

08.06.2023
Srimanta
Sl. No. 10
Ct. No. 652

CO/4242/2016

Sumitra Shaw & Anr.
-Vs.-
Bijoylakshmi Ghosh (Saha) & Ors.

Mr. Abir Lal Chakraborti,
Mr. R. A. Khan

...for the petitioners.

Affidavit-of-service filed by the petitioners is taken on record.

The opposite parties are not represented.

This application under Article 227 of the Constitution of India has been directed against the order dated 4th August, 2016 passed by learned Civil Judge (Junior Division), Alipore in Misc. Case No. 46 of 2014. Petitioners contended that opposite parties herein being the landlord instituted a suit for eviction and recovery of khas possession against the present petitioners/tenants and the said suit was decreed on 23rd December, 2008 in favour of opposite parties herein. Challenging the said decree the petitioners have preferred title appeal before learned District Judge, South 24-Parganas at Alipore and the said appeal was also dismissed on 25.06.2014. The petitioners herein challenging the said judgment and decree passed in the said title appeal, preferred second appeal before this Court being SAT No. 366/2014 which is still pending. Petitioners further contended that though the suit was decreed on 23.12.2008 and the first appeal was filed in 2009 but during pendency of the said first appeal, in the year 2011 the opposite parties filed execution case being Title Execution Case No. 12584/2011 and the said

execution case was filed without giving notice to the petitioners herein. The opposite parties also never brought to the notice of the first Appellate Court about pendency of the execution case.

It is further submitted that the opposite parties herein most illegally and fraudulently by suppressing materials facts and in abuse of the process of law obtained an order of writ of summons for execution of judgment and decree on 25.07.2014 behind the back of the petitioners. When it came to the knowledge of the petitioners about filing of the execution case they prayed for recalling the writ of summons and learned Court was pleased to recall the writ of summons vide order dated 28.08.2016. On 02.09.2014 the opposite parties herein filed application under Order 41 Rule 5(1) of the Code of Civil Procedure along with two affidavits for issuance of writ of possession and fraudulently they obtained the same on 14.11.2014. The petitioners came to know about the issuance of writ of delivery of possession by the Court on 15.11.2014 and on the same day they filed an application for stay of execution of the matter and accordingly the writ of summons was recalled. In spite of knowledge of the said order dated 15.11.2014, the opposite parties continued the eviction process and they have ousted the petitioners from the suit property on 15.11.2014. They informed the incident to the local Police but Police did not take any action. The petitioner contended that there is dispute regarding the action of the bailiff of the learned Court and challenging the aforesaid execution of the writ of delivery of possession by the bailiff the petitioners herein filed application under Section 144 of the Code of Civil Procedure read with Section 151 of the Code praying for restoration and/or

repossession of the suit property in favour of the petitioners. The petitioners also filed application under Order 39 Rules 1 and 2 seeking injunction when they found that opposite parties are trying to construct a building upon the suit premises. The injunction application filed by the petitioners therein were rejected on 22.06.2016 but the Court below directed the opposite parties to give an undertaking that he would restore the possession of the petitioners/judgment debtors in the scheduled property and hand over to the petitioners if they succeeded in the proceeding under Section 144 read with Section 151 of the Code and further directed the opposite parties to file an indemnity bond of Rs.50,00,000/-.

Aforesaid application under Section 144 read with Section 151 of the Code of Civil Procedure came up for hearing on 04.08.2016 before the Court below but learned Court below by the impugned order was pleased to reject the petitioners' said application.

Being aggrieved by that order the petitioners have contended that the bailiff report does not bear any signature of the petitioners or any of her relatives and/or her representatives. The bailiff report bears signature of the witnesses, one of whom is also a tenant under the opposite parties and another witness with whom the petitioners have a dispute which is pending since long and as such it is very easy for them to be witnessed against the petitioners' cause. The bailiff had given possession of the said tenanted premises by breaking the padlock of the suit premises and he had broken the padlock without having authority to break such lock and such act was done by the bailiff keeping the petitioners in complete darkness. Moreover, bailiff had not given any notice

to the petitioners about the delivery of possession and accordingly the order impugned is liable to be set aside.

During the course of argument the main contention raised by the petitioner is that the Court below failed to appreciate that writ of summons was issued on 14.11.2014 at about 4.00 p.m. behind the back of the petitioners and the same was recalled on 15.11.2014 at 3.00 p.m. and during such short period the writ of summons ought not to have been executed. The petitioners ought to have been informed at least one day prior before the bailiff had come for taking possession of the premises. Learned Court below ought to have considered that the bailiff had acted in connivance with the opposite parties and had given possession of the premises in a most mala fide manner.

I have gone through the order of the Court below wherefrom it appears that the Court below had specifically observed that even if the petitioners' contention is taken to be true that at 3.00 p.m. on 15.11.2014, the writ of delivery of possession was recalled but it appears that the bailiff had handed over possession by executing the decree on the same day at 11.30 a.m. and as such bailiff had not violated any order of the Court and it cannot be said that the bailiff was aware of the order of recalling or that in violation of order of Court he had given possession of the suit premises by executing the decree. Accordingly, it is not in dispute in the present case that the recalling order, if any, was passed on 3.00 p.m. on 15.11.2014 and whereas the bailiff had handed over possession of the suit premises by executing the decree at 11.30 a.m. on 15.11.2014.

The basic principle underlying in Section 144 is “actus curiae neminem gravabit” which means that the act of the Court should not result in harm to a litigant. The whole object of Section 144 is to restore status quo ante. If a person was wrongfully deprived of a property on account of a decision of a Court, which was later reversed, he is entitled to claim restoration of the possession of that very property. In other words, 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 other party for what he has lost. Where a decree has not been varied or reversed, a Court has no power to grant restitution under Section 144 of the Code.

In the present case, there is no averment that the decree which has been executed has been varied or reverse in any appeal, revision or in any other proceeding. It is submitted by the petitioners that the second appeal before this Court is pending but it is not their case that in the second appeal the decree has been reversed or modified or set aside. Though learned Counsel for the petitioners submits that beside Section 144 of the Code he has also made the prayer under Section 151 of the Code of Civil Procedure for restoration but it is well settled that the object of Section 151 of the Code is to supplement and not to override or evade other express provisions of the Code.

In view of above, I do not find any substance or merit in the present application and as such it is liable to be rejected. In view of the above, C.O. 4242/2016 is dismissed.

Urgent photostat certified copy of this order, if applied for, be given to the learned Advocates for the parties on the usual undertakings.

Ajoy Kumar Mukherjee, J.)