297. But, that part which was not included in the decree has also been taken into possession by the decree-holders and as a result, the petitioners filed two applications, one under Section 144 read with Section 151 of the CPC for restitution of their possession of the land which was not part of the decreetal

land and another under order 26, Rule 10A of the CPC for purpose of survey.

3. Mr. Choudhury, learned counsel appearing for the petitioners has succinctly submitted that without properly appreciating the averments made in the said petition filed under Section 144 read with Section 151 of the CPC, being Misc.(J) 09 of 2014, the executing court has rejected the petition by the impugned order dated 03.03.2015. The execution case on the basis of the report of the bailiff was disposed of on 06.08.2014. The report of the bailiff was accepted by the court and there had been no protest against the said report. However, from the application filed under Section 144 read with Section 151 of the CPC, it appears that on 25.07.2014 the bailiff of the execution court without taking any assistance from any Survey Commissioner or without taking any measurement of the land as described in the decree, in particular in the schedules B, C and D had taken possession having been solely guided by the decree holders. On taking possession, the bailiff posted the pillars over the land, which is much beyond the decreetal land. It has been further stated that the bailiff of the court is not an competent person to survey and as such, he did not even try to survey the plot according to the decree. A specific statement has been made in the para 7 of that petition which is as under:

“That, by such improper execution made by the Bailiff of the Court by partial and wrong instruction of the Plaintiff D.H. O.P. and her husband recovered more than 0.009 acres i.e. ½ (half) Gandas of land as indicated by posting pillars by the Bailiff of the Ld. Court.”

To support the proposition, the petitioners filed one parallel application under Order 26 Rule 10A of the CPC for appointing a Survey Commissioner to locate such illegality as committed during execution of the decree.

4. Mr. Choudhury, learned counsel has seriously urged that the land beyond the decree as taken in possession by the bailiff is liable to be restituted by the execution court inasmuch as power of restitution lies with every court as inherent to it. Mr. Choudhury, learned counsel has referred a decision of the apex court in **Mrs. Kavita Trehan & Anr. vs. Balsara Hygiene Products Ltd.**, reported in **AIR 1995 SC 441**, wherein the apex court has enunciated that the law of restitution encompasses all claims founded upon the principle of unjust enrichment. Restitutionary claims are to be found in equity as well as at law. Section 144 of the C.P.C. incorporates only a part of the general law of restitution. It is not exhaustive. The jurisdiction to make restitution is inherent in every Court and can be exercised whenever the justice so demands. It will be exercised under inherent powers where the case does not strictly fall within the ambit of Section 144. Section 144 opens with the words “where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for a purpose”. If it appears that the case is not strictly within the ambit of section 144 of the CPC, even then the

aggrieved party can urge for applying the principles of restitution invoking powers inherent in every court.

5. In the similar line, Mr. Choudhury, learned counsel appearing for the petitioners has also relied on a decision of the apex court in **Union Carbide Corporation vs. Union of India**, reported in **AIR 1992 SC 248** to contend that the court's power in this regard is unbridled. Mr. Choudhury, learned counsel has further submitted that even the application filed under order 26 Rule 10A of the CPC has been rejected as corollary to the rejection of the petition for the restitution. Hence, the impugned order is liable to be rejected.

6. From the other side, Mr. Samarjit Bhattacharji, learned counsel appearing for the respondents has submitted that the supervisory power of the court falls within a narrow province and the case that has been made out by the petitioner may not enable this court to exercise that power, inasmuch as where and how the restitutionary jurisdiction can be exercised, it has been well laid under Section 144 of the CPC. In this case there is no variation or reversal or for that matter, there was no deviation in the decree passed by the superior court and as such it is not a case where the power under Section 144 of the CPC can be exercised. As such, the impugned order is not at all susceptible to interference by this court.

7. It is true that in the petition filed under Section 144 read with Section 151 of the CPC, the petitioner has not made any distinct assertion as to what amount of land pertaining to plot No.2297 taken over from the judgment debtors-petitioners.

However, the petitioner has made a vague statement without detail, out of his apprehension that at the time of execution of the decree, some part of their land pertained to plot No.2297 which is beyond the schedule-C has been taken over by the bailiff and handed over the possession of the said land to the decree holders wrongly and that definitely forms the unjust enrichment to the decree holders. As such, the petitioner is entitled to get restitution of that part of land which is not part of the decree.

8. Mr. Choudhury, learned counsel appearing for the petitioner to buttress his contention has further submitted that this contention can only be ascertained if a Survey Commissioner is engaged under order 26 Rule 10A of the CPC. This court is in total agreement with Mr. Choudhury, learned counsel that the restitutionary jurisdiction is not confined only to Section 144 of the CPC, but it is inherent in every court when it has been established beyond all doubt that some exercise has led to unjust engagement to a person. Then the court can exercise its inherent power also direct restitution. But, here is a case unfortunately that the petitioners themselves do not know how much of the land and what part of the land as claimed to be the part of the plot No.2297 has been taken into possession illegally by the bailiff and handed over to the decree-holders at the time of execution of the decree. Whether in such a circumstances, the court can exercise the restitutionary jurisdiction or not? In the considered view of this court, the court cannot exercise such jurisdiction. Before exercising the restitutionary jurisdiction, the court must be satisfied that there

had been unjust enrichment. Unless that is proved by a person who is aggrieved no court can pass such order directing restitution. However, in this case this court is of the opinion that the petitioners even after the closure of the execution court can approach the execution court under order 21 Rule 99 of the CPC for recovery of the land for which they have expressed their grievance. Rule 99 of the CPC is an independent provision and that provision has been made for doing the justice arising from illegal dispossession at the time of executing the decree. It is well settled in **H. Seshadri Vs. K.R. Natarajan & Anr.**, reported in **AIR 2003 SC 3524** that even if a person claiming through or under the judgment-debtor may be dispossessed in execution of a decree passed against the judgment-debtor but not when he is in possession of the premises in question in his independent right or otherwise.

9. If the petitioners' assertions are correct they can approach the execution court under order 21 Rule 99 of the CPC. In **H. Seshadri Vs. K.R. Natarajan & Anr.**, reported in **AIR 2003 SC 3524**, the apex court has unambiguously enunciated that the meaning of the words where any person other than the judgment debtor is dispossessed of the immovable property cannot be interpreted in the manner to exclude even the judgment debator in respect of the property where he had an independent right, and which is not the part of the decreetal land. As it has been gathered from Mr. Choudhury's submission that the claim for restitution is entirely based on an independent right which has not been

eclipsed by the decree. As such, the petitioners may approach the execution court if they are really aggrieved and they have the evidence to support that the land over which they have the independent title which has not been eclipsed by the decree has been taken by the bailiff illegally and handed over to the decree holders, the respondents. They may approach the court under order 21 Rule 99 of the CPC for adjudicating their right as claimed. In that event, the enquiry be made in terms of the provisions of Rule 101 of Order 21 of the CPC, which provides that “all questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application, and not by separate suit and for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.”

10. But this court cannot hold that the basis of the records placed alongwith the petition filed under Section 144 read with Section 151 of the CPC that a definite part of the land of the petitioners has been taken over by the bailiff at the time of execution of the decree in question and has been handed over to the respondents.

11. In the circumstances, this court has no other alternative, but to dismiss the petition having the rider as stated above. Accordingly, the petition stands dismissed. If an application

is filed under order 21 Rule 99 of the CPC, the said application shall be decided by the executing court in accordance with law.

There shall be no order as to costs.

JUDGE

Moumita