
(1965) 12 KL CK 0008
In the High Court Of Kerala
Case No : Appeal Suit No. 349 of 1965

Central Bank of India Ltd.

APPELLANT

Vs

S. Chattanath Karavalar

RESPONDENT

Date of Decision : 23-12-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Citation : AIR 1966 Ker 225

Hon'ble Judges : P. Govinda Menon, J; Anna Chandy, J

Bench : Division Bench

Advocate : P.K. Kurien, V. Desikan, K.A. Nayar and K. Sukumaran, for the Appellant; P.H. Sankaranarayana Iyer and R. Ramalinga Iyer, for the Respondent

Judgement

Govinda Menon, J.—This appeal arises out of restitution proceedings in O. S. 114 of 1957 of the Sub Court. Alleppey

2. Shortly stated the facts giving rise to this proceeding are as follows :

The appellant (plaintiff) had filed a suit Order 8. 114 of 1957 before the Sub Court twalnst the respondent and two others for recovery of amounts due under an over-draft account. The respondent resisted the suit on the ground that he was only a surety and not a co-obligant and that his liability as surety was discharged on account of the plaintiff's violation of the terms pf the contract between himself and the bank. Learned Subordinate Judge look the view that the respondent was not merely a surety but a co-obligant and naturally did not go into the question whether he was absolved from liability as a surety and passed the decree as prayed for. Against the judgment and decree the respondent filed A. S. 561 of 1961 D/- 18-7-1962 (Ker) In the High Court, but the appeal was dismissed. The matter was taken up in appeal to the Supreme Court as Civil Appeal 405 of 1964 (SC). The Supreme Court allowed the appeal holding that the respondent was not liable as co-obligant that he was only a surety and sent back the case to the High Court for determination of the question whether the respondent's liability as surety was discharged. The High Court in its judgment

dated 1-4-1965 remitted the suit to the trial court for decision of this question and for fresh disposal

3. Pursuant to the first court decree certain shares which stood in the name of the appellant were sold in execution of the decree and an amount of Rs. 56,799-91 was realised by the plaintiff. The respondent had deposited a sum of rupees one lakh on 13-12-1961 under the orders of the High Court and he also furnished security as a condition precedent to the obtaining of stay. He had, on that account, to incur an expenditure of Rs. 7,674 for purchase of stamp paper and to meet the registration charges. Now, after the disposal of the appeal by the Supreme Court when the decree was set aside and the case was remitted for fresh hearing and disposal the respondent presented an application I A. 1410 of 1965 out of which this appeal arises for restitution of the above said amounts and also a sum of Rs 10,000 which he claimed by way of damages. The plaintiff opposed the application on various grounds. The subordinate Judge ordered restitution in respect of rupees one lakh which the respondent had deposited in court and also Rs. 7,671 spent for executing the security bond, but disallowed the claim for damages. In respect of Rs. 56,799.91 realised by the sale of shares it was held that as the shares were held as security the respondent was not entitled to the amount realised by the sale of such shares. The court, however, directed the plaintiff to produce the shares in court and the plaintiff was given the right to hold the same as security. The plaintiff has come up in appeal challenging the correctness of the order

4. Ex. P-1 is the judgment of the Supreme Court and Ex. P-2 is the judgment of the High Court which shows that the decree of the trial court against the respondent has been set aside. The respondent, therefore, contends that the court is bound to order restitution. The plaintiff does not dispute the right of the respondent to restitution, but what is contended is that in such matters of restitution equitable considerations are relevant and essential to be looked into, that the judgment and decree has not completely exonerated the respondent and the case has only been remanded for fixing the liability as a surety, that the suit is already posted for hearing and could quickly be disposed of and under these peculiar circumstances there is no need to order restitution and in case restitution is to be ordered proper safeguards should be made which might ensure his getting back the amount when the decree is passed in his favour.

Respondent on the other hand contends that the right of restitution is absolute and the court has no discretion in the matter and the court is bound to grant restitution if the conditions laid down by the section are satisfied.

5. Section 144 C. P. C. is in the following terms :

" (1) Where and in ,so far as a decree is varied or reversed, the court of the 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 such part thereof as has been varied or reversed; 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 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)."

This provision embodies the cardinal principle of law that acts of court should not be allowed to work any injury on the suitors and it is the clear duty of the court to place the parties in the position which they would have occupied but for the erroneous order or decree which it had passed.

6. The scope of the doctrine of restitution was considered by the Judicial Committee in a very early case in *Shama Purshad v. Hurro Purshad*. 1868 10 Moo Ind App 208 (PC). The Privy Council observed:

" If it (the original decree or judgment) has been so reversed Or suspended the money recovered under it ought certainly to be refunded and as their Lordships conceive, is recoverable either by summary process or by a new suit or action. "

In *Alexander Rodger v. Comptoir d'Escompte De Paris* (1871) LR 3 PC 465 the Judicial Committee reported that in such circumstances :

" One of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors . . . The perfect judicial determination which it must be the object of all courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest during the time that the money has been withheld. " And observed in support of that dictum.

"... the practice of the courts in India, when there has been a reversal in this country and when money has been ordered in India to be paid back in consequence of that reversal, is to order the payment of interest. " In *Jai Berham v. Kedar Nath*, 49 Ind App 351 : (AIR 1922 PC 269) their Lordships of the Privy Council said :

" It is the duty of the court u/s 144 of the CPC to place the parties in the position which they would have occupied out 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. As was said by Cairns, L. C. in (1871) LR 8 PC 465 : " One of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors and when the expression the act of the court is used, it does not mean merely the act of the Primary Court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matter up to the highest court which finally disposes of the case" ."

7. The principle on which restitution is granted was stated by their Lordships of the Supreme Court in *Bhagwant Singh v Kishen Das*, AIR 1958 SC 136 at p. 139 to be this :

"... the doctrine of restitution ... 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. "

Therefore, the moment we have, a case where the party obtained money in execution of a decree of the first court and such decree is reversed in appeal the person who has paid the money gets an immediate right of restitution.

8. Learned Counsel for the appellant referred us to the decision in *Ramesh Chandra Panigrahi and Another Vs. Binayak Swain*, . There in execution of the decree certain items of properties were sold. Thereafter the decree was set aside in appeal, and remanded when a petition for restitution was put in After fresh hearing the suit was again decreed. What was contended was that the sale had taken place pursuant to the first court decree and as that decree in execution of which property was sold was no longer in existence the defendant is entitled to restitution and the decree-holder could have the property put up for sale again. Their Lordships held that in such matters equitable considerations have to be looked into and simply because the decree in execution on which the property was sold was set aside in appeal, the sale is not necessarily to be deemed as a void sale, that ultimately a decree has been obtained and the language of the provisions of Section 144 does not admit of the position that the ultimate result of the case is to be completely ignored and restitution is to be allowed merely because the first court decree had been varied or reversed and considering the equities the judgment-debtor is not entitled to any restitution. Here the facts are different. There as observed in the Supreme Court decision the decree-holder had derived no advantage to which he was not entitled and the judgment-debtor had lost nothing and it is certainly not the purpose of restitution to place the judgment-debtor in a position of advantage to which he is not entitled. In this case the respondent contends that his liability as a surety is discharged and that question has not been finally decided.

9. That the terms of Section 144 are absolute, that restitution is a matter of right whenever the decree or order in enforcement of which money or property has been taken from a party is reversed and that the discretion of the court is only in regard to payment of interest, damages, compensation or mesne profits which are properly consequential orders have been laid down by this court in *Vasudevan v. Choylkutty* 1964 Ker LT 693.

The Bombay High Court in *Krishna A(SIC) v. Bapu Kalu*, AIR 1969 Bom 400 seems to have taken the same view In AIR 1943 189 (Privy Council) what their Lordships say is that when a decree is varied or reversed in circumstances giving

rise to a right by way of restitution the right arises automatically.

10. We cannot accede to the contention of the learned counsel for the appellant that suitable terms have to be imposed on the respondent before restitution is ordered and the money is allowed to be withdrawn. The decision of the Madras High Court in *Muthuswami Naicker and Others Vs. Ramalinga Naicker*, is instructive on the point. The Head-Note reads :

" The word " restitution" in Order 41, Rule 6 has no reference at all to the restitution proper in Section 144. It means that when a party in whose favour a decree has been passed wants to take the money deposited by the other party to avert a sale in execution of that decree, when an appeal is pending, suitable terms may be imposed on such withdrawal. The thing is quite different, when a party is only trying to draw out one's own amounts put in by the other side, by way of restitution. Simply because a Letters Patent Appeal has been filed by the other side and there is said to be a chance of its succeeding in that appeal, it is no reason to deprive the party of his right to take his money in the meanwhile, even if he is a pauper and even if the other side is prepared to pay interest to the party for the period the money lies in court on his failure to furnish security, because it will mean a forced loan of the money by the party to the other side, which no court in this country has set the power to order.

We understand that the properties of the respondent in this case are under attachment and there is no allegation in the counter filed by the appellant in this proceeding that if the amount is taken away by the respondent it will not be possible to recover it back from him in the event of the suit being decreed in his favour

11. Learned counsel for the respondent has raised an argument that he is entitled to get Rs 56,799-91 being the value of his shares sold under the directions of the court. Learned counsel for the appellant on the other hand, would say that the shares that were sold were tendered to the bank as security and they were entitled to retain the same as security till the final disposal of the suit and the respondent is not entitled to claim restitution of this amount. Learned Subordinate Judge upheld the contentions of the appellant and held that the respondent is not entitled to claim the value of the shares as the shares were held by the bank as security. We are of opinion that the decision of the court below is correct. There is nothing in the words of S 144 to justify the conclusion that it was the intention of the Code to give to the person claiming restitution any better position than that which he occupied at the time when the wrong decree was passed and this is what has to be inferred, if he has to be put in the position which he would have occupied had the right decree been passed. If the parties are relegated to the position as it obtained immediately prior to the institution of the suit the respondent cannot claim back the shares as they were held as security. His position can not be better in a proceeding for restitution.

12. So we are of the view that the respondent is entitled to the restitution in

respect of the sum of rupees one lakh deposited by him under orders of the High Court and interest The question whether the respondent would be entitled to get restitution of the amount spent by him for stamp paper and registration charges is left open to be decided at the time of the final disposal of the suit and award of costs So no order is made in this proceeding for restitution of Rs. 7,671 claimed by the respondent under this head The order of the court below is modified to this extent only There will be no order as to costs

13. Learned counsel for the respondent brought to our notice that in the stay petition stay was made absolute on condition that for the duration of the stay the petitioner will pay interest at 12 percent per annum on whatever sum is eventually awarded to the respondent Learned counsel has prayed that we should give necessary direction in terms of this order We. therefore, direct that during the period of stay the respondent would be entitled to interests at the rate of 12 percent per annum The Sub ordinate Judge will determine the amount and pass suitable direction for the payment thereof.