

(1961) 02 KAR CK 0019

In the Karnataka High Court

Case No : Civil Revision Petition No. 47 of 1960

Anusuya Bai and Others

APPELLANT

Vs

B.N. Ramaiah Raju

RESPONDENT

Date of Decision : 02-02-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 144 (1)

Citation : AIR 1961 Kar 238 : (1961) ILR (Kar) 797

Hon'ble Judges : A.R. Somnath Iyer, J

Bench : Single Bench

Advocate : B.R. Keshava Iyengar, for the Appellant; H.S. Venkataramiah, for the Respondent

Judgement

1. In O.S. No. 238 of 1948-49, in the Court of the Subordinate Judge, Bangalore, the petitioners in this revision petition were some of the defendants. The respondent was the plaintiff. That was a suit brought by the plaintiff for a declaration that he was the owner of a house and for possession thereof to him. His suit was dismissed by the Sub-ordinate Judge, but, in the appeal preferred by him to the District Judge, he obtained the decree which he wanted. In Second Appeal No. 497 of 1953, this Court set aside the decree made by the District Judge, and dismissed the plaintiff's suit.

2. But, during the interregnum between the date of the decree made by the District Judge and that of this Court, the plaintiff executed his decree and secured possession of the house. After the second appeal was allowed, and the plaintiff's suit was dismissed by this Court the Petitioners made an application for restitution, under the provisions of Section 144 of the Code of Civil Procedure. The respondent contended that restitution could be ordered only on condition that the petitioners paid the value of the improvements, he claimed to have effected to the house after he secured possession thereof. He claimed that a sum of Rs. 9000/- should be paid by the petitioners before possession of the house could be delivered back to them.

3. On behalf of the petitioners, it was urged that the respondent could not claim the value of any improvements, even if he had made any, and that under the provisions of Section 144 of the Code of Civil Procedure, it was not open to the respondent to ask the Subordinate Judge to enquire into the question whether the respondent had made any improvements and if so, at what expense, since, according to the petitioners, no one who has made improvements during the pendency of a litigation would be entitled to their value.

4. The Subordinate Judge made an order that the respondent was entitled to claim compensation in respect of the improvements effected by him, and that he was at liberty to produce evidence in that regard.

5. It is against this order that this revision petition is directed.

6. Section 144 of the Code of Civil Procedure, under which the petitioners risk for restitution, reads:

"144. Application for restitution.-

(1) Where and in so far as a decree (or an order) is varied or reversed, the Court of first instance 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 or reversed; and, for this purpose, the Court may make any order 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 or reversal.

(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)".

It will be clear from this section that the order which the Court may make under the provisions of this section is one which is necessary to place the parties in the position which they would have occupied but for the decree or order which has been varied or reversed. An order which the Court may be called upon to make in that way is one which is properly consequential on such variation or reversal. Such order may include an order for the refund of costs, an order for the payment of interest, damages, compensation and mesne profits.

7. Sub-section (2) makes it clear that the restitution or other relief which could be obtained under Sub-section (1) can be obtained only on an application made for that purpose.

8. Now, in this case, the only application made under this section was that made by the petitioners. They are the persons who wanted to be placed in the position which they would have occupied but for the decree of the District Judge which was reversed by this Court. The relief which they wanted was that they should be delivered back possession of the house which was delivered to the possession of the respondent in execution of the decree which was subsequently reversed.

9. The question arising in this revision petition is whether, in a case like this, the respondent is entitled to ask the Subordinate Judge to make restitution on condition that the petitioners should pay him the value of the improvements effected by him or the cost of the reconstruction which he claims to have made of the house.

10. Mr. Keshava Iyengar, appearing on behalf of the petitioners, contends that the enquiry which the respondent wanted the Subordinate Judge to make is entirely outside the ambit of Section 144 of the Code of Civil Procedure. His argument was that a person who makes improvements to a property, possession of which he obtains in execution proceedings, during the pendency of a litigation, cannot claim that he made those improvements bona fide, or the value of those improvements.

11. Now, as pointed out by their Lordships of the Privy Council in *Jai Berham v. Kedar Nath* AIR 1922 PC 269 the principle underlying Section 144 of the CPC is that it is one of the first and highest duties of all Courts to take care that the act of the Court does no injury to any of the suitors.

12. If it can be said that the refusal to enquire into the prayer, made by the respondent in this case, for the ascertainment of the value of the improvements claimed to have been made by him, would result in an injury attributable to an act of the Court, there can be no doubt that the Subordinate Judge properly exercised jurisdiction to relieve the respondent against the consequences of such injury. If not, it is clear that the injury being one which did not arise out of an act of the Court but was the consequence of an act of the party himself, no question of affording relief in respect of such injury can properly arise under the section.

13. That that is so is clear from the words "which are properly consequential on such variation or reversal," occurring in that section. An order which may be made u/s 144, is one which, should be properly consequential on the variation or reversal of the decree. Can it be said that the order which the respondent wanted to be made in this case is one which is properly consequential on the variation made by this Court of the decree made by the District Judge?

14. The section illustrates the types of orders which can be made under it. One such order which can be made is an order for the refund of costs which may have been recovered in execution of a decree which is subsequently reversed. The other kind of order which can be made is one for the payment of interest by a person who has recovered money payable to him under a decree which was subsequently vacated and, in a case like that, it is plain that although the reversing decree does not direct the payment of such interest, the person who had with him possession of the money recovered by him under a decree which was subsequently reversed, is bound to pay interest during the period he retained it with him.

Similarly, an order for damages or compensation could also be made in cases where a person who obtains possession of Immovable property in execution of a

decree, causes damage or injury to it before the decree, in execution of which he obtained such possession, is reversed or varied, and by the time he is asked to deliver back possession of that property.

15. In such cases, even in the absence of a direction to that effect by the ultimate decree, it would be the plain duty of the Court to direct payment of costs, interest, damages or compensation. That would also be the position in the case of an order for mesne profits which can be made under the section, on the principle that a person who was in possession of property and derived income therefrom, although he had no right to it, must be regarded to have been in wrongful possession of the property. These are all orders which are properly consequential on the variation or reversal of the decree.

16. I should not be understood to state that these are the only orders which may be made under the provisions of this section. The section itself makes it dear that these orders specified in that section are illustrative & not exhaustive. There may be cases in which if a person asks for restitution, he can be asked simultaneously to make restitution himself, to the party against whom he is asking restitution. Such restitution would become necessary where the last decree in the litigation gives rise to simultaneous claims for restitution.

17. Now, the Court below was of the view that because Section 144 empowers the Court to make an order for the payment of compensation, it had clearly the power to direct the payment of compensation by the petitioners in this case to the respondent, if he had made any improvements to the suit house or had reconstructed it.

18. It seems to me that this view taken by the Court below rested on a misconstruction of the provisions of the section. The compensation payable under the provisions of this section is clearly what is payable to the person asking for restitution and not to the person from whom restitution is asked.

19. That that is so is clear from the fact that whatever order may be made u/s 144 can be made only on an application presented for that purpose and so long as the decree of this Court did not create a right in the respondent for restitution against the petitioners and indeed he asked for none it is difficult to understand how, on the application presented by the petitioners, the respondent could ask for the payment to him of any compensation in respect of the improvements which he claimed to have made during the pendency of the litigation.

It seems to me that where an order is asked for u/s 144 of the CPC for refund of costs or for the payment of interest, damages, compensation or mesne profits, that order, can be made only in favour of the person who is entitled to restitution and it can hardly be contended, in this case, that the order which the respondent wanted to be made in his favour is either properly consequential on the decree of this Court or can be regarded as in the nature of restitution.

20. But, Mr. Moganna, appearing on behalf of the respondent, has urged that it is

well established law that when an application is made for restitution, it is the duty of the Court below to place both parties in the position which they would have occupied but for the decree which has been varied or reversed. He contends that but for the decree of the District Judge, he would not have obtained delivery of possession of the house and that if he had not obtained delivery of the house, he would not have effected improvements to it or reconstructed it.

He, therefore, asks me to hold that he should be relegated to the position which he would have occupied if he had not spent the money which he claims to have spent over the improvement of the house or its reconstruction.

21. In support of this contention, Mr. Moganna has invited my attention to cases in which it has been held that in a case where the party claiming restitution asks for mesne profits and he is a tenant of the opposite side, liable to pay rent, in respect of the property involved in the restitution proceedings, the rent payable by him to the opposite side can properly be deducted out of the mesne profits claimed by him. That was what was pointed out in AIR 1931 12 (Oudh) and Ponnappalli Venkatappayya and Another Vs. Pushadapu Ramaswami and Others, .

22. Although there was at one stage a conflict of views on the question as to whether in a case like that, the rent payable by the tenant to his landlord could be deducted out of the mesne profits claimed by the tenant, a Full Bench of the High Court of Madras in Ponnappalli Venkatappayya and Another Vs. Pushadapu Ramaswami and Others, on which Mr. Moganna relied, took the view that it could be so deducted. The principle underlying this view is abundantly clear. If a person claims mesne profits for the period during which another man has been in wrongful possession, and, during that period, he was himself liable to pay some rent to that person, he could not be allowed to claim those mesne profits without giving credit in respect of the rents payable by himself.

In a case like that, when the Court, under the provisions of Section 144, makes an order for the payment of mesne profits to the party claiming restitution, the quantification of the mesne profits cannot properly be made without debiting the tenant with the rents which he had himself to pay. The quantification of the liability of the person in wrongful possession of the property, by deducting the rent payable to him is one which is properly consequential to the decree bringing about the variation or reversal of the decree from which there was an appeal and, is, therefore, one which can properly be made u/s 144 of the Code of Civil Procedure.

23. Mr. Meganna, however, strongly relied on the decision of their Lordships of the Privy Council in AIR 1922 PC 269 in support of his contention that when a court is asked to make restitution, it should decide all the claims of all the parties to the proceedings before it, so that there should be no outstanding claim against any one of them.

24. In the case which was decided by their Lordships of the Privy Council, the question which arose for consideration was whether an auction-purchaser who, in

an execution sale, purchased property was entitled to the repayment of the purchase money paid into Court before he could be called up to hand over possession of the property to the judgment-debtor. On the principle that no suitor should suffer from an injury caused to him by an act of Court, their Lordships of the Privy Council held that the auction-purchaser was entitled to the repayment of the purchase money.

25. Now, the payment of the purchase money into Court by the auction-purchaser in that case was one which he did on the faith of the execution sale held by the Court, and their Lordships of the Privy Council pointed out that if the auction-purchaser parted with his money in that way, the judgment-debtor could not ask for restoration of possession without the repayment of the amount paid to him.

26. The distinction between an injury attributable to an act of Court and one which is attributable to a person's own act was also pointed out by their Lordships of the Privy Council in that case. The auction-purchaser in that case not only asked for the repayment to him of the purchase money but he also wanted that a sum of money which he paid to clear off a bond charged on the property purchased by him should also be paid to him before restitution was ordered and, their Lordships of the Privy Council said that he was not entitled to the payment of that amount. On page 271 of the report, this is what their Lordships observed:

"As regards the sums paid by the auction-purchasers to Gobardhan Das to clear off the bonds charged on the property they had intended to purchase, their Lordships are in agreement with the decision of the High Court that this payment stands on a different footing from the deposit of the purchase-money. It was an optional payment, made without any order of the Court, and as it entitled them to stand in the shoes of Gobardhan Das as holders of the bonds, it entails no hardship; but however that may be, these payments cannot be made a condition of restoration to the judgment-debtors".

27. Now, in this case, although the respondent contended that he was obliged to dismantle the then existing house as a result of an order made by the Corporation authorities, it is clear that the reconstruction of the house or the repairs to it, which he claims to have made, was what he did, not on the faith of the decree made in his favour by the District Judge, but of his own accord and at his own option and choice. The decree of the District Judge did not make it necessary for him to reconstruct the house or to improve it when the litigation was still pending.

It may be that the dismantling of the house which the Corporation insisted upon his doing, if his allegation is true, was one which he could not refuse to do, but, even so, it cannot be said that this was what he did on the faith of the decree made by the District Judge in his favour. At any rate, the question as to whether he was entitled to the payment of any money for having done that act is not

what arises in this revision petition, since the sum of money which he claimed was one which he claimed to have spent over the reconstruction of the house and its improvement.

28. Mr. Moganna next relied on another decision of their Lordships of the Privy Council in AIR 1948 178 (Privy Council) .

29. That was a case in which the High Court from whose decision there was an appeal to their Lordships of the Privy Council, allowed credit in respect of a sum which had been spent by the person who had obtained possession of certain property, in execution of the decree which was subsequently reversed, over the repairs which were effected to that property to be deducted out of the arrears of rent. Their Lordships of the Privy Council thought that the order of the High Court was, in the circumstances a proper order.

30. It is difficult to understand from the judgment in that decision, the facts of the case and the circumstances in which that direction was made by the High Court. That was a case in which in execution of a decree, one of the parties realised the arrears of rent from the tenants of the property belonging to another party, and the decree obtained by him was reversed in appeal. Their Lordships of the Privy Council held that in the restitution proceedings the person in whose favour the litigation was ultimately decided was entitled to get back only the actual sum realised by the other party from the tenants and not the full amount of the arrears of rent payable by the tenants.

That decision only enunciated the principle on which the quantification of the sum of money payable to the person asking for restitution should be paid and does not provide any assistance to the argument that if a person obtains possession of an Immovable property, during the pendency of a litigation, and made improvements to it, he could claim the payment to him of the value of those improvement before he could be called upon to deliver possession of that properly to the person to whom it was held to belong.

31. The view that I have taken in this case was also the view expressed by their Lordships of the High Court of Madras in Velusami Naicker v. Bommachi Naicker 25 Mad LJ 324 . It was held in that case that a party who was put into possession of properties under a decree of court, which was subsequently reversed, is not entitled to be paid the value of improvements effected by him while in possession. On page 328 of the report, this is what their Lordships observed:

"The respondent has presented a memorandum of objections claiming the value of certain improvements made by him between the dates of the decree of the Subordinate Judge in O.S. 21, and the judgment of this Court in appeal reversing it. We cannot accept the contention that a party to the litigation is entitled to receive for the improvements made by him pendente lite with the full knowledge of the risk he runs in doing so. It cannot be held that he made the improvements bona fide when he was bound to be fully aware that the decree that he had

obtained might be reversed in appeal. No authority has been cited which would justify a contrary view. The rule laid down in *Mathunsa Rowthan v. Apsa Bin* 21 Mad LJ 969 with regard to an auction purchaser who is not a party to the suit being entitled to compensation for improvements made by him when he is subsequently ousted from possession on account of the sale being set aside, is not applicable to a party to a litigation concerning Immovable property making improvements during the progress of the contest between the parties. The Privy Council has held that a party to a suit who purchases properties in court auction will not have the privileges of a stranger purchaser. See *Zainulabdin Khan v. Muhammad Ashgar Ali Khan* ILR 10 All 166. See also *Sadasiva Aiyar v. Sabapathi Chetty* ILR 5 Mad 106. We therefore disallow the memorandum of objections also".

With this view expressed by their Lordships, I respectfully agree.

32. In the view that I take, the order made by the Subordinate Judge, permitting the respondent to produce evidence about the claim made by him for the value of the improvements and reconstruction of the house which he claimed to have made cannot be sustained.

33. It should also be pointed out that the Sub-ordinate Judge also made an unfortunate mistake in understanding the judgment of this Court in Second Appeal No 497 of 1953. Although in that judgment it was stated by this Court that this court would abstain from expressing any opinion as to whether the respondent would be entitled to the value of the improvements claimed to have been affected by him, in the application for restitution which might be made by the contesting defendants, the Subordinate Judge somehow thought that it contained an indication that this Court was of the view that he could make that claim.

34. This revision petition succeeds. The order of the Court below is set aside and the application for restitution made by the petitioners will now be disposed of by the Court below according to law and in the manner indicated in this order.

35. The costs of this revision petition must be paid by the respondent to the petitioners.

36. Revision allowed.