

IN THE HIGH COURT AT CALCUTTA

CIVIL REVISIONAL JURISDICTION

APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHAITALI CHATTERJEE DAS.

**CO 1616 OF 2022
WITH
CAN 5 OF 2025
DR. RAJASHREE RAY BANDYOPADHYAY
VS
DR. PARTHA SARATHI ROY
WITH
CO 1920 OF 2022
DR. PARTHA SARATHI ROY
VS
DR. RAJASHREE RAY BANDYOPADHYAY
WITH
CO 1921 OF 2022
DR. PARTHA SARATHI ROY
VS
DR. RAJASHREE RAY BANDYOPADHYAY
WITH
CO 2316 OF 2022
DR. RAJASHREE RAY BANDYOPADHYAY
VS
DR. PARTHA SARATHI ROY**

**For the Petitioner/
Dr. Rajashree Ray
Bandyopadhyay
in CO 1616 of 2022
and 2316 of 2022 and
opposite party in
CO 1920 of 2022
and CO 1921 of 2022**

**: Mr. Sayantan Bose, Adv.
Mr. Sarbajit Mukherjee, Adv.
Ms. Priyanka Gope, Adv.**

**For the petitioner/
Dr. Partha Sarathi Ray in
CO 1920 of 2022
And CO 1921 of 2022
For the opposite party
In CO 1616 of 2022
And CO 2316 of 2022**

**: Mr. Saurabh Guhathakurata, Adv.
Mr. Abhratanu Sarkar, Adv.**

Reserved On : 16.06.2026
Judgement On : 24.07.2026
Uploaded On : 24.07.2026

CHAITALI CHATTERJEE DAS, J. :-

1. Four revisional applications under article 227 of the Constitution of India filed by the petitioner, Dr. Partha Saradthi Roy and Dr. Rajashree Roy Bandopadhyay against a composite order dated 1st June 2022, passed by the learned Civil Judge (Senior Division), 2nd Court at Barasat in Title suit no. 669 of 2017 whereby all the applications filed, out which two applications under section 151 by the original plaintiff mother as well as by present petitioner for restoration of possession, one application under order 39 Rule 7 for appointment of Advocate Commissioner and an application for amendment of plaint under Order VI Rule 17 of CPC filed by the brother Dr. Partha Sarathi Roy were disposed of. On the joint prayer made by the parties all the revisional applications are heard analogously .
2. The fact of the case in a nutshell is that a long-term lease in respect of the suit premises was granted on 26 December 1975 jointly in favour of late Dr. Dwijendra Kumar Roy and late Dr. Urmila Roy and they constructed a building over the same who are the parents of the present parties to the proceeding. Dr. Dwijendra Kumar Roy died on 11th January, 2017 leaving behind him his wife, Dr Urmila Roy since deceased and present parties as his legal heirs. Prior to his death Dr. Roy executed a will on 7 September 2016, bequeathing his 50% share in the said property in favour of his daughter and a probate proceeding in respect of the same is pending presently being contested by the brother. Dr. Urmila Roy also on the same date, executed a will bequeathing her 50% share

in the property in favour of the respondent/daughter. On 3rd November 2016 Dr. Urmila Ray revoked earlier will dated 7th September, 2016 and executed a fresh will on 27th January, 2017 and registered a codicil of the said Will registered on 3rd November 2016 whereby she bequeathed her 50% share in the property in favour of her son. According to the plaintiff /mother during April 2017, the daughter with her family members shifted from UK and came to the house of the mother at 19 Creek Row in the middle of 2014 and started living there with her family and after death of her father left the house which the plaintiff mother came to learn that she in fact shifted to their Salt Lake property behind her back and entered into the second floor which were being used by the plaintiff/mother and used to keep under lock and key. The plaintiff further came to learn that the daughter has inducted one Sunny Sharma beyond her knowledge in respect of the first floor .On 26.4.2017 when the plaintiff went to visit the suit property she was denied entry by the domestic help of her daughter .Over the incident she also lodged one GD before the Bidhannagar police station and further instituted a civil suit in the year 2017 against the opposite party/daughter in which the present petitioner was impleaded as proforma defendant number 2.The suit was contested by the daughter by filing written statement denying the allegations levelled against her by her mother .

- 3.** By virtue of an order dated 7th August 2017, an ad- interim injunction order was passed by the Learned Trial Court in favour of the mother on an application filed by the mother under order 39 Rule 1 & 2 of CPC . The opposite party /daughter also filed an application under order 39 Rule 1 and 2 against the mother on 15.3.2018 and the Court passed an order of status-

quo with regard to the nature character and possession of the suit premises. Since the said interim order as granted in favour of the plaintiff /mother was alleged to be violated she further filed an application under Order 39 Rule 2A of the Civil Procedure Code. An application under Section 151 of the Code of Civil Procedure was filed on 29th March, 2018 in the suit by the daughter Dr. Rajyashree Ray Bandopadhyay and on 28th June, 2018 such application was disposed of with a direction to the IC, Bidhannagar PS to remove the padlocks of certain rooms of the suit premises and to handover certain movable properties to the respondent. The respondent was also permitted to use, occupy and reside in certain portions of the same premises and rest of the portions were directed to be kept under possession of late Dr. Urmila Ray and her son.

4. Dr. Urmila Ray filed a revisional application being C.O 2204 of 2018 challenging the said order and by virtue of an order dated 27th July, 2018 passed by the Learned Co-ordinate Bench it was set aside. It is alleged by the petitioner Dr. Partha Sarathi Roy that on 10 July 2018, the respondent through police help with her men and agent ransacked the whole building in the suit premises, looted valuables lying, and tortured her mother who was then aged about 84 years and was very ill. However, the police put new padlocks in certain rooms under occupation and possession of the petitioner and his mother. On 2nd August, 2018 further application was filed with a prayer for necessary direction to the IC Bidhannagar PS to restore possession of rooms and articles in terms of the order dated 28th June, 2018. On 6th October 2018, the original plaintiff/ mother, Dr Urmila Ray expired leaving

behind her last Will and testament dated 22nd May, 2017, which is a holographic Bengali Will and duly registered.

5. On 18 April 2019, when the present petitioner returned to India, his entry was refused to the premises by the respondent and her men and servants. Subsequently on 22nd July 2019, also he tried to enter into the suit premise but he was severely assaulted and police refused to accept the complaint of the petitioner. After demise of the mother, both the petitioner as well as the respondent filed respective application for substitution in the title suit and by an order dated 6th March, 2020 the application of the respondent for substitution in place of deceased plaintiff was rejected and the application of the petitioner was allowed. On 16th December, 2020 the plaintiff filed an application under Order 6, Rule 17 of the Code of Civil Procedure for amendment of the plaint and both the application for amendment and the application for restoration of possession filed by the original plaintiff were fixed for hearing on 8th February 2021. All the applications were heard together and by the order impugned allowed the application for amendment of plaint and application for appointment of Advocate commissioner and rejected the remaining two applications under 151 filed by the original plaintiff and by the substituted plaintiff for restoration of possession. The said order has given rise to 4 revisional applications which are as follows; CO 1616 OF 2022, CO 2316 OF 2022, CO 1920 OF 2022 and CO 1921 OF 2022. This Court also after hearing the matter analogously passed the order in the following manner.

C.O 1616 OF 2022

6. The challenge in the revisional application filed against the portion of the order no. 5 dated June, 2022 passed by the learned 2nd Civil Judge (Senior Division)

Barasat in Title Suit no. 669 of 2017 to the extent that the said order allowed an application filed by the substituted plaintiff for local inspection under order XXXIX Rule 7 of the Code of Civil Procedure, 1908. It is the contention of the learned advocate representing the present petitioner/defendant of the suit that in the schedule to the application for local inspection, the substituted plaintiff being the opposite party herein, Dr Partha Sarathi Roy sought for the commissioner to be appointed for noting of all points which were allowed by the learned court and not sustainable on the ground as follows:-

I) The original plaintiff on the date of filing of the suit was not in actual physical possession of any part or portion of the suit property and the statement was made in various paragraphs of the plaint. She complained of not getting access to the suit property on 26th April 2017, when she tried to enter into the suit property. It is admitted that the second floor of the suit property was let out by the present petitioner to a tenant. Therefore, it was incumbent upon the original plaintiff to seek for restoration or recovery of possession in the suit and in absence of such a prayer the suit itself is hit by Section 34 of the Specific Relief Act, 1963.

II) It is argued on behalf of the petitioner that it is now settled that unless a recovery of possession is prayed for admittedly is not in possession of the property the suit itself is not maintainable and in this regard put reliance on the decision of the Hon'ble Supreme Court of India in the case of ***Union of India versus Ibrahim Uddin and Anr. reported in***¹. This proposition was

¹ (2012) 8 SCC 148

also held by the Supreme Court in its judgement reported in, **Venkata Raja and others versus Vidyane Doureradjaperumal²**.

III). It is further the contention of the learned Counsel that on the date of filing of the suit the plaintiff was not in possession of the suit property which can be found from the general diaries lodged by the original plaintiff with the Bidhan Nagar Police Station, which was submitted in the affidavit in opposition filed by the present opposite party/plaintiff in this revisional application. Therefore, apparently no relief of possession being sought either by the original plaintiff or the substituted plaintiff hence the suit itself is not maintainable. Therefore, as per settled law, when a final relief in the suit cannot be passed, no interlocutory order can be made in favour of the plaintiff. Admittedly, the relief of local inspection sought by the substituted plaintiff opposite party, herein is an interlocutory relief, and the same cannot be granted since the final relief of the suit itself is not maintainable. The learned court allowed the said application whereby the local inspection on the points contended in the schedule to the application which otherwise cannot be sustained were also allowed.

IV). The fourth argument advanced is that a suit for permanent injunction by one co-sharer against other co-sharer from exercising right over any part of the property in joint possession without claiming partition is not maintainable. In this regard, reliance was put in the judgement of **T. Ramalingeswara Rao (Dead) through Lrs and another versus N. Madhava Rao and others³**, for

² (2014) 14 SCC 502

³ (2019) 4 SCC 608

relied upon Bachaspati Bhattacharya & Ors. Versus Smt. Meera Bhattacharjee & Ors⁴.

V). The further contention made before this court is that without prejudice to the averment what it is contained that the application for local inspection filed by the substituted plaintiff could not have been allowed as the same amounts to nothing but a mere attempt to fish out evidence. An analysis of the points on which the local inspection is sought would make it apparent that the real purpose of the application is to ascertain the possession and occupation and occupancy of the suit property as on the date of the filing of the application for local inspection. The attempt of the substituted plaintiff is really to gain information by way of holding the local inspection to be used in collateral proceedings under Order XXXIX, Rule 2A filed by the substituted plaintiff alleging violation of an order of injunction passed by the learned court below. The application under Order XXXIX Rule 7 of the Code of Civil Procedure, 1908 cannot be used to fish out or collect evidence and support of the relief claimed in the case. In this regard, Reliance is placed on the judgement of the Hon'ble Supreme Court of India in the case of **Padam Sen and Anr vs. State of Uttar Pradesh reported in⁵** and **The Institution of Engineers (India) & Anr. Versus Bishnu pada Bag & Anr⁶.**

7. Accordingly submitted that in view of the aforesaid circumstances , it is clear that the portion of the order impugned by which the application filed by the substitute plaintiff/opposite under Order XXXIX, Rule 7 Code of Civil Procedure, 1908 as allowed should be set aside.

⁴ AIR 2019 SC 1777

⁵ AIR 1961 SC 218

⁶ AIR 1978 Calcutta 296

8. Per Contra learned, advocate, representing the opposite party raised objection and took the specific points as to why the prayer of the petitioner in this revisional application should not be entertained. The first point raised that the joint possession of the property as mentioned in the plaint is also admitted by the defendant/petitioner in her written statement and counterclaim. The mother of the opposite party, original plaintiff filed an application under Order XXXIX, Rule 1 and 2 read with section 151 of the Code of Civil Procedure for temporary injunction and the learned Court vide order dated 7.8.2017, restrained the present petitioner in making or creating any disturbance in peaceful possession of the suit property by the original plaintiff. The said entry made was validated by the present petitioner for which a proceeding under Order XXXIX, Rule 2A of the Civil Procedure Code is pending, and the petitioner also filed an application under Order XXXIX, Rule 4 of the Civil Procedure Code. Upon contested hearing of the injunction application and petition filed under XXXIX, Rule 4 of CPC, the learned Court vide order dated 15th March, 2018 directed both the parties to maintain status quo as regards, nature, character and possession in respect of the suit property, as on the date till the disposal of the suit. The said proceeding was never challenged by the petitioner and it attains finality. After that petition was filed with the petitioner under Section 151 on 3.4.2018 for certain directions and to remove her belongings in the suit property and this itself, proves that the petitioner/sister was not in possession of the suit property, and this petition was allowed by the order dated 28.6.2018, which was subsequently set aside by the High Court in CO no. 2204 of 2018.

9. During the interregnum period, the petitioner illegally and unauthorisedly possessed the suit property without giving any undertaking so directed by the learned court. After the petitioner let out the entire ground floor for commercial purpose for which several directions passed by the court to stop such commercial activities. In order to assess the damage caused by the petitioner in the suit property and the present possession of the suit property, the local inspection is required under Order XXXIX Rule 7 of the civil procedure court, and hence no interference is required in respect of the order passed by the learned court whereby the petition is allowed. The learned advocate relied upon the decision reported in ***Padam Sen and anr. versus State of Uttar Pradesh***⁷. ***Allahabad Bank versus Sourendranath Shaw & Anr***⁸. ***Nitindra Nath Roy Chowdhury & Ors versus Subhash Chandra Kar***⁹.

10. Heard the rival contentions of both the learned advocates. The materials placed on record and the pleadings made by the parties prior to his demise, Dr Dwijendra Kumar Ray executed a Will on 7.9.2016, bequeathing his undivided 50% share in the suit property in favour of his only daughter that is the petitioner herein ,now pending for grant of probate being contested by the present opposite party/brother.

11. The record further disclose that Dr Urmila Ray also executed a will on the same date bequeathing her 50% share in the same property in favour of the present petitioner, but later on, she revoked her will executed on 7.9.2016 and further executed a will and a codicil whereby she bequeathed her 50% in favour of the present opposite party. The probate proceeding in connection

⁷ AIR 1961 SC 218

⁸ AIR 1997 Cal 80

⁹ AIR 1981 Cal 319

with that will is also pending before the concerned court. Dr Urmila Roy during her lifetime filed the suit against her daughter and the son was made as pro forma defendant. During her lifetime, she also prayed for an injunction order, which was initially granted directing the parties to maintain status quo in respect of nature, character, as well as possession of the suit property. The order was subsequently modified in terms of the prayer made by the present petitioner and taking the assistance of the police officers of Bidhannagar North took possession of certain portion of the premises, was challenged before the High Court and the said order was set aside. The mother filed an application under section 151 of CPC for restoration of possession of certain portion of the premises and taking advantage of the judicial order, the petitioner, admittedly took possession of certain portion of the suit property and in terms of the subsequent order of the learned coordinate bench, that initial order lost its force. The mother expired on 6.10.2018 and she lodged several complaints over some illegal construction raised by the present petitioner during her lifetime. The present opposite party and his family members admittedly are resident of United Kingdom but claimed that whenever they visit Kolkata, they used to stay in the suit property. The opposite party, after demise of his mother being appointed as an executor to the will of his mother filed application to be transposed as plaintiff. The prayer was allowed and affirmed by this court on challenge . The opposite party in the capacity of an executor also filed an application under Order 39 Rule 7 of Code of Civil procedure for inspection of the portion which has been retained by the present petitioner , in order to ascertain the damage caused by her in the property. The brother /opposite party herein in the writ petition prayed for a direction commanding

the police authorities to enquire, investigate and register cases based upon the complaints lodged by him, as well as his mother on several occasions and no action was taken over the same. The application filed under Order XXXIX, Rule 7 CPC was made for appointing advocate commissioner and the schedule points for local inspection were as follows;

i) to go to the premises number DB1, sector-I, Salt Lake city, Kolkata 700064, being the suit property within the jurisdiction of Police Station, Bidhan Nagar(north) and ascertain as to whether the portion of the such property in map annexed to the petition is kept under lock and key, and if so, to direct the learned commissioner to see the locks and keep the same as such.

(ii) if it is found that those portions are not under lock and key, then to note how those portions are being used and what are the articles in the said portion and take note of those articles.

iii) To ascertain in the mode of user of the ground floor, of the suit property from a part of each, the plaintiff has been dispossessed by the present petitioner on 10th July 2018, with the police assistance for which application for restoration of possession is pending.

iv) To note all other local features, as would be pointed out by the parties in the locale.

12. The judgement relied upon in this regard in ***Union of India versus Ibrahim Uddin and another (Supra)*** it was held that section 34 of Specific Relief Act, 1963 provides that courts have the discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than mere declaration of title, omits to do so. The Hon'ble Supreme

Court took note of **Ram Saran versus Ganga Devi**¹⁰ where it was held categorically that the suit seeking for declaration of title of ownership, but where possession is not sought is hit by the Proviso of Section 34 of the Specific Relief Act 1963, and thus, not maintainable.

13. In **Vinay Krishna versus Keshav Chandra**¹¹, the Hon'ble Apex court dealt with a similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. Similar view has been reiterated observing that the suit was not maintainable, if barred by the proviso to section 34 of the Specific Relief Act. Accordingly held that in view of the above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief.

14. In the decision of **Venkataraja and others (Supra)** this principal was reiterated in para 24 that *"a mere declaratory decree remains non-executable in most cases generally. However, there is no prohibition upon a party from seeking and amendment in the plaint to include the unsought relief, provided that it is saved by limitation. However, it is obligatory on the part of the defendant to raise the issue at an earliest"*.

15. All the above cases cited by the parties relates to declaratory suits not by a person transposed as plaintiff in the capacity of an executor. In terms of section 211 of the Indian Succession Act after demise of the testator the entire property in the will vests upon the executor and he is given ample power to protect the property like the owner till the probate is obtained and the

¹⁰ (1973) 2 SCC 60

¹¹ AIR 1993 SC 957

property is administered to the legatee .In addition the instant suit property is a joint property and the parents of the parties were joint owners and so long the probate of the wills executed by the parents are made, the status of parties being the only legal heirs of their parents are co-sharer of the entire property. The original plaintiff filed the suit for declaration when she had the 50% ownership and also entitled to have her 1/3rd share in respect of 50% of her husband's share and hence was a co sharer.

16. It is settled proposition of law that in a joint and undivided property all the co-owners have equal share in each part of the property .However no prayer for restoration of possession was made under Section 144 Cr.P.C. Consequently, the petition filed under section 151 cpc was not entertained for that relief.

17. In the case of ***Padam Sen and Anr vs State of Uttar Pradesh (supra)*** as relied upon both the Learned Counsels,it was observed in para 13 that “*Rule 7 of Order XXXIX empowers the court ,on an application of any party to a suit ,to make an order for the detention, preservation or inspection of any property which is the subject matter of the suit or as to which any question may arise therein*”. In that case the objection raised regarding the account Book which was held to be not “property” which were the subject matter of suit nor such that about them a question could rise in the suit.

18. In the instant case the original plaintiff prayed for a decree of declaration declaring her joint ownership to the extent of $\frac{1}{2} + \frac{1}{3}$ in respect of the suit property against her daughter who after demise of her father inherited her undivided share in accordance with the rule of succession and became the joint owners with her mother and brother and it is settled law that the co-

sharer has right in each every part of the joint property until divided by metes and bound.

19. The record further disclose that an order of injunction was passed on the prayer made by the original owner/mother directing the parties to maintain status quo with regard to the nature character and possession of the suit property .This order was later on modified and it is the specific case of the petitioner/sister that on the strength of a judicial order she was allowed to take possession of certain portion of the suit property .That modified order was later on set aside by the Learned Single Bench .Accordingly the petition under section 151 CPC was filed during the life time of the mother to restore such possession which was again filed by the brother later on after being transposed as plaintiff .The Learned Court rejected both the applications against which the brother has filed two revisional applications which have been dealt with by this court hereinafter .

20. In the backdrop of the aforesaid factual matrix ,particularly in view of the High court's findings validating the allegations of unauthorized occupation and construction ,the executor ,being a legal obligation to preserve and protect the estate of the testatrix ,is entitled to seek the appointment of an advocate commissioner to inspect the property ,ascertain the nature and extent of the damage caused by the sister and report on whether physical possession of any portion of the property has been parted with or not. These facts unequivocally manifest that even if the argument of the Learned Counsel for the respondent herein is accepted that a suit for declaration without praying for recovery of possession is not maintainable, will not be an issue at this stage in the instant case . But the Learned trial court refused the prayer on the

ground that it cannot be ascertained as to the status of the position when the order of statusquo was passed. This court though is unable to accept such ground for refusal in view of the aforesaid discussion.

21. Accordingly the instant revisional application filed by the sister Dr. Rajyashree Ray Bandyopadhyay being **CO 1616 OF 2022** is dismissed .The order passed by the Learned trial court allowing the application for appointing advocate commissioner stands affirmed .

C.O 1920 OF 2022 /C.O 1921 of 2022

22. The above revisional applications were filed by the brother Dr. Partha Sarathi Roy against the portion of the order dismissing the applications filed by both the original plaintiff and the transposed plaintiff under Section 151 of CPC, refusing the prayer for restoration of possession.

23. The learned advocate appearing for the petitioner submitted, during her lifetime, the mother had lodged several complaints against her daughter/ respondent but police authorities failed to take appropriate steps to investigate or pursue the complaints. A Writ petition had to be filed alleging inaction on the part of the police authorities, as well as against the Bidhannagar Municipal Corporation in respect of an alleged illegal construction raised at the suit premises by the sister in collusion with a local Developer.

24. By virtue of order dated 21.2.2022 and 12.5.2022, the Learned court directed the Municipal Corporation to conduct inspection of the same and to take consequential steps. In course of hearing as called for she admitted of making numerous alternations beyond the scope of sanctioned plan and she

was directed to demolish the illegal unauthorised construction within a period of two weeks and to stop all sorts of commercial activities from the said premises. It is the specific contention that taking advantage of the order passed in the suit, giving access to the respondent on 28.6.2018 the respondent did all sorts of misdeed however the said order was set aside by the High Court holding that restoration of possession always has to be tangible physical possession and there cannot be any restoration of notional or joint possession of the parties. But the legal possession of the mother was taken by the respondent with the help of the police during the interregnum period and for that reason, the application under 151 of the Code of Civil Procedure was filed by her and after death of the mother, the petitioner being transposed as plaintiff prayed for restoration of possession.

25. It is the further contention of the Learned Advocate that in legal terms restitution is used in three senses. i) returned, and restoration of some specific thing ii) compensation for such wrong doing iii) compensation for benefits derived from such wrongdoing. It is also salutary principal that restitution is based on the legal maxim '*actus curiae neminem gravabit*' means that an act of court shall prejudice no man. This principal is recognised under Section 144 of the Code of Civil Procedure and the court can apply the same under Section 151 of the Code.

26. It is further contended that the mother of the petitioner was all along in possession of the suit property till it was taken by the order of the learned court, which was subsequently set aside and the same can be maintained by the petitioner after his transposition as plaintiff in the suit. Therefore, it was

the bounden duty of the learned court below to restore the possession of the suit property as it was there before illegally taken by the opposite party. In this regard relied upon the decision reported in ***Shibesh Paul Steel Authority of India Ltd. and other***¹². Another decision reported in, ***The State of West Bengal versus M/s Bansilal Leisure Parks Limited and Anr***¹³.

27. It is the specific contention of the learned advocate that the interim order was violated for which petition had been filed by the original plaintiff under Order XXXIX Rule 2A of the Civil Procedure Code. After contested hearing of the injunction application and the Order XXXIX, Rule 4 of the Civil Procedure Code, the learned court vide order dated 15th March 2018 directed both the parties to maintain status quo as regard, nature, character, and possession in respect of the suit property and such order has never challenged by the present opposite party and it attains finality. After that the application under Section 151 of CPC was filed to enable her to remove her belongings and filing of such petition clearly proves that the respondent was not in possession of the property. The defendant respondent let out the entire ground floor for which several directions passed by this court to stop such commercial activities and hence the petition had to be filed for restoration possession as it was at the time of filing of the suit and the learned court ought to have considered the entire circumstances without refusing such prayer mechanically, and without exercising judicious mind. The petitioner further relies on the decision reported in ***(Meera Chauhan versus Harsh Bishnoi and another***¹⁴, ***(Sujit***

¹² (2010) 3 CHN Cal 582

¹³ (2019) 4 CHN Cal 582

¹⁴ (2007) 12 SCC 201

Pal versus Praveen Kumar Sun and others¹⁵. Accordingly, prays for such order.

28. *Per contra* the learned advocate representing the opposite party argued that the original plaintiff prayed for restoration of possession from the portion of the suit premises from which she had allegedly been dispossessed in terms of the order dated 28th June 2018. It is settled now that when specific remedy available under another provision of code and the original order passed on 15th March 2018 gets modified by directing the plaintiff and the defendant no. 1 to maintain status quo as regard nature and character and possession in respect of the property as on 15th March 2018, till disposal of the suit. On 28th June, 2018, the inspector in-charge was directed to remove the padlocks of various portions of the property as specified therein and pursuant to the judicial order such order was implemented on 10th July 2018. By the order passed by the High Court in C.O. no. 2204 of 2018, the said order was set aside, and after that, the plaintiff applied for restoration of possession as on the date of her dispossession pursuant to the order dated 27th June, 2018 passed in the said suit. Therefore, the proper remedy for the original plaintiff in the instant case would have been to file an application under Section 144 of Code of Civil Procedure, 1908 which provides mechanism for restitution in case of alteration of a status in terms of an order passed by the Hon'ble Court, which were subsequently set aside, modified or varied. Therefore, the application under Section 151 of the Code of Civil Procedure, 1908 is not maintainable.

¹⁵ AIR 1986 Cal 220

29. It is further argued that the admitted position is that the original plaintiff has since departed her life as on the date then the order impugned in the present civil revisional application was being passed, and such substituted plaintiff who claims to be an executor of an alleged will cannot seek to pursue the said application. Reliance placed by the learned counsel appearing on behalf of the petitioner on the provision of Order 2 Rule 5 of the Code of Civil Procedure, 1908 is completely misconceived, which has no manner of application to the present suit.

30. The learned counsel distinguished the judgement relied upon by the petitioner as the petitioner sought for that it was open to the original plaintiff to seek relief under Section 151 of the Code of Civil Procedure, 1908 since it was possible for a temporary mandatory injunction being passed on an application under Section 151 thereof while there is no quarrel with the proposition that an order of temporary mandatory injunction can be made under Section 151 of the Code of Civil Procedure, 1908. Neither of the cases cited are concerned with the situation where the fact similar to those as of the instant suit. Both the judgements relied upon on behalf of the petitioner relates to a situation where the defendant dispossessed the plaintiff in spite of a subsisting order of injunction restraining the defendant from doing so. Neither the judgement aforesaid contemplate a situation where the alleged dispossession was pursuant to implementation of an order of court. It is further submitted by the learned counsel that the argument advanced on behalf of the petitioner that implementation of the order dated 27th June, 2018 by the inspector in charge of Bidhannagar Police Station on 10th July 2018, amount to violation of the

order dated 15th March 2018 is thoroughly misconceived, and hence the instant revisional application deserves to be dismissed with cost.

31. Heard the rival contentions of both the learned counsels. On perusal of materials on record as well as considering the submission advanced the facts which are found to be admitted that the suit premises jointly owned by the parents of the present parties of this revisional application and both of them executed respective Wills bequeathing their 50% share to the petitioner and the respondent, who are the brother and sister, respectively. The learned trial court considering both the injunction application passed the order on 15.3.2018, directed both the parties to maintain status quo as regard the possession of property. Fact remains such order was modified by the subsequent order directing the Bidhannagar PS to remove the pad lock of AC bedroom, personal study room, computer room, children's room and the kitchen on the second floor and allowed the defendant/daughter to take all her belongings there from and allowed the defendant no 1 to occupy with all her belongings in only two bedrooms, which will be small in size compared to the kitchen in the second floor of the suit flat.

32. The Learned Court further directed that in the event the defendant already enjoying such two bedrooms, she will not get any other bedrooms that is to say in total the defendant no. 1/present respondent can enjoy two small bedrooms, two toilets and bathroom and one small living room and the kitchen in the second floor of the suit flat. Direction was also given to the police station to remove the padlock of the said chamber in the ground floor of the flat and allowed the respondent to occupy the same and to see that public peace and

tranquillity can be maintained. The remaining rooms in the second floor of the suit to be under lock and key as it was for the purpose of using by the plaintiff or the former defendant and the IC Bidhannagar was directed to handover keys to the plaintiff. Further direction given to the defendant no. 1 to file a written undertaking supported with an affidavit that she will not claim any equity in her favour in future in claiming exclusive or settled possession in respect of the rooms arranged by this order. This order was implemented by the police on 10 July 2018.

33. The said order was set aside vide order dated 27.07.2018 with the observation that when restoration of possession is concerned, it is always to be tangible physical possession and there cannot be any restoration of notional or joint possession of the parties. During this entire period that is from the order of status quo passed by the learned trial court on 15. 3. 2018 till July 27, 2018.

34. Therefore, it is apparent that the police implemented the order on 10th July 2018 after the order passed by the learned trial court to maintain status quo was modified on 28.6.2018, by giving specific direction to the Bidhan Nagar police to open the pad lock. That order was set aside on 27.7.2018 after implementation of the previous order handing over the possession over to the present respondent. The judgement relied on by the petitioner in **Meera Chauhan (Supra)**, an application for injunction restraining the respondent no. 2 from transferring, eliminating or encumbering was filed and an ex parte interim order of injunction was passed, but the order of interim injunction was granted against the respondent no. 2 from interfering with possession of

respondent no. 1 in respect of the suit property. When the interim order of injunction was in force, the applicant purchased the property from respondent no. 2, and she was put into possession on the same date. Petition was filed against said police authorities claiming for dispossession during his absence. Praying for restoration of possession by respondent no. 1, a suit under section 6 of Specific Relief Act was filed before the Civil Judge for restoration of possession and an application to that extent was filed by him under Section 151 of Code of Civil Procedure on the allegation that he was dispossessed from the suit property during the pendency of the suit when interim order of injunction was in force. The Hon'ble Supreme Court observed that the question of possession at the relevant point of time, it would be appropriate to note that the order for restoration was passed by the trial court on an application under Section 151 of the Code of Civil Procedure. A question may arise whether such an application can be entertained by the court when specific provision under Order 39 of the Code of Civil Procedure has been made for grant of injunction in the form of mandatory order in exercise of power under the said order. It was held-

“15. on a bare perusal of Section 151 CPC it cannot be said to be in dispute that Section 151 confers wide powers on the court to make such orders as maybe necessary for the ends of justice or to prevent abuse of the process of the court.

16. The power of section 151 to pass order of injunction in the form of restoration of possession of the court is no more res integra now”

17. In **Manohar Lal Chopra versus Rai Bahadur Rao Raja Seth Hiralal AIR 1962 Supreme Court 527** while dealing with the power of the court to pass orders for the ends of justice or to prevent the abuse of the process of the court, the Court held that the courts have an inherent jurisdiction to issue temporary order of injunction in the circumstances which are not covered under the provisions of order 39 of the Code of Civil Procedure.”

35. In the case of **Sujit Pal (Supra)** the opposite party made an application for temporary injunction, and the learned Judge passed an order of interim injunction, restraining the defendant from interfering with the possession of the Opposite Party of the said room, despite such injunction, the defendants in violation of the said order of injunction forcibly dispossessed the opposite party from the suit premises. An application under Order XXXIX Rule 2A CPC and under Section 151 of CPC was filed praying for mandatory injunction, restoring the possession of the opposite party of the said room with police help and such application was allowed directing restoration of possession of the room in the said premises with police help.. Being aggrieved by the impugned order, the petitioner preferred an appeal and filed the present application for an interim order of stay of operation of the said order. Argument was advanced on behalf of the petitioner challenging the jurisdiction of the learned judge to entertain an application under Section 151 of Civil Procedure Code for a temporary mandatory injunction for the restoration of possession to the opposite party of the said room. It was submitted by the learned advocate that there is express provision under Order XXXIX Rule 2A for a remedy for the violation of a temporary or interim injunction and court has no power to grant

a temporary mandatory injunction in exercise of its inherent power. It was contented that the provision of order XXXIX Rule 2A is a provision for execution of an order for a temporary injunction, and that in case of disobedience of a temporary or interim injunction the only remedy of the aggrieved party is to avail himself of that provision. The Supreme Court took note of **Manoharlal versus Seth Hiralal**¹⁶ and held that- *“the inherent power of the court as recognised under section 151 of the court is in addition to the power conferred on the court, under the provision of the code. All that the court is concerned is to prevent abuse of the process of court and to do justice by immediately intervening under circumstances, which require such intervention by the court”*. It was held after taking note of **Hari Nandan versus SN Pandita**¹⁷, where the Allahabad High Court took the same view that *“when a party has been dispossessed in disobedience of the order of injunction the court can in exercise of its inherent power pass such order for ends of Justice as would undo the wrong done to the aggrieved party.”*

36. In the present case, the question boils up as to whether at all, there was disobedience by the respondent in this case or not since the original order of maintaining statusquo passed by the court was modified granting permission to the police to remove the padlock and on the strength of a judicial order such order was implemented by the police and the possession was handed over to the respondent. The subsequent order of modification was set aside much after the possession was given to the respondent by virtue of a judicial order and therefore the above judgments are distinguishable factually and is not

¹⁶ AIR 1962 Supreme Court 527

¹⁷ AIR 1975 ALL 48

applicable in the instant case, since there was no violation of order of temporary injunction or interim injunction. In such circumstances when the petitioner is claiming restoration of possession he ought to have come by filing Section 144 of the Code of Civil Procedure which is as follows;

“144. Application for restitution

1) where, and in so far as a decree or an order is varied or reversed in any Appellate, revision or other proceeding, or is set aside or modified in any suit or appeal, the court, which passed the decree or order shall, on the application of any party entitled to 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, the court may make any orders, including orders for the refund of costs, and for the payment of interest, damages, compensation, and mean 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 revision 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)."

37. In the case of ***Vanshidhar Sharma versus state of Rajasthan and others***¹⁸, the doctrine of restitution under Section 144 and 151 and its applicability was discussed. It was observed that-

"17. It clearly transpires that Section 144 CPC applies to a situation wherein decree or order is varied or reversed in appeal, revision, or any other proceedings or is set aside or modified in any suit instituted for the purpose. The principle of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the suit to receive the benefit of the decree to make restitution to the other party for what he has lost. The obligation arises automatically on the reversal or modification of the decree and necessarily carries with it. The right to restitution of all that has been done under the decree which has been set aside or an order is varied or reversed, and the court is making restitution is bound

¹⁸ (2019) 19 ACC 701

to restore the parties, so far as they can be restored to the same position as they were in at the time when the court by its action had displaced them.”

In the present fact and circumstances, she filed an application before the court after the order of interim injunction was passed and the court after hearing the parties passed the order which was implemented by the Bidhan Nagar Police official. Therefore, by no stretch of imagination, it can be said that the order of injunction was violated. If the subsequent order is construed as a modified order pursuant to which possession was restored to the sister, and thereafter, upon the modified order being set aside the question of invoking the inherent jurisdiction of the court under Section 151 of the code of civil procedure does not arise. In such circumstances, Section 151 CPC cannot be invoked to seek restoration of possession.

38. The learned trial court after considering the submissions made by the learned advocates of both sides and considering the materials and record was also of the view that it has to be ascertained as to what the position was before the police had acted as per order passed by the court, is not possible at this stage accordingly rejected the said petition.

In view of the discussions as made the question of exact position while passing of the interim order which was subsequently modified about the exact position at the time of passing of the original order becomes secondary but when it is evident that no order of interim injunction was violated and the entire action was done on the strength of a judicial order which was set aside after implementation of such order, it can be termed as violation of Court's

Order. Accordingly this court do not find any merit in the case for interference as the restoration of possession in this case cannot be allowed by exercising inherent power when alternative remedy is available.

39. In **C.O 1921 of 2022** filed by the present petitioner/son was the pro forma defendant in the suit filed by the mother and later on transposed as the plaintiff in place of his .After being transposed, he filed the petition under Section 151 of the Code of Civil Procedure with the further prayer directing the opposite party to makeover possession of all the floors of the suit property within a specific time limit and also to restore all household articles, furniture fixture and fittings.

40. The Learned advocate appearing on his behalf tried to impress upon the court that it is an equivocally established that the respondent behind the back of the petitioner had entered into a development agreement with a developer, namely Rajiv Rajan Kumar, who with active aid and advice of the respondent dismantled the entire internal structure of the suit property and used the same for commercial and business purpose without any sanction and authority of the competent authority. At the instance of the petitioner by an order dated 21.02.2022 in W.P.A no. 2090 of 2022 coordinate bench directed Bidhan Nagar municipal Corporation to hear the parties to pass a reasoned order and in pursuance to such order the Bidhannagar municipal Corporation by an order dated 10.7.2023, directed demolition of the unauthorised structure ,directed without any sanctioned building plan and contravention of the provision of the West Bengal municipal Corporation act, 2006. An appeal was preferred by the respondent before the Hon'ble Division Bench and

whereby on 26.2.2024, the order of the learned Single Judge was affirmed. Therefore, it is crystal clear that there was violation of the injunction order as the respondent has changed the nature and character of the suit property illegally and raised unauthorised construction in the suit property , and also changed the nature of the building from residential to commercial without any sanction or authority. Assuming the contention raised by him are correct but for that reason a proceeding under Order XXXIX Rule 2A of CPC has been initiated and these facts are not relevant to consider the subject matter of the revisional application.

41. Similarly this court do not appreciate the submissions made by the Learned Counsel of the Respondent regarding applicability of the provision of order 2 Rule 5 of the code of civil procedure, 1908 in the instant suit as the transposed plaintiff is an executor to the will of his mother and is also a legatee. It is specifically argued on her behalf that the proceeding filed under section 151 of the code is not maintainable for having a relief of restoration of possession but that can be claimed by taking appropriate recourse .It is admitted that on the strength of a judicial order she was given possession of certain portion and hence after such judicial order being set aside her possession becomes questionable and the present plaintiff in the capacity of an executor can very well maintain appropriate application for restoration of such possession. However as discussed thoroughly in **C.O no. 1920 of 2022** and the same prayer being made this revisional application also cannot be allowed. Accordingly this revisional application being CO 1921 OF 2022S stands dismissed.

C.O 2316 OF 2022

42. This revisional application is filed by Dr. Rajashree Roy Bandopadhyay against her brother challenging the portion of the common judgement dated 1st June, 2022 in T.S no. 669/2917 whereby an application under Order VI Rule 17 of CPC was allowed. It is the case of the petitioner that after demise of the original plaintiff the present opposite party as an executor to the last will as alleged of their mother Late Urmila Roy applied to be transposed as plaintiff and the same was allowed which was challenged before this court by the petitioner being perverse .After being transposed the opposite party filed this application for amendment of the plaint which practically would change the nature and character of the suit as he is now praying for declaration of his right title and interest in respect of the suit property against the present petitioner which is not sustainable in the eye of law .

43. The Learned Advocate appearing on behalf of the opposite party on the contrary argued that the four points raised by filing such amendment application are necessary for determining real controversy between the parties and formal in nature and in no way will destroy the basic structure of the suit.

44. On perusal of the application filed under Order VI Rule 17 of the Code of Civil Procedure, 1908 it appears that the proposed schedule of amendment prayed for as follows;

“1. In para 4 of the plaint after the last sentence “On death of Original plaintiff and before the order of transposition, the transposed plaintiff duly applied for probate of the Will which having been rendered contentious now pends before learned 1st Court of

Additional District Judge at Barasat being numbered as OS 44/2019". This sentence be inserted

2. In para 8 of the plaint after the last word "earlier", "even through as per statement made earlier in para 4 of the plaint, the alleged will allegedly made by Dr. Urmila Roy stood revoked followed by a holographic Will". Be inserted

3. In para 9 of the plant at page 8 in fourth line after the word "absolutely" "and on the death of Dr. Urmila Roy transposed plaintiff is entitled to $\frac{1}{2} + \frac{2}{3}$ rd of balance half of the property total $\frac{5}{6}$ th share of the whole property" be inserted.

4. In the prayer (a) second line " $\frac{1}{2} + \frac{1}{3}$ rd" will be deleted " $\frac{5}{6}$ th share" will be inserted.

5. In the prayer (b) in fourth line after the words "suit property by the" "transposed" be inserted, and in same line after the word "Plaintiff" "and also proforma defendant" be deleted."

45. Therefore the above proposed amendment disclose that the opposite party after being transposed as plaintiff has tried to amend the plaint by claiming his own share inherited after demise of their mother in accordance with the law of succession . The law in this regard is very clear that a transposed plaintiff cannot exert any other point than what was claimed by the original owner. The opposite party was not substituted in his place but transposed as an executor and the entire suit property vests in him. He can take all such steps to preserve and protect the interest of the original plaintiff but cannot prayed anything in excess which would be beneficial for him in his personal capacity though in this case the opposite party is the legatee himself. However after the probate is granted the situation would be otherwise and the opposite party will then be entitled to claim his own right title interest on the strength of the probate if granted but till such time excepting the required amendment

which is necessary after demise of the original plaintiff which are to be amended . Accordingly the portion of the order allowing the amendment is hereby set aside.

46. The opposite party is given liberty to take out an amendment application afresh within a period of two weeks from this date and to serve the copy of the same to the conducting Advocate of the petitioner and the Learned Court is directed to dispose of such application at an earliest preferably within a period of one month therefrom after giving opportunity to both the parties.

47. Accordingly this revisional application being **C.O 2316 OF 2022** stands disposed of with the above observations.

48. Urgent certified copy if applied by any of the parties to be supplied subject to observance of all formalities.

(CHAITALI CHATTERJEE DAS, J.)