

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28/11/2003

CORAM

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN

C.M.S.A.No.8 of 1994

1.Kandan (died)  
2.Kandayee  
3.Palaniammal  
4.Perumayee  
5.Saraswathi  
6.Arukkani  
7.Arumugham .. Appellants  
(Appellants 2 to 7 brought on  
record by order dated 28.11.2003  
made in C.M.P.No.15081 of 2003)

-Vs-

K.Periaswamy .. Respondent

PRAYER: Against the judgment and decree dated 12.3.1993 passed by the Subordinate Judge, Sankari in C.M.A.No.34 of 1991 on appeal from the judgment and decree in R.E.A.No.143 of 1986 in R.E.P.No.89 of 1979 in O.S.No.408 of 1978,d ated 11.9.1989.

!For Appellants : Mr.S.P.Subramaniam

^For Respondent : Mr.V.Radhakrishnan

:JUDGMENT

Heard Mr.S.P.Subramaniam, learned counsel for the appellants and Mr.V.Radhakrishnan, learned counsel for the respondent.

2.1. The Appellants 2 to 7 are the legal representatives of the first appellant, who was the defendant in the suit O.S.No.408 of 1978 on the file of the District Munsif Court, Sankari laid by one Arthanari Goundar for recovery of a sum of Rs.795.50.

2.2. Pending the suit O.S.No.408 of 1978, the plaintiff, Arthanari Goundar also obtained an order of attachment before judgment in I.A. No.932 of 1978 and the same was made absolute by order dated 22.8.1978, setting the the first appellant herein exparte. Thereafter, the exparte decree was passed in O.S.No.408 of 1978 on 29.8.1978. The plaintiff, Arthanari Goundar filed E.P.No.89 of 1979 for recovery of Rs.81 6.25 and Rs.152.90 by sale of 1.75

Acres of land, and the property of the first appellant herein was ordered to be sold on 7.6.1979, by setting the first appellant herein ex parte, and ultimately, the property was sold for a sum of Rs.1,400/- to the respondent herein on 7.6.1979. Concededly, the respondent herein is the son-in-law of the plaintiff, Arthanari Gounder. Thereafter, the sale was confirmed by an order dated 17.8.1979 and possession was also delivered to the respondent herein, viz., auction purchaser on 8.3.1980.

2.3. In the meanwhile, the first appellant filed I.A.No.525 of 1980 to set aside the ex parte decree dated 29.8.1978 made in O.S.No.408 of 1978 and the same was transferred to the file of the District Munsif Court, Thiruchengode and renumbered as I.A.No.115 of 1981. The said I.A. was allowed by order dated 8.3.1982, and the suit was restored and numbered as O.S.No.192 of 1982 on the file of the District Munsif Court, Thiruchengode.

2.4. In view of the restoration of the suit, the plaintiff, Arthanari Gounder filed I.A.No.523 of 1982 to set aside the order passed in I.A.No.115 of 1981 dated 8.3.1982, and the first appellant filed R.E. A.No.143 of 1986 under Section 144 of the Code of Civil Procedure for restitution of his property. However, I.A.No.523 of 1982 was dismissed by order dated 2.9.1985 and the same was confirmed by an order of this Court dated 1.11.1985 in C.R.P.No.3825 of 1985.

2.5. Since no steps were taken by the legal representatives of the deceased plaintiff, the suit O.S.No.192 of 1982, was dismissed as abated by order dated 29.4.1986 of the learned District Munsif, Thiruchengode. The application, R.E.A.No.143 of 1986, preferred by the first appellant herein was also dismissed on 16.11.1987 for non appearance of the first appellant herein. Thereafter, by an order dated 23.11.1987 made in R.E.A.No.382 of 1987, the order dated 16.11.1987 made in R.E.A.No.143 of 1986 was set aside and consequently, R.E.A.No.143 of 1986 was restored. However, R.E.A.No.143 of 1986 preferred by the first appellant herein under Section 144 of the Code of Civil Procedure for restitution of his property was dismissed by order dated 11.9.1989 holding that the respondent/auction purchaser is bonafide purchaser and the same was confirmed, on appeal, in C.M.A.No.34 of 1991 by judgment and decree dated 12.3.1993. Hence, the present civil miscellaneous second appeal.

3. Mr.S.P.Subramaniam, learned counsel for the appellants contends that, under the facts and circumstances of case, particularly in view of the undisputed relationship between the respondent/auction purchaser, who is the son-in-law of the plaintiff in O.S.No.192 of 1982, the finding of the Courts below that the respondent is a bonafide purchaser is perverse and illegal apparently on the face of the records and in any event, in view of the order of restoration of the suit dated 8.3.1982, which had become final as per the order of this Court dated 1.11.1985 in C.R.P.No.3825 of 1985, the appellants are entitled for restitution of their property as per Section 144 of the Code of Civil Procedure Code.

4. Mr.V.Radhakrishnan, learned counsel for the respondent contends that, notwithstanding the relationship of the respondent/auction purchaser as

son-in-law of the plaintiff, the respondent is a bonafide purchaser and therefore, the property cannot be restored.

5. I have given careful consideration to the submissions of both sides.

6. The substantial question of law that arises for my consideration in this appeal is "whether the appellants are entitled for restoration of the property under Section 144 of the Code of Civil Procedure in view of the restoration of the suit by order dated 8.3.1982 in I.A. No.115 of 1981, which also got confirmed by an order of this Court dated 1.11.1985 in C.R.P.No.3825 of 1985?"

7. In this context, it is apt to refer Section 144 of the Code of Civil Procedure, which reads as under:

"Section: 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 mense profits, which are properly consequential on such variation, reversal, setting aside or modification or the decree or order.

Explanation: For the purpose 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) whether 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)."

8.1. Under Section 144 of the Code of Civil Procedure, the doctrine of restitution contemplates that where a 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 which 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 Code of Civil Procedure to reconstitute the amount with interest or quantified damages or by way of compensation, vide *Kartar Singh v. State of Punjab*, (1995) 4 SCC 101.

8.2. The doctrine of restitution is based upon the high cardinal principle that the acts of the court should not be allowed to work in injury or injustice to the suitors. Section 144 of the Code of Civil Procedure, therefore, contemplates restitution in a case where property has been received by the decree-holder under the decree, which was subsequently either reversed or varied wholly or partly in those proceedings or other proceedings. In those set of circumstances, law raised an obligation on the party that received the benefit of such reversed judgment to reconstitute the property to the person who had lost it, vide *Neelathupara Kummi Seethi Koya Phangal v. Montharapalla Padippua Attakoya*, 1994 Supp (3) SCC 760.

8.3. While disposing an application filed under Section 144 of the Code of Civil Procedure, the burden, therefore, lies on the Court to render complete justice but not merely disposing the application on technical grounds, because the Courts are inclined to undo the ill effects of the wrong doer by passing an order to meet the ends of justice instead of defeating the justice. A reading of Section 144 of the Code of Civil Procedure makes it clear that it would apply where the judgment and decree itself was reversed and set aside.

9. In the instant case, it is not in dispute that the very decree made in O.S.No.408 of 1978 was set aside in view of the restoration of the suit. In such case, the Court has got a duty to enforce its obligation to reconstitute the property to the applicant who was deprived of his possession based on the decree or order, inasmuch as it is a settled law that whenever an *ex parte* decree or order is set aside, the party who was dispossessed or evicted in pursuance of such *ex parte* decree or order is entitled to restitution forthwith, in spite of the fact that, ultimately, on merits, he

might loose the cause; and that whenever an exparte decree or order is set aside, no person who has entered into possession through the party obtaining the exparte decree or order, can resist or obstruct restitution on the ground that he is a bonafide transferee.

10. Concededly, the respondent is the son-in-law of the decree holder, who obtained the exparte decree, but not a stranger. Hence, the owed object of the legislature enshrined under Section 144 of the Code of Civil Procedure has been miserably overlooked by the Courts below in dismissing the application filed by the first appellant in R.E.A.No.143 of 1986, as confirmed by order dated 12.3.1993 passed by the learned Subordinate Judge, Sankarai in C.M.A.No.34 of 1991.

11. For the reasons aforesaid, answering the substantial question of law in favour of the appellants, the appeal is allowed, the learned District Munsif, Sankari is directed to restore the possession to the appellants, however without prejudice to the right of the respondent to workout his right for claiming the sale amount from the legal representatives of the plaintiff, Arthanari Gounder.

In the result, the appeal is allowed. No costs.

Index: Yes

Internet:Yes

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To:

1. The District Munsif  
Sankari.

2. The Subordinate Judge  
Sankari.

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