

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FA 132 of 2022

Smt. Niyati Ghosh & Anr.
versus
Sri Sujit Banik & Anr.

For the Appellants : *Mr. Saptangshu Basu, Sr. Adv.*
Mr. Biswajit Konar,
Mr. Arijit Mahinder.

For the Respondent No.1 : *Mr. Krishanu Ghosh,*
Mr. Debashis Sarkar,
Mr. Jayanta Samanta.

Hearing is concluded on : *16th February, 2023.*

Judgment On : **23rd February, 2023.**

Tapabrata Chakraborty, J.

1. The present appeal has been preferred challenging the judgment and decree dated 27th January, 2020 passed by the learned Additional District Judge, 4th Court, Alipore in Miscellaneous Appeal no. 178 of 2019.

2. Shorn of unnecessary details, the facts are as follows :

- a) A partnership firm, namely, M/s Naba Punjabi Stores and its partners, namely, Niyati Ghosh (hereinafter referred to as Niyati) and the Mukti Ghosh (hereinafter referred to Mukti) preferred a suit for dissolution of partnership and for accounts being Title Suit No. 1344 of 2010 against another partner, namely, Sujit Banik (hereinafter referred to as Sujit);
- b) The said suit was decreed in preliminary form by judgment and decree dated 16th May, 2013. Aggrieved thereby, Sujit preferred a title appeal being T.A. No. 153 of 2013. During pendency of the said appeal, the plaintiffs put the decree into execution by filing a title execution case being T.Ex. No 17 2013. On the basis of an order passed in the same on 26th February 2015, Sujit was dispossessed from the suit property on 27th February 2015;
- c) Thereafter, Sujit filed an application under Section 144 of the Code of Civil Procedure (hereinafter referred to restitution application) read with Section 151 of the Code of Civil Procedure (hereinafter referred to the Code) in the pending appeal. Upon contested hearing, the appeal was allowed by a judgment and decree dated 23rd November, 2015 setting aside the judgment and decree dated 16th May 2013 passed by the learned Court below and the suit was sent down on remand to the learned Court below for proper consideration and the restitution application was allowed by an order dated 20th February, 2016;

d) Challenging the judgment and decree dated 23rd November, 2015 and the order dated 20th February, 2016 allowing the restitution application, Niyati and Mukti preferred two separate appeals before this Court being FMAT No. 288 of 2016 and FMAT No.327 of 2016;

e) By a judgment dated 2nd May, 2016, FMAT 288 of 2016 was allowed setting aside the order of remand and sending the appeal back to the learned First Appellate Court. The other appeal being FMAT 326 of 2016 was also disposed of on 2nd May, 2016 setting aside the order impugned in the restitution application being the order dated 20th February, 2016;

f) Thereafter the First Appellate Court disposed of the title appeal being TA No.153 of 2013 by a judgment dated 2nd November, 2016 setting aside the judgment and decree passed in the title suit being T.S. No.1344 of 2010. By the said judgment, the restitution application of Sujit was also dismissed;

g) Subsequent thereto, Sujit again filed a restitution application before the learned Civil Judge (Junior Division) 2nd Court at Alipore being Misc Case No.193 of 2017. By an order dated 18th August, 2018 the said restitution application was dismissed since the same had already been decided by the learned First Appellate Court by the judgment and order dated 2nd November, 2016;

h) Challenging the said order, Sujit filed a revision application before this Court being CO No. 3174 of 2018 which was disposed of granting liberty to Sujit to file a proper appeal in the District Court at Alipore;

i) Pursuant thereto, Sujit preferred the appeal being Misc Appeal No.178 of 2019. The said Misc Appeal was disposed of allowing Sujit's application for restitution. The said order is under challenge in the present appeal.

3. Mr. Basu, learned senior advocate appearing for the appellants being Niyati and Mukti submits that Sujit himself chose to file the restitution application before the First Appellate Court prior to reversal of the decree and as such the said application could not have been an application for restitution and the same was in fact an application under Section 151 of the Code. While disposing of the said application the concerned Court came to a categorical finding that Mukti was the actual tenant of the shop room and such finding binds the parties to the proceeding. Law is well-settled that even if erroneous, an inter party judgment binds the parties if the Court of competent jurisdiction had decided the *lis*. In view thereof, the learned Court erred in law in allowing the restitution application filed by Sujit. In support of such argument reliance has been placed upon a judgment delivered in the case of *Gorie Gouri Naidu (Minor) and another –vs- Thandrothu Bodemma and others*, reported in AIR 1997 SCC 808.

4. Drawing our attention to the provisions of Section 144 of the Code, Mr. Basu submits that the phrase '*the Court which passed the decree or order*' shall be deemed to include '*the Court of first instance*'. In view thereof, the First Appellate Court had every jurisdiction to decide the restitution application and as such in the order impugned in the present appeal the Court arrived at an erroneous finding that the First Appellate Court could not have been construed to be '*the Court of first instance*'. The doctrine of restitution is that on the reversal of a decree, 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 had lost and such obligation arises automatically on the reversal or modification of the decree and as such the First Appellate Court had the jurisdiction to decide the restitution application. In support of such contention reliance has been placed upon the judgments delivered in the cases of *Sham Lal Dhingra -vs- Jaswant Kaur and another*, reported in AIR 1980 Delhi 171 and *Puni Devi Sahu and another -vs- Jagannath Mohapatra*, reported in AIR 1994 Orissa 240.

5. He argues that appeal is a continuation of a suit and as such an application under Section 144 of the Code can be entertained by the appeal Court and the learned Court failed to appreciate that while a similar application under Section 144 of the Code was rejected by the Appellate Court on remand upon setting aside the decree of the trial Court in the suit, the same attained finality and the subsequent similar restitution application before the subordinate forum was barred by the principles of *res judicata*.

6. Answering our query as to whether the ambit of an explanation appended to the main section can go beyond the ambit of the section itself, Mr. Basu argues that there is a difference between the term '*means*' and the term '*includes*'. The term '*means*' prefixed to a provision would be restricted to the ambit of the concerned provision. The term '*includes*', however, would imply addition of the contents of the explanation to the contents of the section to which it is appended. In the explanation appended to Section 144 it has been stated that for the purposes of sub-section (1) the expression '*Court which passed the decree or order*' shall be deemed to '*include*' the First Appellate Court. In support of such contention reliance has been placed upon the judgments delivered in the cases of *Bengal Immunity Company Limited -vs- State of Bihar*, reported in AIR 1955 SC 661, *Feroze N. Dotivala -vs- P.M.Wadhwani*, reported in (2003) 1 SCC 433 and *P. Kasilingam -vs- P.S.G. College of Technology*, reported in (1995) Suppl.2 SCC 348.

7. According to Mr. Basu, in view of the term '*include*' which is used as a prefix to the clauses (a), (b) and (c) of the '*explanation*' appended to Section 144 (1) of the Code, the First Appellate Court has been included as a Court of competent jurisdiction to consider a restitution application and Sujit having himself elected to file the restitution application before the Appellate Court, cannot subsequently dispute the competence of the said Court. In support of such argument reliance has been placed upon the judgment delivered in the case of *Kanchusthabam Satyanarayana and Others -vs- Namuduri Atchutaramayya and Others*, reported in (2005) 11 SCC 109.

8. Mr. Ghosh, learned advocate appearing for the respondent being Sujit denies and disputes the contention of Mr. Basu and submits that in Black's law dictionary, the definition of '*Trial Court*' is '*a Court of original jurisdiction where the evidence is first received and considered – also termed Court of first instance; instance Court; Court of instance*'. Such definition applied to the provisions of Section 144 of the Code would clearly reveal that the Court which at the inception decided the suit would be the Court of first instance having jurisdiction to decide an application for restitution. There is thus no infirmity in the finding that the order passed by the First Appellate Court suffers from a jurisdictional error.

9. He argues that the Court which decreed the suit is the competent Court to decide a restitution application and not the First Appellate Court which may have either reversed or varied the decree in exercise of Appellate or revisional jurisdiction. In support of such contention reliance has been placed upon the judgments delivered in the cases of *State Bank of Saurashtra –vs- Chitranjan Rangnath Raja and Another*, reported in (1980) 4 SCC 516 and *Neelathupara Kummi Seethi Koya Phangal (Dead) by LRS –vs- Montharapalla Padippua Attakoya and Others*, reported in 1994 Supp (3) SCC 760.

10. He further argues that it is a fundamental principal well-established that a decree passed by a Court without jurisdiction is a nullity and that its invalidity cannot be cured even by consent of the parties. Thus, even if it is assumed that Sujit mistakenly filed a restitution application prior to reversal of

the decree, the findings arrived at by the concerned Court being the First Appellate Court cannot be construed to be binding amongst the parties. If a decision of a Court or Tribunal is without jurisdiction, the same cannot operate as *res judicata* in any subsequent proceedings. In support of such contention reliance has been placed upon judgments delivered in the cases of *Sushil Kumar Mehta –vs- Gobind Ram Bohra (Dead) through his LRS.*, reported in (1990) 1 SCC 193 and *A.G. Pasupathy –vs- Mohamed Ismail*, reported in (1998) 1 MLJ 746. Reliance has also been placed upon a judgment delivered in the *Bansidhar Sharma (since deceased) represented by his legal representative –vs- State of Rajasthan and Others*, reported in (2019) 19 SCC 701 for explaining the object behind incorporation of the term ‘order’ in Section 144 of the Code.

11. In reply, Mr. Basu submits that the judgment in the case of *Neelathupara Kummi Seethi Koya Phangal (Supra)* has no application as the 1976 Amendment Act pertaining to Section 144 of the Code was not under consideration in the same. The judgment delivered *Sushil Kumar Mehta (Supra)* and *A. G. Pasupathy (Supra)* are distinguishable on facts as in the instant case the First Appellate Court had the jurisdiction to consider the restitution application.

12. It is well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction in fact or an additional fact may make a lot of difference in decision making

process. Judgment is a precedent for the issue of law that is raised and decided and not observations made in the facts of any particular case.

13. Section 144 of the Code speaks of variation or reversal of a decree or an order a) in any appeal; or b) in a revision; or c) in other proceeding or d) in any suit instituted for the purpose and that in all such cases the Court which passed the decree or order shall consider a prayer for restitution. To rule out any confusion, in the explanation clause it has been reiterated and specified that where the decree or order is varied or reversed or set aside in exercise of appellate or revisional jurisdiction or by a separate suit, *‘the Court which passed the decree’* shall be deemed to include *‘the Court of first instance’*. The explanation clause cannot be looked into *dehors* the main section and such argument as advanced by Mr. Basu is not acceptable to this Court.

14. In the case of *State of Bank of Saurashtra (Supra)*, the respondent surety made an application in the Court (the Hon’ble Supreme Court) that in compliance with the decree made by the trial Court he had paid the entire amount and he should not be exposed to second round of litigation for restitution of the amount and that this Court (the Hon’ble Supreme Court) should give a direction to the Bank as part of this judgment that the amount be returned with interest at current rate to the respondent surety. While disposing of the said application, the Court observed as follows :

‘21. The limited question is whether this Court can grant restitution. Prior to Amendment Act, 1976, an application for restitution under Section 144 in

all cases had to be made to the court of first instance. Even since the amendment the substituted expression “the Court which passed the decree or order” would, as per clause (a) of the explanation, mean the Court of first instance because the expression “the Court which passed the decree or order” has been deemed to include where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the court of first instance. The present one is the simplest case where the suit in favour of the appellant and against the surety was decreed by the trial court, i.e. the court of first instance, and this decree has been reversed by the High Court in exercise of its appellate jurisdiction. In such a situation, clause (a) of the explanation would be attracted and an application for restitution will have to be made to the court of first instance i.e. the Court of Civil Judge, Senior Division, Gondal ...’

15. Since the jurisdiction for granting relief of restitution is on the Court of first instance, i.e., the Court which passed the decree and not on the Appellate Court which reversed the decree, the decision or finding of the First Appellate Court cannot operate as *res judicata*.

16. We, thus, do not find any reason to interfere with the judgment and decree dated 27th January, 2020 passed by the learned Additional District Judge, 4th Court, Alipore in Miscellaneous Appeal no. 178 of 2019.

17. The appeal fails and the same is, accordingly, dismissed, however, without any order as to costs. Judgment and decree impugned herein are affirmed.

18. Let a decree be drawn up accordingly.

19. Let a copy of this judgment along with LCR be sent down to the learned court below forthwith.

20. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)