

(2017) 06 BOM CK 0203
In the Bombay High Court
Case No : 338 of 1994

Bhikchand S/o. Dhondiram Mutha

APPELLANT

Vs

Smt. Shamabai Dhanraj Gugale And Others

RESPONDENT

Date of Decision : 05-06-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 144](#)
a> - Application for restitution

Citation : (2017) 06 BOM CK 0203

Hon'ble Judges : S.C.Gupte

Bench : SINGLE BENCH

Advocate : Mohan Pungliya, Piyush Shah, S.M. Gorwadkar, Sujay Gangal

Final Decision : Allowed

Judgement

1. This second appeal raises an important question concerning restitution of a judgment debtor on a decree being varied, reversed, set aside or modified, which principle is statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. The decree passed by the trial court in the present case was varied by the appeal court. In the meantime, however, the decree was executed by sale of the judgment debtor's property. The judgment debtor applied for restitution. Both the trial court and the lower appellate court rejected his application inter alia on the ground that the original decree was modified only to the extent of interest payable and the judgment debtor, not having deposited any amount in Court after the original decree was passed and the property was put to auction, was not entitled to restitution. This second appeal was admitted on the footing that the law of restitution distinguished between decree holder auction purchaser and an innocent stranger auction purchaser, holding the former to be disentitled to any protection from restitution.

2. A few facts, which are not in dispute, may be noted at the very outset. Respondent Nos. 1 to 3 (original Plaintiffs) filed a special civil suit (S.C. Suit No.255 of 1992) against the Appellant (original Defendant No.1) and two others

for recovery of Rs.10,880/with interest at the rate of 12% per annum pendente lite and post decree, and other ancillary reliefs and costs. The suit was partly decreed on 15 February 1982 by the 4th Joint Civil Judge, Senior Division, Pune, by awarding (i) principal amount of Rs.8,000/, (ii) presuit interest of Rs.2,880/ (at the rate of 12% p.a.), (iii) pendente lite and further interest at the rate of 12% p.a. till realization of the principal amount and (iv) costs, against Defendant No.1 ("Defendant"), whilst rejecting the money claim and ancillary reliefs against Defendant Nos.2 and 3. The Plaintiffs filed an appeal (Civil Appeal No.1293 of 1986) in the District Court against the partial decree. The Defendant filed crossobjections. The Civil Appeal was decided by the District Court on 2 August 1988, by dismissing the Plaintiffs' appeal and allowing the Defendant's cross objections to the extent of interest and cost. Instead of 12% p.a., it awarded interest at the rate of 6 % p.a., both presuit and pendente lite/future interest. It directed the parties to bear their own costs. As a result, the appellate decree, whilst retaining the principal decretal amount of Rs.8,000/, reduced the presuit interest from Rs.2,880/to Rs.1,440/and the pendente lite/future interest from Rs.15,360/to Rs.7,680/, and denied costs of Rs.1,454 altogether. The total decretal amount of Rs.27,694/thus stood reduced to Rs.17,120/. The Plaintiffs had, however, in the meanwhile, applied for execution of the original decree. The properties of the Defendant were put to auction and were purchased by Plaintiff No.1 decreeholder ("Plaintiff") for a sum of Rs.34,000/, recovering by way of adjustment the entire decretal amount. One agricultural land admeasuring 24 acres was even sold thereafter by the Plaintiff to Respondent No.4. After the Defendant's cross objections were partly allowed, as noted above, varying the original decree, the Defendant applied for having the sale set aside and reversed by way of restitution. The Defendant also deposited the decretal amount (as finally decreed by the appeal court) in the trial court. Both the trial court and the first appellate court rejected the Defendant's application, basically on the ground that the Defendant had not deposited any amount in Court, when the suit was originally decreed and the decree was put in execution, that is to say, not even a part of the amount which was finally decreed by the appeal court and hence, could not invoke the principle of restitution.

3. Mr. Punliya, learned Counsel for the Appellant, makes the following submissions : (a) The auction purchaser, in the present case, being the decree holder herself, is not entitled to any equity, which a bona fide auction purchaser with no knowledge of the litigation or the pending appeal would have in the mater of such auction purchase. Learned Counsel relies on the decisions of the Supreme Court in the cases of Binayak Swain Vs. Ramesh Chandra Panigrahi, AIR 1966 SC 948 (V 53 C 182) and Chinnamal Vs. P. Arumugham, AIR 1990 SC 1828 in support of his submissions;

(b) Even an assignee of a decreeholder auction purchaser (in the present case, Respondent No.4) cannot be equated with a bona fide purchaser for value without notice. Learned Counsel relies on the Supreme Court decision in Padanathil Rugmini Amma Vs. P.K. Abdulla, AIR 1996 SC 1204 in this behalf; and

(c) In the case of a decreeholder himself being an auction purchaser, the sale cannot stand not only in the case of reversal of a decree, but any variation or modification of it. Learned Counsel relies on Rangoon High Court decision in Ban Gyi Maung Vs. Ma Ngwe Bon, AIR 1929 Rangoon 157 on this point.

4. Per contra, it is submitted by Mr. Gorwadkar, learned Senior Counsel appearing for Respondent No.4 (the transferee of the decreeholder auction purchaser), that the principle of Section 144 does not apply to the facts of the present case. It is submitted that the test for applying the principle of restitution is to consider what would be the position had the appellate decree been passed by the trial court; if the sale still would have been held for recovery of the amount eventually found payable in appeal, there is no legal or equitable reason for setting aside the sale and ordering restitution. It is submitted that even for recovery of Rs.17,120/, i.e. the amount of the final decree, the sale was inevitable in the facts of the case and as such, not liable to be set aside upon variation of the decree in appeal. Learned Counsel relies on the Supreme Court decision in Janak Raj Vs. Gurdial Singh, AIR 1967 Supreme Court 608 and two decisions of Madras High Court in Manganti Venkataswami Naidu Vs. Annpareddi Nagireddi alias Mutyalu Reddi, AIR (33) 1946 Madras 258 and Kuppa Sankara Sastri Vs. Kakumanu Varaprasad, AIR (35) 1948 Madras 12, in support of his submissions.

5. It is important at the outset to understand the principle behind the order of restitution made after the original decree is reversed or varied. Is it that every variation of a decree in appeal, revision or other proceedings, however small, would call for setting aside of a sale effected in execution of the original decree, particularly if the auction purchaser is the decree holder himself ? Is it, for that matter, really the extent of variation which is decisive ? What is really meant to be achieved by the principle of restitution ? At the very core of the principle of restitution lies the maxim "*actus curiae neminem gravabit*", meaning that an act of court shall prejudice no man. As explained by the Supreme Court in South Eastern Coalfields Ltd Vs. State of M.P., AIR 2003 SC 4482, the idea behind this maxim, and the principle of restitution deduced from it, is to relieve the aggrieved party from a situation where "an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act such party". The injury, if any, by the act of the court in such case shall be undone, and the gain, if any, resulting thereby returned, by suitably commanding the party liable to do so. There is no particular way of undoing this injury or returning the gain. The order of restitution must meet the ends of justice and not defeat the same. In Lala Bhagwandas Vs. Lala Kishen Das, AIR 1953 SC 136, the Supreme Court put the matter thus :

"On the reversal of a judgment, the law raises an obligation on the party to 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."

6. The principle of restitution is explained by the Supreme Court in the case of South Eastern Coalfields Ltd (supra) in the following words :

"24.The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal or a decree or order, what has been lost to him in execution of decree or order of the Court in direct consequence of a decree or order (See Zafar Khan & Ors. V. Board of Revenue, U.P. & Ors. AIR 1985 SC 39). In law, the term "restitution" is used in three senses : (i) return of restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done 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 nontortious 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 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."

"26. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the "act of the court" embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the Court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."

7. In a nutshell, what this means is that the ground for restitution is unjust impoverishment of a party or unjust enrichment of the other party, and the relief or measure of restitution is restoring what is lost to the impoverished party, or, correspondingly, returning of the advantage by the unjustly enriched party. If either of these is caused by an order of the Court, which is varied, modified or reversed in appeal, revision or any other proceeding, such restitution takes the

statutory shape of Section 144 of the Code. In either case, the principle commands that the party successful in getting the original decree or order varied, modified or reversed, ought to be placed in the same situation in which it would have been, had the original decree or order not been passed against it. Correspondingly, the unsuccessful party will have to return the advantage gained by it as a result of the original order. There is, however, no particular way of achieving this. The actual order that may have to be passed towards such restitution depends on a host of factors, such as, as the Supreme Court explains, (i) what the excluded party (or the successful party) would have made and (ii) what the party under obligation (or the unsuccessful party) might reasonably have made, had the original decree or order not been there or would have been there in the same form as the varied or modified decree or order. In any event, the endeavour, it is important to remember, is to do real justice as between the parties.

8. Different situations call for different measures to be adopted to do such real justice. Cases of different High Courts as well as the Privy Council and the Supreme Court provide some such instances. Some of these even date prior to the Code coming into force. In *ZainUIAbdin Khan Vs. Muhammad Asghar Ali Khan*, (1888) ILR 10 ALL 166 (PC), a case decided by the Privy Council in 1887, the decree, in pursuance of which an auction sale was held, having been subsequently set aside after such sale, the sale was not allowed to stand. In *Baboo Gawree Boyjonath Pershad Vs. Jodha Singh*, 19 W.R. 416, where the decree was not set aside but modified, it was held that a judgmentdebtor seeking as plaintiff to get rid of the sale should have relief only on condition that he paid up what was due under the ultimate decree. In *Gouree Vs. Jodha*, (1878) 19 W.R. 416, a case decided under the Code of 1859 (which contained no express provisions as to restitution), the auction sale had taken place in pursuance of an ex parte decree of Rs.10,000, which was subsequently reduced to Rs.2,000/. The partly successful judgmentdebtors could not have the sale set aside, even though the decreeholder himself was the auction purchaser. The Court held that although the ex parte decree had been set aside, nevertheless, as it now appeared, the original defendants were indebted to the plaintiff to the extent of Rs.2,000/; they were not entitled to recover the property without paying this money as a condition precedent. As they never made any such offer, their suit to recover the property was dismissed. In *Ban Gyi Maung Vs. Ma Ngwe Bon*, AIR 1929 Rangoon 157, a case under Section 144 of the Code, the original decree for Rs.550, in pursuance of which an auction sale was held and where the decreeholder was the purchaser, was modified by the High Court in appeal and reduced to Rs.110. The judgmentdebtor paid Rs.115 into the Court and demanded to be placed in possession of his property under Section 144. The Rangoon High Court held that the decreeholder would merely have a charge on the property for the amount ultimately found due by the High Court and that, on this view, the judgmentdebtor was entitled to have the land restored to him on his depositing the decretal amount in Court. The Court held that there was no

injustice to the decreeholder, who did not pay the purchase money into Court but set it off against the decree. In a more recent case of our Supreme Court, in *Lal Bhagwant Singh Vs. Kishen Das*, AIR 1953 SC 136, the original decree was affirmed at all stages except that the amount of the decree was slightly altered from Rs.3,88,300/and odd to Rs.3,76,790 and odd. The Supreme Court held that the amended decree did not in any way alter the position of the parties as it stood prior thereto and the judgmentdebtor was not entitled to restitution. The Court observed that the altered decree required the judgmentdebtor to pay the altered decretal amount in twelve equal installments and in default of three installments, made the whole decretal amount payable. The Court held that in view of the default, on the date of the sale the default clause had come into operation and the sale had not caused any loss to the judgmentdebtor in the absence of proof that he had the money to pay the installments.

9. Relying on some of these cases, Mr. Pungliya contends that in the present case the variation in the original decree is substantial, to wit, he submits, the appellate decree is 38.19% lesser than the original decree of the trial court. Learned Counsel argues that since the difference between the amounts of the appellate and the original decree is substantial, the lower appellate court's finding in the present case that "the slightest modification does not give right to restitution" is wrong. But is it really the extent of difference between the two decrees, which is determinative of the issue ? It will, no doubt, be a consideration, since, as I have noted above, it may be one of the many factors that the court may have to take into account for working out the measure of restitution. But is it crucial ? I think not. And my reasons are based on the very same considerations, which I have discussed above, as to what is truly to be achieved by applying the principle of restitution. If the idea of restitution is to place the parties in the same position which they would have occupied but for such decree or such part thereof as has been varied or reversed, the true criteria would be to consider what would have been the position had the appellate decree been passed by the court of first instance. Would the auction sale have gone through. If the sale was inevitable even in that case, there could possibly be no legal or equitable reason for setting aside the sale whilst ordering restoration. Refund to the judgmentdebtor of the amount recovered in excess by the decreeholder, possibly with a competent rate of interest, may in that case be a more appropriate measure of restitution.

10. I am fortified in this view by several judgments of our High Courts, quite a few of them of good vintage and by very learned judges. The first of them I would like to refer to is the case of *Doyal Sarkar Vs. Tari Deshi*, AIR 1932 Calcutta 303, decided by Rankin, C.J. and Pearson, J. of Calcutta High Court. The appellant, Doyal Sarkar, in that case sued the principal respondents for possession of certain lands. The trial court passed a decree for possession of lands claimed and a sum of Rupees 4986 for costs. On the respondents' appeal, the decree was varied by disallowing the plaintiff's claim to five bighas out of the suit lands and by reducing the costs to Rs.3679. In the meantime, the plaintiff

levied execution and in an auction purchase for execution of the decree of costs, himself purchased two jotes of the defendants. The jote first sold fetched Rs.35 and the second Rs.15. The defendants applied for restitution after the decree was varied. Such restitution was sought not only in respect of five bighas of land as to which they had succeeded before the appeal court, but also in respect of the two jotes sold in execution of the decree of costs. The question before the Calcutta High Court was only of these two jotes. It refused to direct possession of the two jotes to be given back to the defendants. This was on the footing that for the amount of costs ultimately awarded, it would still have been necessary to sell both jotes. The order to which the defendants were entitled was an order for the difference between the money which the plaintiff obtained by the process of execution and the amount of money to which he was ultimately found to be entitled, together with interest upon this difference. The High Court considered the true object of restitution, which it put thus :

"It is to restore the parties, so far as may be, to the position in which, according to the ultimate decision they ought to be, setting aside, so far as is necessary, and so far as is possible, all consequences produced by any erroneous action of the Court."

It considered the dicta of Madras High Court in Sundararama Reddi Vs. Raghava Reddi, AIR 1922 Mad. 96, to the effect that under Section 144, the prejudice to be removed by restitution must be the result of erroneous terms of the original decree. Madras High Court had refused to set aside the sale, having found that the amount already realized upon sale of the property was short of the sum ultimately found to be due and that if the original decree had been for the correct amount, it may still have been necessary to proceed with the sale. Ramkin C.J., speaking for Calcutta High Court, concurred with the decision in Sundararama Reddi's case and held as follows :

"It appears to me that as a matter of construction of S.144 the decision in Sundarama Reddi Vs. Raghava Reddi, is correct and that the respondents before us cannot recover property which was sold in execution except upon showing that the sale of the last of the two jotes was in substance and in truth a consequence of the error in the original decree. They cannot now be restored to the possession of anything unless it is made to appear that but for the fact that the trial Court awarded Rs.4986 as costs instead of Rs.3679 only they would now be in possession of the jotes. We have 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."

These words have to be applied with attention to the substance and reality of the matter. It makes no difference, in my judgment, whether the decree of the appellate Court is expressed by saying that the trial Court's decree be varied by reading Rs.36 instead of Rs.49; or whether it is expressed by saying that the trial Court's decree is set aside and in lieu another decree is made for the smaller

sum".

Wadsworth and Patanjali Sastri JJ in *Maganti Venkataswami Naidu Vs. Annapareddi Nagireddi*, AIR (33) 1946 Madras 258 explained the principle of Section 144 in the following words :

"Under Section 144 of the present Code the position is plain. It is only where and in so far as a decree is varied or reversed that restitution can be made and the restitution to be made is that which will, so far as may be, 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. The true criterion seems to be to consider what would be the position had the appellate Court's decree been passed by the Court of first instance. If the sale which has been held is one which would have been held even if the Court of First Instance had decreed the amount eventually found due in appeal, there is no legal or equitable reason for setting aside that sale on ordering restitution."

11. Even Supreme Court in *Lal Bhagwant Singh's* case (supra) accepted the principle stated by Rankin C. J in *Doyal Sarkar's* case (supra) in the following words :

"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 decreeholder in the present case derived no advantage to which he was not entitled and the judgmentdebtor has lost nothing. In either event he had to discharge and satisfy the decretal debt due from him whether under the first decree or under the second and that debt could only be discharged by sale of the villages selected by the decreeholder. In the words of Rankin C. J, in *Doyal Sarkar Vs. Tari Deshi*, 59 Cal. 647, the judgmentdebtor is not entitled to recover the properties except upon showing that the sale was in substance and truth a consequence of the error in the reversed decree. The sale being inevitable under the amended decree, the judgmentdebtor was clearly not entitled to restitution. It was held in *Gansu Ram Vs. Mt. Parvati Kuer*, AIR 1941 Pat. 130, that where a judgmentdebtor could not have paid even the reduced decretal amount and the sum realized at the sale was less than the decretal amount the situation could not have been altered in any way had the decree been modified before, instead of after the sale and the judgmentdebtor could not invoke the provisions of S.144, except by showing that the sale was in substance and truth a consequence of the error in the original decree. The observations made in this case have opposite application to the facts and circumstances of this case."

12. These, then, are the principles, making use of which, an appropriate order

towards restitution, which does real justice as between the parties in any given case, needs to be passed. A Madras case decided by Wadsworth J., *Kuppa Sankara Sastri Vs. Kakumanu Varaprasad*, AIR (35) 1948 Madras 12, is instructive in this behalf. In that case, a decree was passed in a mortgage suit for Rs.411974. Subsequently, under the provisions of Madras Agriculturists Reliefs Act, an application was filed by the judgmentdebtors to scale down this decree. At the time when this application was filed, execution proceedings were pending. The application was rejected on the ground that the judgmentdebtors were not agriculturists. The sale was thereupon held in execution in two lots, one for Rs.1900 and the other for Rs.2225. The decreeholder was the purchaser of both lots. The judgmentdebtors filed a revision against the dismissal of their application for relief. The revision was allowed and the application for relief was remitted to the trial court, which scaled down the decree to Rs.172890 and Rs.493 costs with subsequent interest. Under this decree, the amount which must be deemed to have been due at the time of the sale was about Rs.2469. The judgmentdebtors claimed by way of restitution the cancellation of the sale against payment of the amount of the decree as scaled down. Both the courts below held that the judgmentdebtors were not entitled to have the sale cancelled. The relief granted was of refund of the difference between the amount due under the scaled down decree and the amount realized by the sale. When the matter went to Madras High Court in second appeal, the argument of judgmentdebtors was that the equitable way of dealing with the application for restitution was to set aside the sale, at any rate, of the second item, leaving the judgmentdebtors to deposit the small amount which remained due under the scaled down decree after the sale of the first item. The High Court negatived the contention, holding that the argument seemed to rest on a misunderstanding of the correct legal position. It said :

"When the first item was sold for Rs. 1,900 there would remain an amount of approximately Rs. 569 due under the decree as finally scaled down. This amount was secured on the balance of the hypotheca and unless it was paid the Court had necessarily to complete the sale. It has not been shown that the second item was capable of subdivision with convenience or that if the decree as ultimately revised had been in existence at the time of the sale, the sale of the second item would not have been necessary in order to realise the balance of the decree."

Had the revised or scaled down decree been fully satisfied by means of the sale of the first lot, the Court would have certainly set aside the sale of the second lot, whilst maintaining the sale of the first. But since the sale of the first item would have left a balance of approximately Rs.569 still due under the amended decree, had the ultimate decree been in existence at the time of the sale, the executing court would have had no option but to proceed with the sale of the second item in order to realise the balance due under the decree. In the case before the Court, in fact, the judgmentdebtors were paid the whole of the excess price realised by the sale by the time the case came before the High Court. The Court said, their real grievance is that they have lost the increment in the value

of the land which had certainly taken place since the date of the sale. "There is no equitable reason why they should be entitled", said the Court, "to claim any portion of this increased value".

13. In the present case, the original decree was modified from Rs.27,694 to Rs.17,120. Had this modified decree been passed by the court of first instance, the auction sale would still have to be held. There was no deposit of, or even offer to pay, the amount of the modified decree by the judgmentdebtor in pursuance of the original decree at any time before the auction sale was held. There is nothing placed on record to show that had the original decree required the judgmentdebtor to pay the correct amount ultimately found by the appellate court as payable, he would have actually paid this amount. The decreeholder in the present case has derived no advantage to which he was not entitled and the judgmentdebtor has lost nothing, as a result of the unamended decree. In other words, there is nothing to show that the sale was in substance and truth a consequence of the error in the original decree. Even if that error had not been there and the original decree had been for the correct amount, the decretal debt could only be discharged by holding the auction sale in execution.

14. Learned Counsel for the Appellant submits that the decreeholder himself being the auction purchaser in the present case, he is not entitled to resist the application for setting aside the sale upon variation of the original decree, as held by the Supreme Court in *Binayak Swain* (supra) and *Chinnamal* (supra). Learned Counsel submits, relying on *Padanathil Rugmini Amma's* case (supra), that Respondent No.4, being a transferee from the decreeholder auction purchaser is in no better place to resist the application. I have explained above the principle of restitution and its application upon consideration of various circumstances. What *Binayak Swain's* and *Chinnamal's* cases lay down is that whereas a stranger auction purchaser is entitled to resist restitution on the basis of the equities applicable to a bona fide purchaser for value without notice, a decreeholder or, for that matter, a purchaser who has notice of the pending appeal, is not entitled to such equities. *Padanathil Rugmini Amma's* case puts an assignee on par with his assignor decreeholder in this respect. But that is insofar as the principle of restitution and the relief of setting aside of an auction sale as part of its application apply to the case. If they apply, a sale will be set aside save in the case of a third party auction purchaser who did not have notice of the appeal. If they do not, there is no question of applying them in the case of a decreeholder or third party auction purchaser with notice of the appeal.

15. As I have noted above, the principle of restitution in the present case does not call for setting aside of the auction sale. The proper relief to be granted in this case is to order refund by the decreeholder of the difference between the modified decree and the original decree with interest to the judgmentdebtor. There is no question then of contrasting the rights of an innocent third party purchaser with those of the decreeholder here.

16. Insofar as the Courts below have omitted to order refund of the difference

with interest, the orders need to be inferred with, though the Courts are right in refusing to set aside the sale.

17. In the premises, the Second Appeal is partly allowed by ordering Respondent Nos.1 to 3 to refund the sum of Rs.10,574 with interest at the rate of 9 per cent per annum from the date of the auction sale order, i.e. 30 April 1986 till payment or realisation. No order as to costs.

18. The status quo order operating in the matter to continue for a period of eight weeks from today.