
(1954) 01 KL CK 0007
In the High Court Of Kerala
Case No : Second Appeal No. 9 of 1954

Ithack Joseph

APPELLANT

Vs

Kalliyani and Others

RESPONDENT

Date of Decision : 18-01-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Citation : (1954) 01 KL CK 0007

Hon'ble Judges : Subramonia Iyer, J

Bench : Single Bench

Advocate : K.T. Ninan, for the Appellant; T.S. Krishnamurthy Iyer, for the Respondent

Final Decision : Dismissed

Judgement

Subramonia Iyer, J.—The Appellant in this Second Appeal presented a plaint in the Shertallai Munsiff's Court which was numbered as O.S. 1011/1120. The suit was for redemption of a possessory mortgage. The property sought to be redeemed is situate within the territorial jurisdiction of the Shertallai Munsiff's Court. The Plaintiff was the transferee of the equity of redemption. For some reason which is not clear on the record the suit was transferred to the file of Alleppey Munsiff's Court and numbered as O.S. 562 of 1124. Both the Shertallai and Alleppey Munsiff's Courts are within the appellate jurisdiction of the District Court of Alleppey. The Alleppey Munsiff passed a decree for redemption on 12-11-1951. Execution having been applied for in that Court, the decree was transferred to the Shertallai Court for execution because the property was there. On 22-7-1952 the decree-holder obtained delivery. Thereafter the 8th Defendant filed an appeal to the Alleppey District Court (A.S. No. 421 of 1952) against the decree which was allowed. The decree of the Munsiff of Alleppey was set aside and the case remanded to him for fresh disposal. The appellate decree was on 23-2-1953. On 29-8-1953, the 8th Defendant from whom possession was taken and delivered to the Plaintiff decree-holder, filed C.M.P. No. 2135/1953 for

restitution on account of the reversal of the decree by the District Judge. The Munsiff of Shertallai allowed the application by order dated 22-9-1953. The Plaintiff appealed to the District Judge against this order (A.S. No. 428 of 1953) but did not succeed as the District Judge confirmed the order of the Munsiff. Hence he appeals to this Court.

2. Learned Counsel for the Appellant urges that the Munsiff of Shertallai had no jurisdiction to order restitution because restitution could be ordered only u/s 144, CPC which authorises only "the Court of first instance to give restitution". The Court of first instance is according to the learned Counsel for the Appellant the Court which passed the decree which in this case is the Court of the District Munsiff of Alleppey. It is argued that though the property is situate within the jurisdiction of the Munsiff of Shertallai and it was that Munsiff that delivered possession to the decree-holder nevertheless the moment he executed the decree the Munsiff became "functus officio and could not thereafter pass any order. Reliance was placed upon the decision reported in - Kishori Mohan Shadhu and Others Vs. Kumar Brahma Niranjana Chakravarty Bahadur, , where satisfaction of a decree for money was obtained by the decree-holder on the special circumstances of that case in more Courts than one, the decree having been executed in two Courts and the properties of the judgment-debtor having been attached and sold in both the Courts. The decree was passed by one of the Courts and it was transferred for execution to the other Court. It was held that the transferee Court had no jurisdiction to entertain an application for restitution.

This decision was considered in - "Alfred Zahir v. Siraj-ud-din" AIR 1944 Lah 165 (B) and the learned Judges took a view different from that held therein.

"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 "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 matters upto the highest Court which finally disposes of the case". Per Lord Cairns in - "Roger v. Comptoir D'Escompte De Paris" (1871) LR 3 PC 465 at p. 475 (C). Mulla's Code of Civil Procedure, 12th Edition, page 476.

Restitution is not execution. When on account of any wrong decision of the Court, that is to say, a decision which ought not to have been passed, a party obtains a benefit the moment the decision is found to be erroneous it becomes the duty of the Court to put matters right and every Court that is competent to set matters right has jurisdiction in that behalf. That jurisdiction is not one conferred but recognised by the Code of Civil Procedure. It is one inherent in the Court because in the absence of that jurisdiction it will be impossible to administer justice. It is fundamental that no mistake of the Court should injure a party and if a wrong decree of the Munsiff has injured the person in possession of property in the matter of his being deprived of such possession the Court that can grant restitution has inherent jurisdiction so to grant. The Court of first

instance mentioned in Section 144 really means the Court which is competent to set matters right by granting restitution in the manner and to the extent that is proper under the circumstances.

In this case the only Court that could grant restitution by redelivery of property is the Shertallai Munsif's Court because, as already stated, the property delivered and to be redelivered is situate within the jurisdiction of that Court. The argument that the application for restitution should have been presented to the Alleppey Munsiff's Court, though that Court was not competent to grant the relief but had necessarily to transfer the application to the Shertallai Court is based upon the analogy of an application for execution. For instance, a Court which had jurisdiction to pass a decree in respect of immovable property has jurisdiction to entertain the application even after the jurisdiction is transferred to Anr. Court though it cannot deal with the application but has to forward it to the Court having jurisdiction for purposes of execution.

The analogy relied upon is inapplicable if not misleading because the jurisdiction in execution is different from that in restitution. The jurisdiction as to restitution bears only a superficial resemblance to the jurisdiction as to execution.

"The Jurisdiction to order restitution is inherent in the Court and it flows, not from any power which it may have to carry into effect the decree or order of the Court, but from the recognition of the duty which it owes to the suitors to take care that no injury is done to them by its acts." Per Das J. in - Balmukund Marwari Vs. Basanta Kumari Dasi and Another, .

In my judgment, therefore the Shertallai Munsiff had jurisdiction to entertain the application for restitution and grant it.

3. Both the Munsiff of Shertallai as also the District Judge of Alleppey made a mistake in their respective orders in thinking that the decree that is executed was the one passed by the Shertallai Munsiff. That mistake, however, does not affect the correctness of the order for restitution however regrettable the mistake might be.

4. Another point urged by learned Counsel for the Appellant is that improvements have been effected in the property which he values at Rs. 75/- and that before determination of the value and payment thereof to him he ought not to be dispossessed. It is not necessary for me to consider whether the Appellant would be entitled at all to get value of improvements because learned Counsel for the Respondent does not question his right to value of improvements if he has effected any. He is agreeable that the amount claimed as value of improvements, i.e., Rs. 75/-, may be set apart from the amount deposited by the Appellant in Court to await the adjudication as to the factum of making improvements, if any made, by the Appellant and the valuation, thereof.

5. The orders of both the Courts below directing restitution to be given to the 8th Defendant Respondent are therefore correct and the second appeal is dismissed

with costs. The Appellant will be entitled to have the question of improvements effected by him and their value adjudicated on an application made by him in that behalf to the Shertallai Munsiff's Court. The necessity to consider the question of the existence of the improvements or their value will not however stand in the way of the order for restitution being given effect to forthwith.