

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23..12.2016

CORAM

THE HON'BLE MRS.JUSTICE PUSHPA SATHYANARAYANA

TR.CMP.No.739 of 2016

and

C.M.P.Nos.19157 and 19884 of 2016

Accord Finance and Properties Ltd.,
rep.by its Director R.Ramakrishna
10, Lynwood Avenue
Mahalingapuram
Chennai 600 034. ... Petitioner

vs

M/s.Besser Concrete Systems Ltd.
rep.by Saji Cherian
1/208, Kelihaman Koil Street
Kelambakkam
Kancheepuram District
Tamil Nadu 603 103. ... Respondent

Prayer: Transfer Civil Miscellaneous petition filed under Section 24 of the Code of Civil Procedure seeking to transfer E.P.No.6 of 2015 in O.S.No.668 of 2014 including the miscellaneous petitions in E.A.No.74 of 2016 pending on the file of the District Munsif at Chengalpattu to the file of the Principal District Judge, Chengalpattu to be tried along with O.S.No.119 of 2016 forming the subject matter of Execution Petition and the connected suits, as per orders of this Court passed in CRP No.60 and 793 of 2016 dated 01.07.2016.

For Petitioner : Mr.R.Thiagarajan

For Respondent : Mr.M.S.Krishnan
Senior counsel for
M/s.Fox Mandal Associates

ORDER

The plaintiff in O.S.No.668 of 2014 is the petitioner, who has filed the above petition seeking transfer of E.P.No.6 of 2015 in O.S.No.668 of 2014 including the miscellaneous petition

in E.A.No.74 of 2016 pending on the file of the District Munsif at Chengalpattu to the file of the Principal District Judge, Chengalpattu to be tried along with O.S.No.119 of 2016 forming the subject matter of Execution Petition and the connected suits, as per orders of this Court passed in CRP No.60 and 793 of 2016 dated 01.07.2016.

2. It would be relevant to discuss the facts, before proceeding to decide on the Transfer Civil Miscellaneous Petition.

(i) The petitioner/plaintiff has filed the civil suit in O.S.No.668 of 2014 against the respondent/defendant before the District Munsif Court at Chingleput claiming the relief of delivery of vacant possession of the suit property. The suit was decreed exparte on 09.04.2015. Pursuant to the same, the petitioner filed E.P.No.6 of 2015 for delivery of vacant possession and the same was also ordered on 05.01.2016.

(ii) Earlier, the respondent had paid Rs.2 crores to the petitioner company on account of purchase of land. The respondent was put in possession of the entire property and they had also put up super structure and buildings. The said land was leased out by registered lease deeds to the respondent through various lease deeds. When it was agreed to be sold, Rs.Two crores was paid towards sale price and an agreement to sell was entered into between the parties on 10.10.1997. While the agreement was in subsistence, the petitioner seems to have sold portion of the land to third parties. Therefore, the respondent has filed a suit seeking specific performance of the agreement to sell before the High Court in C.S.No.856 of 2005 against the petitioner and others. The said suit was transferred to the District Court at Chingleput and was re-numbered as O.S.No.54 of 2016.

(iii) In the meantime, the above suit in O.S.No.668 of 2014 came to be filed by the petitioner and an exparte decree was passed. The respondent filed an application to set aside the exparte decree with a delay petition. On 05.01.2016, the delay petition was dismissed and on 06.01.2016, delivery warrant was issued to the petitioner herein in E.P.No.6 of 2015. Against the dismissal of the delay petition, the respondent preferred CRP No.60 of 2016 along with a stay petition. One another petition in CRP No.793 of 2016 was also filed by the respondent against the order of delivery passed in E.P.No.6 of 2015. In the meanwhile, restitution application was also filed by the respondent. On 01.07.2016, this Court had passed a common order in both the Civil Revision Petitions allowing the same and had set aside the exparte decree passed in O.S.No.668 of 2014. There was also a direction by this Court to the

District Munsif, Chingleput to pass an order in the restitution petition, filed by the respondent. As against the order passed in the above Civil Revision Petitions, the petitioner filed SLP before the Hon'ble Supreme Court and that was dismissed on 29.07.2016.

(iv) The restitution petition filed by the respondent was re-numbered as EA No.74 of 2016 and was taken up for hearing and the learned District Munsif, Chingleput had allowed the restitution petition vide order dated 29.08.2016 and also directed the petitioner to handover possession to the respondent on or before 09.09.2016. Against the said order, the petitioner filed an appeal in A.S.No.24 of 2016 before the learned Additional Subordinate Judge, Chingleput along with a stay petition in I.A.No.268 of 2016. The stay petition was dismissed after contest, on 23.09.2016. Aggrieved by the same, the petitioner preferred CRP No.3274 of 2016 before this Court and said CRP also met with a same fate on 24.10.2016. A Special Leave Petition was again filed by the petitioner before the Hon'ble Supreme Court in SLP No.32744 of 2016 and the same was dismissed at the admission stage itself on 15.11.2016. Thereafter, E.P.No.6 of 2015 and E.A.No.74 of 2016 were listed for hearing. In view of the dismissal of CRP No.3274 of 2016, the learned District Munsif, Chingleput ordered delivery and the petitioner was directed to re-deliver the possession to the respondent. The said warrant could not be executed for various reasons and the same was reported to this Court.

3. While passing orders in CRP Nos.60 and 793 of 2016, this Court had transferred the suits in O.S.Nos.121, 122, 130 and 131 of 2011 and O.S.No.668 of 2014 to the Principal District Court, Chingleput to conduct simultaneous or joint trial of the suits and conclude the same within a period of three months from the date of disposal of the restitution application by the Court, which passed the decree.

4. The learned counsel appearing for the petitioner contended that the civil suit originally filed before the District Munsif Court, Chingleput in O.S.No.668 of 2014 has been re-numbered as O.S.No.119 of 2016 and is now pending before the Principal District Court at Chingleput, pursuant to the order of this Court. Therefore, to avoid multiplicity of proceedings and to avoid conflicts of decision, the petitioner seeks transfer of E.P.No.6 of 2015 in O.S.No.668 of 2014 including the miscellaneous petition in E.A.No.74 of 2016 pending on the file of the District Munsif at Chengalpattu to the file of the Principal District Judge, Chengalpattu. It is also stated that no prejudice or hardship or inconvenience will be caused to the respondent, if such transfer is ordered.

5. It is now relevant to consider the order passed by this Court dated 01.07.2016 in CRP Nos.60 and 793 of 2016, wherein this Court had earlier given certain directions. In para No.26 of the said order, it is directed that the restitution application is forwarded to the Court, which passed the decree and the Court is directed to pass order in accordance with the provisions of Section 144 of the Code of Civil Procedure and other applicable principles.

6. In para No.29 of the said order, it is held that "it is for the Court, which passed the decree to pass orders on the application filed under Section 144 of the Code of Civil Procedure and to dispose of the same within a period of one month from the date of receipt of a copy of the said order". Finally a direction was given for the disposal of the transferred suits by the learned Principal District Judge, Chingleput, within a period of three months from the date of disposal of the restitution application, by the Court, which passed the decree.

7. The above observations made by this Court in the said order was challenged before the Hon'ble Supreme Court and as stated earlier, the same was dismissed. Therefore, it has reached finality. In the order passed in the revision, it is specifically directed that the restitution application has to be tried and disposed of only by the Court, which passed the decree. Therefore, while transferring the O.S.No.668 of 2014 to the Principal District Judge, Chingleput, this Court had consciously directed the disposal of the restitution application only by the Court, which passed the decree, viz., the District Munsif Court, Chingleput.

8. Section 144 of the Code of Civil Procedure, 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 proceedings or is set aside or modified in 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 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 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.]

(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)."

Even as per the above provisions of the Code of Civil Procedure, the Court, which passed the decree alone has jurisdiction to try the restitution petition, that is the reason why, earlier this Court also though transferred the suit to the other Court, to be tried along with the other suits, for the sake of convenience, thought it fit to retain the restitution application with the Court, which had passed the decree.

9. It is also to be noted that the order in the revision was passed by this Court in the presence of both the parties. While so, if the petitioner was so aggrieved, he could have immediately pointed out to this Court about the difficulty or even when the order was challenged before the Hon'ble Supreme Court in the Special Leave Petition, the same could have been clarified. However, such clarification is not possible as the provision under Section 144 of the Code of Civil Procedure is very clear that only the Court, which passed the decree has jurisdiction to try the restitution application.

10. Mr.M.S.Krishnan, the learned Senior Counsel appearing for the respondent placed his reliance, in support of his contentions, on the following judgments of the Hon'ble Supreme Court and the relevant paragraphs are extracted as follows:

(i) AIR 1966 SC 948 [Binayak Swain vs. Ramesh Chandra Panigrahi and another]

"4. We are of the opinion that the appellant is entitled to restitution notwithstanding anything which happened subsequently as the right to claim restitution is based upon the existence or otherwise of a decree in favour of the plaintiff' at the time when the application for restitution was made. 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....."

(ii) (1995) 4 SCC 101 [Kartar Singh alias Naranjan Singh and others vs. State of Punjab]

"4. Under Section 144 C.P.C., the doctrine of restitution contemplates that where property was received by a decree- holder in execution of a decree which, on appeal, either in whole or in part thereof, is subsequently reversed or varied, the court is empowered to restore to the judgment debtor what has been lost to him in execution of the decree and it is the consequence of the erroneous decree. The restitution is consequential to the variation or reversal of the decree or on its being modified or set aside. The condition precedent for restitution, therefore, is that the decree of the, trial court must be reversed or varied in appeal or otherwise. The word "consequentially" lays emphasis on the obligation on the party to the suit or proceedings who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. The court therefore, is bound to restore the parties, as far as they can be, to the same position they were at the time when the court by its erroneous action had displaced them from it. Equally where a sum of money was

recovered in execution by a decree which was subsequently reversed or varied, the judgment-debtor is entitled to get back not only the sum recovered but also the interest thereon or damages or compensation for the period that the amount had been retained by him. The reason being that the person who has taken the money improperly from the judgment-debtor has to reconstitute to him the amount as a corollary with interest during the time that the money has been withheld from him. The owner or the person interested in the land when recovered the compensation under the award and decree which was reversed, varied or modified on appeal, the court is empowered under Section 144 CPC to reconstitute the amount to the State with interest or quantified damages or by way of compensation."

(iii) (2003) 8 SCC 648 [*South Eastern Coalfields Ltd. vs. State of M.P. and others*]

"26. The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 of the C.P.C. speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order. The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the Court, so as to wipe out the

effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing, wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

27. Section 144 of the C.P.C. is not the fountain source of restitution; it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the Court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In *Jai Berham v. Kedar Nath Marwari* (1922) 49 LA. 351, their Lordships of the Privy Council said: "It is the duty of the Court under Section 144 of the Civil Procedure Code to place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. Cairns, L.C., said in *Rodger v. Comptoir d'Escompte de Paris*, (1871) L.R. 3 P.C.: "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression, the act of the Court is used, it does not mean merely the act of the primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole from the lowest court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case". This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it, [*A. Arunagiri Nadar vs. S.P. Rathinasamy*] (1971) 1 MLJ 220. In the exercise of such inherent power the Courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144."

11. The restitution is a right given to a party not for the act of the Court being wrongful, but an act of the party doing wrongful act. The restitution means, restoring the party

to its original position, what has been lost by him, in execution of a decree or order of the Court.

12. The above decisions also only indicate that it is only the Court, which pass the decree that can pass orders in the restitution also. When such legal position is clear and this Court also had earlier specifically not transferred the execution proceedings, but only the suit to the Principal District Court, Chingleput, the transfer petition filed by the petitioner, does not have any merit, warranting transfer of the Execution Petition also to be tried along with the other suits before the Principal District Court, Chingleput.

13. In the result, the Transfer Civil Miscellaneous Petition is dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/
Assistant registrar (CS VI)

TRUE COPY//

sub assistant registrar

vj2

To

1. The District Munsif, Chengalpattu

+1 CC to M/s Fox Mandal Associates SR 76038

WEB COPY

TR.CMP.No.739 of 2016
and
C.M.P.Nos.19157 and 19884 of 2016

KSJ
sp/11/1