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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
DECIDED ON: 26th July, 2013

+ **FAO(OS) 329/2013**
M/S HANSA VISION PVT LTD

..... Appellant

Through : Mr. I.C.Kumar, Adv.

versus

M/S DABUR (INDIA) LTD & ORS

..... Respondents

Through : Mr. Sudhir K.Makkar, Adv. for
Dabur(India) Ltd.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

% **MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)**

FAO(OS) 329/2013 & CM No. 11216/2013(stay)

1. The present appeal is directed against the order of the learned Single Judge dated 21st May, 2013 whereby the appellant was directed to pay the interest at the rate of 9% per annum on the sum of Rs. 23,39,177/- deposited by the respondents/defendants during the pendency of RFA(OS) No.27/2010.

2. The brief facts of the case are that the present appellant had filed suit No.2532/2000 for recovery of Rs.43,85,605/- against the defendants. That suit was decreed on 15th February, 2010. The

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Respondents/defendants' appeal was admitted by an order of 5th May, 2010. They were directed to deposit the principal amount of Rs.23,39,177/-, which they did. The plaintiff/appellant applied to the Court for withdrawal of the amount; the Court permitted it to do so and further directed it to furnish an appropriate security by way of bank guarantee. Eventually, by the judgment dated 13th July, 2012; the respondents' appeal was allowed and the plaintiff's suit was dismissed. At the time of the delivery of judgment, the Division Bench stated that the defendants/respondents would be entitled to refund of the sum withdrawn by the plaintiff during the pendency of the appeal and any orders on interest would be upon an application made in that regard, to its restitution of the benefits derived by the plaintiff.

The defendant approached the Court under Section 144 CPC which has been allowed by the impugned order. Whilst allowing the claim under Section 144 CPC, the Court observed that:-

"Though it was nowhere stated in the interim order of 5th May, 2010 that any interest was payable by the plaintiff in the event of there being any order of invoking of bank guarantee, but the Division Bench in its order of 13th July, 2012 specifically observed that if defendant

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No.1 was able to establish a claim with respect to the interest on the said amount, it would be entitled to seek restitution by initiating appropriate proceedings. Section 144 CPC provides the remedy of restitution not only in the case of judgment and decree being set aside and modified, but even in the case of any order being varied, modified or set aside, that the party entitled to benefit of restitution could seek restitution of the benefits enjoyed by the other party. It is specifically provided that in such an event, the Court may pass any order including orders for the refund of the costs and for payment of interest, damages, compensation and mesne profits which are properly consequential on such variation, reversal setting aside or modification of the order. In the instant case, the plaintiff having enjoyed the benefit of withdrawal of Rs.23,39,177/- which it was ultimately found as not entitled to, the plaintiff can be directed to retribute the benefit of interest on the said amount to the defendant No.1 from the date of withdrawal of the said amount. Consequently, the plaintiff is directed to pay the interest @ 9% on the said amount of Rs.23,39,177/- to defendant No.1 from the date of withdrawal till the date of repayment. Further, the defendant No.1 would also be entitled to the refund of the Court fee which is not contested by the plaintiff."

4. Counsel for the plaintiff/appellant contests the impugned order and submits that the learned Single Judge fell into serious error of law invoking the power under Section 144 CPC. It was urged that the plaintiff has never sought for deposit of the amount and could not be said to have derived the advantage which the learned Single Judge

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inferred. It was urged that as a consequence of operation of law, i.e. under Order 41 Rule 5 CPC, the defendant had deposited the amount which the plaintiff was entitled to withdraw during the pendency of the appeal. The counsel highlighted the fact that the plaintiff had to spent Rs.2 lakh as commission to the Bank in order to keep the bank guarantee alive. Counsel relied upon the decision of the Supreme Court reported as *Bhagwant Singh v. Sri Kishen Das* AIR 1953 SC 136, especially the following observations:-

"An order of restitution in the manner asked for in the circumstances of this case would be contrary to the principles of the doctrine of restitution which is that on the reversal of a judgment the law raises an obligation on the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost and that it is the duty of the Court to enforce that obligation unless it is shown that restitution would be clearly contrary to the real justice of the case. The decree holder in the present case has derived no advantage to which he was not entitled and the judgment debtor has lost nothing."

5. It would be relevant to extract Section 144 of the Code of Civil

Procedure for deciding this appeal. It reads as follows:-

"144. Application for restitution.- (1) 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 ii any

suit instituted for the purpose, 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 mesne profits, which are property consequential on such variation; reversal, setting aside or modification of the decree 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.

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

6. The Supreme Court had in the decision reported as *Mrs. Kavita Trehan and another v. Balsara Hygiene Products Ltd.* AIR 1995 SC 441 occasion to review the law on the subject. While doing so, the Court considered the previous rulings *Padam Sen and Anr. v. The State of Uttar Pradesh* AIR 1961 SC 218 and a latter judgment in *Binayak Swain v. Ramesh Chandra Panigrahi & Anr.*, AIR 1966 SC 948, especially the following passage:-

"...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 or 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 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..."

The Court in *Kavita Trehan* (supra) held that the law on restitution is not confined to the four corners of the letter of section

144 but is a wider concept. Pertinently the Court observed that :

"The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did 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 the purpose,..." The instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court."

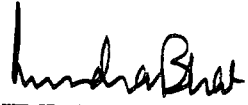
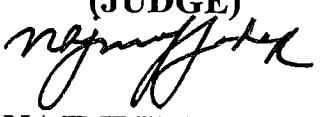
7. In the present case, the plaintiff succeeded in his suit; the appeal was entertained on 5th May, 2010 subject to the defendant depositing the principal amount, i.e. Rs.23,39,177/-, which they did. The plaintiff had the benefit of that amount as is evident from the fact that he was permitted to withdraw it subject of course to furnishing of his bank guarantee. He continued to enjoy that benefit for more than two years; the suit was eventually dismissed on 13th July, 2012.

8. Having regard to the overall conspectus of facts, this Court is satisfied that the justice of the case demanded that substantial restitution so far as the benefit of interest which the plaintiff enjoyed over and above the principal amount, had to be made to the defendant.

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The Court notices that originally the suit had been decreed for Rs.43,85,605/- with interest at the rate of 12% per annum. All that the Single Judge did by the impugned order was to reconstitute the defendants to the extent directing the plaintiff to pay 9% per annum on the sum of Rs.23,39,177/- for the duration he enjoyed it. As stated earlier, this Court is satisfied that the justice of the case demanded that substantial restitution had to be made to the defendants. There is an indication in the Division Bench's order (allowing the defendant's appeal) that recourse could be made to an application under Section 144 CPC.

9. In view of the above discussion, the Court is of the opinion that the present appeal is meritless; it is, therefore, dismissed.


S. RAVINDRA BHAT, J
(JUDGE)

NAJMI WAZIRI, J
(JUDGE)

JULY 26, 2013
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