

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

901 WRIT PETITION NO. 269 OF 2018

CHANDRAKALABAI W/O BAPURAO SHIRSAT
VERSUS
HABIB KHAN S/O ABDUL RAHEMAN KHAN AND OTHERS

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Advocate for Petitioner : Mr. Jadhavar R.K.
Advocate for Respondent Nos. 1 to 4 : Mr. Nanabhau R. Thorat

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CORAM : V. K. JADHAV, J.
DATED : 04th December, 2019

ORDER :-

1. Heard finally with consent at admission stage.
2. The petitioner is original defendant no.3 in Regular Civil Suit No. 123 of 1978. Respondent no.1 herein had instituted the said suit for declaration and ownership and for recovery of possession. By judgment and decree dated 02.05.1987, the learned Civil Judge, Junior Division, Kaij decreed the suit and thereby declared respondent no.1/original plaintiff as the owner of the suit land Survey No. 290 situated at Waghebabulgaon, Taluka Kaij ad-measuring 9 acres 30 guntha. The trial court has also declared the sale deed dated 02.04.1974 in the name of the defendant executed by one Purushottam Ramrao Kulkarni as benami sale deed and

further, in clause (C) of the operative part of the decree, directed that the land be taken back from the possession of the Court and the plaintiff be put in possession of the disputed land with mango trees. Being aggrieved by the said judgment and decree passed by the trial court in the aforesaid Regular Civil Suit, the petitioner herein (original defendant no.3) and original defendant no.2 Bhanudas s/o Dhondiba Morale preferred Regular Civil Appeal No. 162 of 1987 before District Court, Ambajogai. Learned District Judge, Ambajogai, by judgment and order dated 16.07.1991 allowed the appeal, quashed and set aside the judgment and decree passed by the trial court in the aforesaid Regular Civil Suit No. 123 of 1978. Being aggrieved by the same, respondent no.1/original plaintiff preferred Second Appeal No. 370 of 1991 and this Court by judgment and order dated 23.02.2010, dismissed the said Second Appeal. In terms of the judgment and decree passed by the trial court in Regular Civil Suit No. 123 of 1978, particularly clause (C) of the operative part of the decree, respondent Habib Khan (original plaintiff) was put in possession of the disputed land with mango trees. The petitioner/original defendant no.3 in the said suit, in terms of the judgment and order passed by this Court in the aforesaid Second Appeal No. 370 of 1991, and since the said

judgment and order passed by this Court attained finality, filed an application for execution of the decree under Order XXI Rule 11 of C.P.C. In fact, the said application for execution of decree is wrongly mentioned as filed under Order XXI Rule 11 of CPC. The same is required to be treated as the application filed under Section 144 (1) of C.P.C. The said application for execution of decree is registered as Regular Darkhast No. 3 of 2011. The petitioner herein filed applications Exhibits 43 and 45 praying therein for issuance of the possession warrant and accordingly, notice came to be issued to the judgment debtor i.e. respondent no.1 herein and he filed his objection and say to Exhibit 43 vide Exhibit 49. Respondent no.1/original plaintiff raised objection to the effect that in favour of the petitioner no specific order has been passed by the Court to put her in possession and as such, the petitioner is not entitled to claim possession of the suit property. Learned Civil Judge, Junior Division, Kaij, by order below Exhibit 1 in Regular Darkhast No. 3 of 2011 dated 04.08.2016, dismissed the said Darkhast with costs. Hence this Writ Petition.

3. Learned counsel for the petitioner submits that Section 144 of C.P.C. speaks about restitution. In terms of the provisions of

Section 144 (1) of C.P.C., so far as a decree or order is valid or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which pass 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, place the parties in possession which they would have occupied but for such decree. Learned counsel submits that the petitioner has lost her possession due to the decree passed by the trial court which was set aside in the first appeal by the District Court and the said order has also been confirmed in the Second Appeal by this Court. Consequently, even if no order has been specifically passed by the appellate court to put the petitioner in possession of the suit property, in terms of the provisions of Section 144 (1) of C.P.C., the petitioner/original defendant no.3 is entitled for restitution.

4. Learned counsel for respondent no.1/original plaintiff submits that the executing court has rightly rejected Regular Darkhast No. 3 of 2011. During pendency of the suit, a compromise had taken place between the plaintiff and defendant no.1 Shahjanbi and in terms of the said compromise, defendant no.1

Shahjanbi was put in possession of the suit property. Learned counsel submits that prior to institution of the suit, proceedings came to be initiated under Section 145 of the Criminal Procedure Code before the Executive Magistrate and in those proceedings, the suit property was given in possession of the receiver. Learned counsel submits that in terms of the said compromise, under the panchanama drawn in the said proceedings under Section 145 of the Criminal Procedure Code, the respondent Shahjanbi (original defendant no.1) was put in possession of the suit property. Learned counsel submits that it is not the case that in terms of clause (C) of the operative part of judgment and decree passed by the trial court dated 02.05.1987 in Regular Civil Suit No. 123 of 1978 respondent no.1/original plaintiff Habib Khan was put in possession of the suit property and as such, on reversal of the said decree in its entirety, the petitioner herein is entitled for restitution. Learned counsel submits that the petitioner has not approached the executing court with clean hands and she has suppressed the material facts. There is no substance in this Writ Petition and the same is thus liable to be dismissed.

5. On careful perusal of the judgment and decree passed by the trial court, particularly clause (C) of the operative part, it appears that after decreeing the suit of the plaintiff (respondent no.1 Habib Khan) in terms of the prayers made in the suit, the trial court has directed that the land be taken back from the possession of the court and the plaintiff be put in possession of the disputed land with mango trees. The learned Additional District Judge, Ambajogai, by judgment and order dated 16.07.1987 allowed the appeal and thereby quashed and set aside the said judgment and decree passed by the trial court. So far as clause (C) of the operative part of the judgment and decree passed by the trial court, the learned Additional District Judge in para 19 of the judgment has observed that though there is no application for appointment of court receiver found on the record, however, learned Additional District Judge found only one letter vide outward no. 260/1987 dated 19.05.1987 written by the Civil Judge, Junior Division, Kaij to Shri S. N. Daund (court receiver) directing him to hand over possession of the property to respondent Habib Khan/original plaintiff. Though later the Additional District Judge has adversely commented on the said directions given by the trial court, the fact remains as it is that in terms of clause (C) of the judgment and

decree passed by the trial court and to comply with the further directions given by the trial court through the said letter vide outward no. 260 of 1987 dated 19.05.1987, the possession has been handed over to respondent no.1 Habib Khan/original plaintiff.

6. In Second Appeal No. 370 of 1991 preferred by respondent no.1/plaintiff Habib Khan, in para no. 17 of the Judgment, this Court has observed that the suit property has been subsequently purchased on 31.12.1979 by defendant Bhanudas and then 4 acres to Chandrakalabai (present petitioner). This Court has observed that it was after making inquiry with the Talathi regarding title to the suit property and thus there is no reason to hesitate to hold that the transactions of subsequent sales (Exhibits 89 and 96) are absolutely in terms of the provisions of section 41 of the Transfer of Property Act as the purchasers have taken care to verify the title, verify actual possession and rights of the vendors to execute the sale deed.

7. In the backdrop of these facts, Section 144 (1) of C.P.C. which is relevant for the present discussion is reproduced herein below:

“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 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.”

8. In the case of ***Mahijibhai Mohanbhai Barot v. Patel Manibhai Gokalbhai and others***, reported in AIR 1965 SC 1477, in paragraph no. 23 of the judgment, the Supreme Court has made the following observations:

“23. With this background the Legislature in passing the Code of Civil Procedure, 1908, introduced S. 144 therein. The said section is more comprehensive than S. 583 of the Code of 1882. Section 144 of the present Code does not create any right of restitution. As stated by the Judicial Committee in Jai Berham v. Kedar Nath Marwari, 49 Ind App 351 at p. 355; (AIR 1922 PC 269 at p. 271),

"It is the duty of the Court under S. 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."

The section, to avoid the earlier conflict prescribes the procedure, defines the powers of the Court and expressly bars the maintainability of a suit in respect of a relief obtainable under this section. The section does not either expressly or by necessary implication change the nature of the proceedings. Its object is limited. It seeks to avoid the conflict and to make the scope of the restitution clear and unambiguous. It does not say that an application for restitution, which till the new Procedure Code was enacted, was an application for execution, should be treated as an original petition. Whether an application is one for execution of a decree or is an original application depends upon the nature of the application and the relief asked for. When a party, who lost his property in execution of a decree, seeks to recover the same by reason of the appellate decree in his favour, he is not initiating any original proceeding, but he is only concerned with the working out of the appellate decree in his favour. The application flows from the appellate decree and is filed to implement or enforce the same. He is entitled to the relief of restitution, because the appellate decree enables him to obtain that relief, either expressly or by necessary implication. He is recovering the fruits of the appellate decree. Prima facie, therefore,

having regard to the history of the section, there is no reason why such an application shall not be treated as one for the execution of the appellate decree.”

In view of the above observations made by the Supreme Court, the application filed by the petitioner/original defendant no.3 Chandrakalabai before the court below shall be required to be treated as one for the execution of appellate decree.

9. Learned counsel appearing for the respondents vehemently submits that so far as the appellate decree is concerned, there are no directions for restoration of possession and as such, the provisions under Section 144 of CPC are inapplicable. I find no substance in this submission. In the case of ***Union of India represented by the Commissioner of Income-tax Madras v. Ummer Sait and others***, reported in AIR 1969 Madras 212, the Madras High Court held that the right to get restitution is a right created by the statute, flowing as a consequence of the decree being reversed by the appellate court. Whether there is any direction expressly authorising the successful party in the appeal to claim restitution or not, by the very fact of success in the appeal, the successful party acquires a right in terms of Section 144 of C.P.

Code. In paragraph no. 3 of the Judgment, the Madras High Court has made the following observations:

“3. As far as the first contention is concerned, I have no doubt whatever that the same is absolutely untenable. The right to get restitution is a right created by the statute, flowing as a consequence of the decree being reversed by the appellate court. Whether there is any direction expressly authorising the successful party in the appeal to claim restitution or not, by the very fact of the success in the appeal, the successful party acquires a right in terms of Section 144 C. P. Code. Therefore, I reject the first contention of Mr. Jayaraman.”

10. In the case of ***Mrs. Kavita Trehan and another v. Balsara Hygiene Products Ltd.***, reported in AIR 1995 SC 441, in paragraph nos. 13 and 15, the Supreme Court has made the following observations:

“13. The Law of Restitution encompasses all claims founded upon the principle of unjust enrichment. 'Restitutionary claims are to be found in equity as well as at law'. Restitutionary law has many branches. The law of quasi-contract is 'that part of restitution which stems from the common Indebitatus counts for money had and

received and for money paid, and from quantum meruit and quantum vale bat claims." [See 'The Law of Restitution' - Goff & Jones, 4th Edn. Page 3]. Halsburys Law of England, 4th Edn. Page 434 states :

“Common Law. Any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi contract or restitution.”

For historical reasons, quasi contract has traditionally been treated as part of, or together with, the law of contract. Yet independently, equity has also developed principles which are aimed at providing a remedy for unjustifiable enrichment. It may be that today these two strands are in the process of being woven into a single topic in the law, which may be termed "restitution".

Recently the House of Lords had occasion to examine some of these principles in Woolwich Equitable Building Society v. Inland Revenue Commissioners, [1993] A.C. 70.

14.

15. *Section 144 CPC incorporates only a part of the general law of restitution. It is not exhaustive. (See Gangadhar v. Raghubar Dayal, AIR 1975 All 102 (FB) and State Govt. of Andhra Pradesh v. M/s. Manickchand Jeevraj & Co., Bombay, AIR 1973 Andhra Pra. 27).*

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....."

In view of the above observations, even if the cases not falling within the ambit of Section 144 of CPC, restitution can be made under inherent powers.

11. In the case of ***South Eastern Coalfields Ltd. v. State of M.P. and others***, reported in **AIR 2003 SC 4482**, in paragraph no. 24, the Supreme Court has made the following observations:

24. *In our opinion, the principle of restitution takes care of this submission. The word 'restitution' in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the Court or in direct consequence of a decree or order (See : Zafar Khan and Ors. v. Board of Revenue, U.P., and Ors., AIR 1985 SC 39). In law, the term 'restitution' is used in three senses; (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, Seventh Edition, p.1315). The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that 'restitution' is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done. "Often, the result in either meaning of the term would be the same. Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortuous misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed." The principle of restitution*

has been statutorily recognized in S.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.”

In terms of the above observations, it is clear that Section 144 of CPC is not fountain source of restitution; it is rather a statutory recognition of a pre-existing rule of justice, equity and fair play. Therefore, 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.

12. So far as the point of limitation as raised by learned counsel for the respondents is concerned, in terms of Article 136 of the Limitation Act, 1963, the period of limitation for execution of any decree or order of Civil Court is twelve years and the time from which the period begins to run is when the decree or order becomes enforceable. In the instant case, the Second Appeal preferred by the respondents came to be dismissed by the judgment and order dated 23.02.2010 and as such, execution application filed by the petitioner herein is well within limitation in terms of Article 136 of the Limitation Act, 1963.

13. I also find no substance in the submission made on behalf of respondent no.1/plaintiff that in terms of the compromise effected between respondent no.1/original plaintiff and defendant no.1 Shahjanbi, said Shahjanbi was put in possession of the suit property. Though I find the said compromise in the record and proceedings with a verification thereon by the court, however, no further order has been passed in connection with the said compromise. On the other hand, the trial court vide clause (C) of the operative part of the order dated 02.05.1987 gave directions to put the plaintiff in possession. If at all the property was in possession of the receiver appointed in the proceedings under Section 145 of the Criminal Procedure Code, however, in terms of the directions in clause (C) of the operative part of the order dated 02.05.1987, respondent no.1 Habib Khan/original plaintiff was put in possession of the suit property. Furthermore, in Second Appeal, this Court has considered the submissions made on behalf of the purchasers, the original defendants Bhanudas and Chandrakalabai (present petitioner) and in unequivocal words made observations to the effect that they are *bonafide* purchasers.

14. In view of the above discussion and in terms of the ratio laid down by the Supreme Court in the aforesaid cases, the impugned

order is not sustainable and the same is liable to be quashed and set aside. It is incumbent upon the executing court to pass appropriate orders in terms of Section 144 of CPC for restitution. Hence, I proceed to pass the following order:

ORDER

- I. The Writ Petition is hereby partly allowed.
- II. The impugned order dated 04.08.2016 below exhibit 1 in Regular Darkhast No. 3 of 2011 passed by Civil Judge, Junior Division, Kaij, District Beed is hereby quashed and set aside.
- III. Regular Darkhast No. 3 of 2011 be restored to its original position.
- IV. The executing court shall pass appropriate orders in terms of Section 144 of CPC to restore possession of the petitioner to the extent of 4 acres out of the land Survey No. 290 situated at Waghebabulgaon, Taluka Kaij, District Beed as detailed in Regular Darkhast No. 3 of 2011.
- V. The Writ Petition is accordingly disposed off.

15. Learned counsel for the respondents at this stage submits that the effect of this order may be stayed for a period of four

weeks so as to enable respondent no.1/original plaintiff to file Special Leave Petition before the Supreme Court. However, I do not find any substance in the submissions made on behalf of respondent Habib Khan. He had finally lost the litigation way back in the year 2010 when this Court had decided Second Appeal No. 370 of 1991 by Judgment and order dated 23.02.2010. Even then respondent/original plaintiff is in possession of the suit land on the basis of the judgment and decree passed by the trial court in Regular Civil Suit No. 123 of 1978, particularly clause (C) of the operative part of the decree. The request is refused.

(V. K. JADHAV, J.)

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