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**(1965) 04 KAR CK 0003**

**In the Karnataka High Court**

**Case No : Civil Revision Petition No. 124 of 1965**

Bhim Rao Swami Rao Desai

APPELLANT

Vs

Laxmibai and Another

RESPONDENT

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**Date of Decision : 01-04-1965**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 144, 144 (1), 151, 2 (2)

**Citation : AIR 1966 Kar 112 : (1965) ILR (Kar) 358 : (1965) 1 MysLJ 786**

**Hon'ble Judges : Sadasivayya, J**

**Bench : Single Bench**

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## **Judgement**

(1) This is a revision petition directed against an order dated 21-1-1965 made by the Munsiff of Navalgund, ordering the restitution to the defendants of the lands, resurvey numbers 199 and 220 of Alagawad village. The relevant facts briefly stated are as follows:--

The present petitioner who was the plaintiff in the suit before the Munsiff of Navalgund (L.C. Suit No. 244 of 1961), had brought that suit for the possession of the said lands, from the defendants. In that suit, the plaintiff obtained an ex parte decree against the defendants on 28-2-1964. The defendants filed an application under Order IX Rule 13 of the Code of Civil Procedure, praying for the setting aside of that ex parte decree. While that application was pending (In Misc. Application No. 7 of 1964), the plaintiff executed the ex parte decree and obtained possession of the suit lands. Thereafter, the application which the defendants had filed under Order IX Rule 13 of the C.P.C. was allowed and the ex parte decree was set aside. Then, the defendants filed an application under S. 144 of the C.P.C. seeking restitution. It was on that application, that the order which is the subject matter of the present revision petition was passed by the Munsiff of Navalgund.

(2) At the time of hearing Sri. B.V. Deshpande for the respondents raised a preliminary objection that the revision petition was not maintainable as the order passed by the lower Court would be a decree within the meaning of S. 2(2) of

the CPC and that therefore the remedy of the petitioner would be only by way of an appeal and not by way of revision.

As against the above objection of Sri Deshpande, Sri Raikar for the petitioner has sought to contend that though the lower Court has purported to act under S. 144 of the C.P.C. the order is really one which would properly fall under S. 151 of the C.P.C. and not under S. 144 of the C.P.C. His contention is that the restitution contemplated in S. 144 of the CPC is confined only to those cases where a decree or order has been reversed by a superior Court in appeal or revision and that the power of the Court under that section to order restitution, does not extend to those cases where an ex parte decree has been set aside by the very same Court which had passed that ex parte decree. It is argued by Mr. Raikar that it could be only in the exercise of its inherent powers under S. 151 of the Code of Civil Procedure, that restitution could be ordered by a Court on its setting aside an ex parte decree passed by it.

(3) Having regard to the above contention, it is necessary to decide as to whether the order dated 21-1-1965 passed by the Munsiff of Navalgund directing restitution, is one which would fall within the ambit of S. 144 of the Civil Procedure Code. It is not disputed before me by Mr. Raikar that if that order really falls under S. 144 of the C.P.C. then this revision petition would not be competent.

(4) The decisions of the various High Courts have taken different views on the question as to whether an order for restitution made, consequent on an ex parte decree being set aside, would fall within the scope of S. 144 of the C.P.C. One view, which is a narrow one, is that such an order falls more appropriately under S. 151 of the C.P.C. This view is that result of understanding S. 144 as providing for restitution only in those cases where a decree or order has been varied or reversed, only in appeal or revision by a superior Court. The other view which is a more liberal one, is that the restitution contemplated in S. 144 is not confined only to those cases in which a decree or order has been varied or reversed in appeal or revision, and that the section is wide enough to include cases where restitution becomes necessary consequent on a variation or reversal of the decree or order, whatever may be the process by which such variation or reversal is brought about.

(5) Before referring to the decided cases it would be necessary to carefully examine the provisions of S. 144(1) of the C.P.C. A n analysis of that section shows:

(a) Where and in so far as a decree or order is varied or reversed,

(b) the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, 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;

(c) 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 on such variation or reversal.

The first part contained in (a) above sets out the condition on which are dependant the other matters set out in the sub-section. That condition is, that a decree or order must become varied or reversed. If that condition is satisfied, a duty is case, under the second part (shown under (b) above), on the Court of the first instance to cause restitution to be made. Under the last part of the sub-section (shown under (c) above), the Court is empowered to make any orders for the purpose of discharging it duty of causing the restitution to be made.

It will be noticed that it is not stated anywhere in S. 144(1) that the variation or reversal of the decree or order, must have resulted from any judgment or order made by a superior Court acting in appeal or revision. The duty of the Court to cause restitution to be made has not been made to depend on the condition that the variation or reversal should be the result of proceedings in appeal or in revision. On a plain reading of the language of the sub-section, it appears that where and in so far as a decree or an order is varied or reversed, the duty on the part of the Court arises to cause restitution to be made, on application by any party entitled to such restitution.

The narrow view, taken by some of the Courts is due to placing emphasis on the expression "the Court of first instance" in S. 144(1). It is said that this expression implies that the variation or reversal (of the decree or order), must be by a superior Court acting in appeal or revision. But, there seems to be no good reason for drawing such an inference. Section 583 of the Code of 1882(which corresponded to present S. 144) was as follows:--

"When a party entitled to any benefit (by way of restitution or otherwise), under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred: and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits."

That old section pertained to execution of decrees of appellate Courts. Section 144 has been placed in Part XI under the heading "Miscellaneous", in the Code of 1908. It will be noticed that there is no reference in S. 144(1) either to any Court of appeal or to the Court which passed the decree. Instead, the reference is to the "Court of first instance". As long back as the year 1917, a Full Bench of the Old Chief Court of Mysore repelled the contention that the words "the Court of first instance" necessarily implied interference only by a superior Court. The learned Chief Judge, while delivering the opinion of the Full Bench, explained as to why these words were inserted in the new Code, at p. 184 of 23 Mys CCR 180, *Puttanna v. Puttachari*. This is what he has stated:--

"..... I take it that the words "the Court of first instance" ought not to be read as necessarily involving the interference of a superior Court. The words were inserted in the Code in consequence of a difficulty which arose under Ss. 583 and 587 of the former Code in cases when the variation or reversal was by a Court of Second Appeal, and are not I think intended to restrict the application of the section to cases in which one Court varies or reverses the decree of another."

That the expression " the Court of first instance" need not necessarily be equated to "trial Court", is seen from a decision of a Division Bench of this Court reported in 1963(2) Mys LJ 421 : AIR 1964 Mys 117 Ratanchand v. Multanmull. Tukol J. who delivered the judgment of the Court has stated as follows at p. 423(of Mys LJ): (at p. 119) of AIR):--

"The expression is obviously distinguishable from the expressions "trial Court" and "executing Court" which are indicative of the function of the Court. So giving the words contained in the expression their normal meaning and bearing in mind the object of Section 144, it will have to be interpreted as meaning the court which can effectively give the relief by way of restitution to the party making the application such a Court need not in all cases be identical with the "trial Court" since the Court which made the payment or delivered the property may be some other court,.... It would therefore be clear that the "court of first instance" contemplated by Section 144 is that Court which paid the amount or delivered the property into the possession of the person, who by a subsequent decree or order of a competent court is bound to be not entitled to the same and it is only such Court that can set matters right."

It is thus clear, that merely on the basis of the expressions "the Court of first instance", it cannot be reasonably contended that the variation or reversal (of the decree or order)contemplated in Section 144, must necessarily be a variation or reversal effected by a superior Court. To put such a construction would be to read into the section words of limitation which are not actually there.

A Full Bench of the Patna High Court Maqbool Alam Khan Vs. Mt. Khodaija Begum, rejected the contention that the expression "the court of first instance" contemplated the variation or the reversal of the decree only by a superior court; Ramaswami J., who delivered the leading judgment, stated as follows at page 134:

"In my view; there is no warrant for construing the section in this limited sense. The phrase "varied or reversed" in the present section is unqualified and ought to receive its full force and effect. It is an established rule that words of limitation are not to be read into a statute if it can be avoided."

Further on, the learned Judge has stated as follows:

"For the applicant it was suggested that the phrase "varied or reversed" was used in a technical sense, that the phrase exclusively meant that variation or reversal of decree should be by appeal in the same proceeding. In my opinion

this argument is unfounded and there is no reason to hold that the phrase is used in such a restricted technical sense. A decree may be varied or reversed not only by an appeal but by revision to a superior court which may either affirm, set aside or modify the decree. A court may review its own decree and set it aside. If a decree is obtained by fraud or granted by a court that has no jurisdiction, succession a decree may doubtless be varied or reversed by a suit brought in a different court."

In *Alapati Ankamma Vs. Pavuluri Basava Punnayya, Patanjali Sastri J.* (as he then was), has taken the view that section 144 would be applicable provided the decree is varied or reversed, however the variation or reversal has been effected and that it is not necessary that the variance or reversal must be in appeal.

Section 144 embodies the principle that one of the first and higher duties of all courts is to take care that the act of the Court does not cause injury to the suitors. In AIR 1935 12 (Privy Council) the Privy Council has pointed out that the duty of the Court when awarding restitution under S. 144 of the Code is imperative, and that it shall place the applicant in the position in which he would have been the order had not been made. Section 144 has been enacted with a view to shorten litigation and afford speedy relief. The section does not say that the variation or reversal must be by a superior court; all that is required for the purposes of section 144 is, that the decree or order must have been varied or reversed. There is no justification for limiting the scope of that section by reading into it words of limitation which are not there.

In a Full Bench decision of the Allahabad High Court reported in *Jagendra Nath Singh Vs. Hira Sahu and Others*, Malik J. who delivered the leading judgment, has stated as follows at page 255:

"The most common method is to file an appeal or, where the decree is not appealable, a revision in a superior court which may either "affirmed", "varied", or "reversed". A Court may also review its own decree and in that case it sets aside its previous decree. It will be noticed that there is no question then of a superior and an inferior court as the Court had itself passed the decree. If a decree has been obtained by fraud or has been obtained against a person who was not properly represented or has been passed by a Court that had no jurisdiction, it may be possible to have it varied or reversed by another Court. There seems to be no reason why restitution under S. 144 should be confined only to the case where the decree has been "varied" or "reversed" in appeal or revision and has not been "varied" or "reversed" by any court by any of the other modes."

In a later decision reported in *Vindhyachal Tewari Vs. Board of Revenue and Others*, , a Division Bench of that High Court has held that S. 144, C.P.C., applies to all cases in which a decree or order is varied or reversed and when that is the case, any party entitled to any benefit by way of restitution or otherwise is entitled to be placed in the position which he would have occupied but for such

decree or order which has been varied or reversed. The learned Judges have, in that context, further observed that a decree or order may be varied or reversed in appeal or in revision, or in some other proceedings, or in a separate suit, or even by subsequent legislation. The above decision of the Allahabad High Court has been followed by the Madhya Pradesh High Court in a case reported in Choudhary Hariram and Others Vs. Pooran Singh, .

In a decision reported in Ettiyathi Madhavan v. Ouseph Thomas AIR 1950 Trav Co 48 it has been held that a variation or reversal by the Court which passed the decree will also entitle the party, who got the benefit, to secure the necessary relief under the section.

(6) From a consideration of the above authorities and on a careful examination of the language of section 144(1), I am satisfied that the said sub-section is wide enough to cover cases in which restitution is sought, consequent on an ex parte decree being set aside. I am also satisfied that this view does not in any way offend the principle underlying this sub-section. I do not see any real difference between the expression "reversed" and the words "set aside". There is no justification to exclude from the ambit of section 144(1), cases in which restitution is sought consequent in an ex parte decree being set aside.

At page 186 of the Full Bench decision of the old Mysore Chief Court reported in 23 C.C.R. 180, it is stated as follows:

"It may be that the defendant's failure to appear is often not due to any fault of the plaintiff: the defendant may miss a train, or meet with an accident on his way to court, or be misled by a mistake in the summons, or misinformed by an official of the court; but even so, there does not seem to me to be any reason why he should suffer when the court can put the parties back in the position which they would have occupied but for the decree. The decree is set aside because the court would not have made it without hearing the defendant had it known all the circumstances, and the true view seems to be that once set aside the decree not only is of no authority to support further execution, but cannot be relied on in support of acts done under it before it was set aside. It is annulled and must be dealt with as if it never had any force at any time, at any rate as between the plaintiff and the defendant.

I think therefore that section 144 is applicable and should be applied to the case before us....."

I find myself in agreement with this reasoning.

(7) From what has been stated above, it is clear that after the ex parte decree was set aside, the defendants were entitled under S. 144(1) to ask for restitution. An application for that purpose was maintainable under that sub-section. The plaintiff did not, as a matter of fact, raise any objection to the effect that such an application did not lie u/s 144(1) of the C.P.C. The lower Court has made the order in the exercise of its power under S. 144(1) of the C.P.C.

Under section 2(2) of the C.P.C., the definition of "decree" includes the determination of any question within section 144. Consequently, the remedy of the plaintiff who feels aggrieved by the decision of the lower court, is only by way of appeal and not by way of revision. This conclusion of mine is supported by the view taken in Maqbool Alam Khan Vs. Mt. Khodaija Begum, .

In the result, this revision point is not maintainable and is dismissed with costs.

(8) Revision dismissed.