

**(1991) 05 DEL CK 0041**  
**In the Delhi High Court**  
**Case No : Suit No. 39 of 1990**

Kavita Trehan and Others

APPELLANT

Vs

Balsara Hygiene Products Limited

RESPONDENT

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**Date of Decision :** 28-05-1991

**Acts Referred:**

**Citation :** AIR 1992 Delhi 92 : (1991) RLR 544

**Hon'ble Judges :** A.D. Singh, J

**Bench :** Single Bench

**Advocate :** I.S. Mathur, A.K. Ganguly and S.C. Gupta, for the Appellant;

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## Judgement

Anil Dev Singh, J.

(1) Two questions arise in this suit. The first one being whether the suit is liable to be dismissed in view of Section 69 of the Indian Partnership Act, partnership being un-registered on the date of filing of the suit and in case the suit is to be dismissed, the second question would, be whether the parties are to be relegated to be original situation prevailing on March 27. 1989, the date the suit was and an ex-parte order granted permittiang the plaiatiffs. agents to sell the goods defendant principal. In order to appreciate these questions, it will be necessary to recount the relevant facts.

(2) The plaintiffs instituted the present suit against defendant in the court of senior Sub Judge, Chandigarh. In this suit, the plaintiffs, defendant seek a declaration that they being clearing and forwarding agents of defendant have lien over the goods of the latter which were lying in their possession account of their outstanding outstanding commission. Apart from this, the plaintiffs claim a decree restraining the defendants from interfering in any manner in disposing of the stocks of the defendant lying in their possession. . . In the plaint, it is averred that the plaintiffs were carrying on business as partners of M/s Subhagya Agencies, and they were appointed by the defendants as their Clearing and forwarding Agents for selling their products namely, tooth-paste, tooth powder,

tooth-brush, mosquito-repellent, cleaning powder and toilet freshner. An agreement is said to have been executed between the parties, operative w.e.f. April 1, 1985, wherein it was stipulated that the plaintiffs will be entitled to a commission @ 1.5% up to a turn over of Rs. 2 crores and on subsequent transactions @ 15. According to the plaintiffs the terms and conditions of the agreement were revised by the letter of the defendant dated April 4, 1986 in anticipation of increase in the turnover for the year 1986-87. It is further pleaded that the first agreement between the parties was for the period April 1, 1985 to March 31, 1986, While the second agreement was to remain in force from April 1, 1986 to March 31, 1987. It was the case of the plaintiff that they suffered huge losses during the year 1986-87 as the defendant was not able to maintain the quality of its products. In view of this, the plaintiffs expressed their unwillingness to continue on the then existing terms and conditions. However it is alleged that defendant after the expiry of the agreement for the year 1986-87 kept on persuading the plaintiffs to continue working as its agents. Former kept on assuring that losses suffered by the later during the year 1986-87 would be compensated by revising the terms for the subsequent year and the commission for the year 1987-88 would be paid as per normal trade practice. It is further maintained that other companies similarly situate had been paying the commission @ 2% during the year 1987-88 to their agents. It is also averred that the plaintiffs were Clearing and Forwarding Agents for Hawkins Cokers Limited, Bombay and Indian Shaving Products, Delhi and the said companies were paying to the plaintiffs a gross commission of approximately 2% on the sale of their products. According to the plaintiffs as per the trade practice, the C&F agents were being paid commission @ 2% during the year 1987-88. the further allegation of the plaintiffs is that for the period April 1, 1987 to December 31, 1988 the defendants kept on making payment to them on the same patte as was followed in 1986-87 and were paid only a sum of Rs. 20,000.00 per month as commission. The plaintiffs further stated that they signed an agreement with the defendant for the year 1987-88 only on September 13, 1988. The agreement according to them has no validity in the eye of law as the same was not executed during the currency of year 1987-88. It is the further case of the plaintiffs that in December 1988 the defendant company sent a draft agreement for execution which contained inter-alia a condition that commission would be payable at 3% over and above the expenses to be incurred by the former for running their C & F business besides the plaintiffs were to be paid rent for Zirakpur and Chandigarh depots @ Rs. 3700.00 and Rs. 2000.00 per month respectively. That apart the plaintiffs were also entitled to unloading and local delivery charges besides the plaintiffs were to be paid a consolidated suift of Rs. 5,500.00 per month for services rendered and other establishment expenses insured by them. It is asserted that the total turnover of the plaintiffs for the year 1988-89 including stock receipts up to March 25, 1989 which were being dispatched as per letter of the defendant dated March 21, 1989 comes to Rs. 4,19,45,725.70. The plaintiffs claim that they are entitled to a sum of Rs. 15,80,861.85 from the defendants as per the following details : Commission amount on @ 3% total turn over Rs.

12,581,361.46 Amount of security deposited Rs. 3,00,000.00 Interest on security Rs. 22,500.00 Total amount recoverable Rs. 15,80,861.85. The plaintiffs go on to plead that the defendant vide its letter dated, February 15, 1989 informed them that the agency was being terminated with effect from March 31, 1989. The plaintiffs over that a request to settle the accounts was made by them to the defendant but were informed that the defendant was not in a position to make payment due to its other liabilities. Despite the reminders no payment was made. According to the plaintiffs they filed present suit apprehending interference by the defendant in case the stocks were sold by them for recovering their dues. The prayer clause in the plaint reads as under .

"(A)decree the suit of the plaintiffs declaring their lien over the goods lying in their possession belonging to the defendants to the extent of amount recoverable from the defendants on account of security deposit, interest due and commission amount etc. (b) pass a decree infavor of the plaintiff and against the defendants declaring the letter dated 21.3.1989 written by the defendants to the plaintiffs is not binding upon the rights and interest of the plaintiffs and the same is null and void and contrary to the agreement between the parties: ((r)) pass a decree in favor of the plaintiffs and against the defendants restraining the defendants from interfering in any manner in disposing of the stocks iti possession of the plaintiffs and further restraining the defendants from carrying out the activities of the plaintiffs ; and (d) grant any other relief to the plaintiffs against the defendants as may be deemed fit and proper by the Hon"ble Court on their facts and in the circumstances of the case."

(3) Along with the suit an application under Order 39, Rules 1 and 2, Gic were filed praying that during the pendency of the suit the defendant may be restrained from preventing the plaintiffs from selling in the open market the "defendant's stock lying in their possession" By order dated March 27, 1989 the Sub Judge 1st Glass Chandigarh granted- an ad-interim ex-parte injunction in the following terms :0 "Court fee is reported to be correct. Suit be registered." "2. Along with the present suit the plaintiffs have also moved an application under Order 39, Rules 1 and 2 Cpc, which is supported by affidavit. From the allegations in the plaint coupled with the affidavit of the plaintiffs and the documents on record, a prima facie case in favor of plaintiffs is made out. In that situation and in the interest of justice. the defendants are restrained from interfering in the disposal .of the stock in question otherwise than in due course of law till further orders In the meanwhile notice of the suit as well as application U/O 39, Rules 1 and 2 Cpc be issued to the defendants on filing of Pf for Interest on security 8-5-1989. Compliance of Order 39, Rules, 3, CPC be also made by plaintiff".

(4) Upon service of the notice the defendant filed an application seeking sealing of the godowns of the plaintiff and for vacating the ex-parte ad.interim order dated March 27, 1989 passed by the Senior Sub Judge. However, the stay was confirmed by the Senior Sub Judge. Chandigarh by his order dated April 29,

1989.

(5) There is no dispute that in pursuance of the aforesaid ex-parte interim order dated March 27, 1989 the plaintiffs sold the goods and stocks of the defendant company lying in their possession.

(6) On November 21, 1989 the Supreme Court transferred the suit to this Court. This is how the matter is before this Court. After transfer of the matter the defendant filed its written statement wherein a preliminary objection has been taken that the suit is not maintainable as the firm; M/s Subhagya Agencies is not registered under the Partnership Act. Upon merits it is averred by the defendant that during the subsistence of the last agreement the defendant by its letter dated August 31, 1988 addressed to M/s Subhagya Agencies brought to their notice various defaults committed by them in performing the obligations under the agency agreement. However, the defendant did not find any improvement in the performance of the said firm. Accordingly the defendant by its letter dated February 15, 1989 informed the firm, that the agreement will come to an end on March 31, 1989 and thereafter they should hand over all the stocks and record in their possession to the defendant. Subsequently, the said agreement was extended by the defendant for a period of one month expiring on April 30, 1989.

(7) It is also alleged that after the expiry of the agency agreement dated March 31, 1988 the defendant forwarded a fresh agreement to M/s Subhagya Agencies for execution on the same terms and conditions which were incorporated in the agreement dated April 1, 1987. The plaintiffs however did not sign the proposed agreement but acted upon the terms and conditions contained therein. According to the defendant the plaintiffs were entitled to payment of fixed expenses on account of rent, unloading and local delivery charges and in addition to Rs.150 per case as remuneration calculated on the basis i.e. on total number of cases dispatched and invoiced from firm's premises also Rs.5,500.00 per month for services rendered by them. It is further pleaded that the plaintiffs claimed their remuneration as per clause 13 of the agreement till the month of February, 1989. According to the defendant plaintiffs furnished statement, of stocks as on February 28, 1989 which the tune of Rs.43,76, 113.39 for Zirakpur and Chandigarh. Thereafter goods worth Rs. 42,59,756.00 were transferred by the defendant to the plaintiffs during the month of March, 1989. It is alleged that by the end of March, 1989 the plaintiffs had stock of goods of the defendant worth Rs.86,39,869.39. In para 13 of the written statement it is denied that sum claimed by the plaintiffs were due and recoverable from the defendant.

(8) After transfer of the case to this court the same was listed before D.P.Wadhwa, J. on July 20, 1990 who was of the opinion that it was a fit case in which statement of: the parties should be recorded at the threshold under Order 10, Rule 2 CPC. Accordingly the statement of the plaintiffs were recorded. After recording the statement the learned judge felt that even assuming the claim of the plaintiffs to be correct a sum of Rs. 7 lacs which was available with the

plaintiff was due to the defendant. The plaintiffs also did not contest this position and were directed to deposit the said amount. Accordingly the said amount was deposited by the plaintiffs with the Registrar of the Court and the same was paid to the defendant. Some stocks as indicated in order of D.P. Wadhwa, J. dated March 7, 1991 were also returned by the plaintiffs to the defendant. Thereafter an application bearing no. 16663 of 1990 was filed by the defendant wherein it was inter alia prayed that the plaintiffs be directed to deposit a further sum of Rs. 32,14,533.84 and the defendant be permitted to withdraw the same. .

(9) Two questions have been thrown up by D.P. Wadhwa, J. in his order dated February 25, 1991 for resolution which have already been indicated above.

(10) I have heard the learned counsel for the parties with both the questions. In so far as the first point is concerned, learned counsel for the plaintiff fairly conceded that the suit is liable to be dismissed as the partnership was not registered on the date of institution of the suit. The position in law is that where the suit is filed by the partners it shall be taken to be a suit on behalf of the firm. In the present case the suit has been filed by the partners of a firm which was not registered on the date of filing of the suit and as such the suit would be hit by the provisions of sub-section 2 of Section 69 of the Partnership Act. For this proposition there are numerous authorities both of the various High Courts as well as the Supreme Court. "However, it is not necessary to refer to all of them. Even one or two would suffice. In *Shanker Housing Corporation (Ext.) Vs. Mohan Devi and Others*, a Division Bench of this court took the same view and held as under: "10. Section 4 of the Partnership Act defines the term Partnership as the "relation between the persons who have agreed to share the profits of a business carried on by any one or more of them acting for all. It further states that persons who have entered into partnership with one another are called individually partners and collectively a firm and the name under which their business is carried on is called the firm name, thus a firm is not a separate legal entity but is only a collective or compendious name for all the partners. So, if a suit to enforce a right arising from a contract is to be instituted by a firm against a third party, the firm would be the plaintiff, If the suit is to be instituted "on behalf" of a firm, the partner or partners who want, or want to institute the suit on behalf of (i.e. for the benefit of) the firm would be the plaintiff But, in both the cases, the suit would in effect be by or on behalf of all the partners of the firm. Section 69(2) lays down that the suit of the nature mentioned above can be instituted only if (a) the firm is registered and, (b) the persons suing are or have been shown in the Register of Firms as partners in the firm. The use of the words "is" and "are" or "have been" which are in the present tense, shows that the point of time contemplated in Section 69(2) is at the time of institution of the suit, that is to say, the firm must be a registered firm by the date of the institution of the suit and the persons suing (i.e. all the partners) must have been shown in the Register of firms as partners of the firm by the date of the institution of the suit. This appears to us to be the plain meaning of Section 69(2)". In *Shreeram Finance Corporation Vs. Yasin Khan and Others*, the Supreme Court held that the

suit not to be maintainable in view of the fact that two of the partners on the date of the institution of the suit were not shown as partners as per relevant entries in the register of firms maintained by the office of Registrar of firm. In this regard, it was observed as follows : "\*6. hi the present case the suit filed by the appellants is clearly his by the provisions of sub-section (2) of Section 69 of (be said Partnership Act, as on the date when the suit was filed, two of the partners show as partners as per ffi(r) relevant entries in the Register of firms were not, in fact, partners, one new partner had come in and two minors had been admitted to the benefit of the partnership firm regarding which no notice was given to the Registrar of firms" Thus, the persons sung, namely, the current partners an on the date of the suit were not shown as partners in the Register of firms. The result is that the Kavita Trehan & On. v. Balsara Hygiene Products Limited suit was not maintainable in view of the provisions of sub-section (2) of Section 69 of the said Partnership Act and the view taken by the I rial court and confirmed by the High Court in the connection is correct. Although the plaint was amended on a later date that cannot save the suit. Reference has been made to some decisions in the judgment of the trial court; however, we do not find it necessary to refer to any of them as the pesition,in law in our opinion, is clear on a plain reading of sub-section (2) of Section 69 of the said Partnership Act. II. Having regard to the well established legal position I hold that the suit is not maintainable and is liable to be dismissed However, the matter does not end here as the plaintiffs taking advantage of the courts interim order. dated March 27, 1989 have disposed of the goods and stocks belonging to the defendant. 12. Before the legal aspect of the matter is thrashed out, if has first tote seen as to what extent the goods and stocks of the defendant were in the custody and possession of the plaintiffs at the time of passing of the interim order. Fortunately that evidence to some extent is on record. The plaintiffs have filed the accounts of Zirakpur and Chandigarh. The account of Zirakpur is as follows :

(A) Account of Zirakpur Depot (a) Opening stocks in March, 1989 Rs. 35,52,126.30 (b)

Stocks received In March, 1989 Rs. 38,20,929 (e) (i) Stocks dispatch during March, 1989 (Documents of 31.3 1989) enclosed Rs. 37,74,685.60 (ii) Stocks transferred from Zirakpur (Punjab) to Chandigarh vide GTN/ZIK/CHN/001 Rs. 2,23,510.60 (iii) Stock transferred from Zirakpur (Punjab) to Kundli (Haryana) vide GTN/ZIR/KUL/001 to defendant company"s office Rs. 53,080.32 (d) Stocks received by defendant company vide court order Rs. 32,677.94 (e) Stocks lying in office (as per list price) (shifted to Chandigarh) Rs. 2,64,461.00 The account of Chandigarh is as follows : 76 (a) Opening stocks in March, 1989 Rs. 4,71,711.60 (b) Stocks received in March, 1989 Rs. 98,046.24 (c) Stocks transferred from Zirakpur to Chandigarh vide GTN/ZIR/CHN/001 Rs. 2,23,510.00 (d) Stocks dispatched during March, 1989 Rs. 5,14,644.00 (e) Stocks received by defendants vide court orders Rs. Rs.3,670.00

(11) Again in the statement of Mr. Prem Nath Trehan, general attorney of M/s

Subhagya Agencies, it has been clearly admitted that the value of the goods of the defendant which were with them were to the tune of Rs. 35 lakhs on the date when the present suit was filed. It has been further stated that they are left with stocks worth Rs. 2,64,000.00 . It is also admitted in his. statement that though goods worth about Rs. 32 40 lakhs were sold pursuant to the orders of the Sub-Judge, no payment as such was made by them to the defendant. Mr.Trehanhas stated that the value of the goods sold was no doubt to the tune of Rg.32.4u lacs but payment was received by the firm only "to the extent of Rs.22.00,000.00 or Rs. 23,00,000.00 . For this the Explanation is that the defendant used to give 20% normal discount apart from trade discount and promotional discount. In view of the aforesaid accounts of Zirakpur and Chandigarh and statement of general attorney of the firm there is no manner of doubt that the goods worth Rs. 32.40 lakhs belonging to the defendant have been admittedly sold by the plaintiffs. For the purpose of this case, I would proceed on this basis though the figure is disputed by the defendant who claims that its goods and stocks in the hands of the plaintiffs was more than what is made out by them. Out of the said amount a sum of Rs. 7 lacs stands paid by the plaintiffs to the defendant. Now the question that arises in whether the plaintiffs can be directed to pay the remaining sum of Rs. 25.40 lacs to the defendant, if not, what is the other course open to secure the interest of the defendant.

(12) It is well settled that a party who has received benefit under erroneous order of the court must restore to the other party what the latter lost as a result of the said order on the same being reversed or set aside. Here, in the present case, how far this principle applies is to be determined.

(13) Mr. Ishwar Sahai, learned counsel for the plaintiffs has submitted that the principle of restitution embodies in Section. 144 of the Code of Civil Procedure, will not be attracted in the present case as the defendant was not made to give up possession of the goods as a consequence of the order of the court dated March 27, 1989 as on that date the possession of the same. was with his clients. This position has been disputed by Mr. Ganguly, learned counsel for the defendant. He submitted that the plaintiffs were clearing and forwarding agents of the defendant and their position was that of a bailee. The legal possession still remained with the defendant and the plaintiffs merely had the custody of the goods on behalf of the former convassed the learned counsel It was further submitted that goods having been wrongly sold by the plaintiffs after being armed with the order of the court, on dismissal of the suit the defendant would be entitled to receive the value of the goods entrusted to the plaintiffs as its dealing and commission agents.

(14) I have given my anxious thought and consideration to the submission of the learned counsel for the parties on this aspect of the matter and I proceed to examine the same.

(15) Section 148 of the Contract Act, Inter alia defines "Bailment" as the delivery goods by one person to another for some purpose upon a contract that they

shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. Therefore, one of the requirements of the bailment is delivery of goods to the bailee. Delivery of possession to the bailee is a sine qua non of bailment. In order to constitute a bailment a change of possession is essential (See : Trustees of the Port of Bombay Vs. Premier Automobiles Ltd., . Under Indian Law like English Law the person in the de facto control of the property would normally be treated as the person who is in possession.

(16) Mr. Ganguly invited my attention to Section 151 of the Indian Contract Act. This section provides that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would under similar circumstances. There is no doubt about this principle but the submission is of no avail to the learned counsel and does not advance his case as the possession and the de facto control of the goods and stocks was undoubtedly with the plaintiffs on the date of ex parte order.

(17) In Banarsi Prasad v. Hare Krishan Radhey Kishun Air 1932 Patna 317 it was held that where a party is not in possession no question of restitution would arise on reversal of a decree as he is not deprived of the same owing to the orders of the court. The relevant observations are at page 318 of the report which are as follows : "It is to be remembered that in the present case the appellant was never in actual possession of any bales of cotton. It is true that an injunction was issued by the court which tried the suit restraining the Co-operative society of Allamganj and Radhey Krishna Choudhry from dealing with the bales pending the decision of the suit but that injunction was withdrawn as soon as the suit was decided against the appellant by the trial court. The fact however remains that the appellant was never in possession of bales of cotton and although they were actually lying in the court, yet at the time when they were attached at (he instance of the Co-operative Society they were in the possession of Radha Kishun Chaudhry. On a careful reading of Section 144 it will be plain that it is meant to apply ordinarily to the class of cases where a person having obtained a decree executes it and recovers some money or property from the judgment debtor and then the decree is reversed which necessitates restitution of the property of money which the judgment debtor had a part with at the instance of the court on the ground that the decree is no longer in force". Similarly in Baikuntha Nath Chatteraj Vs. Prosannamoyi Debi, it was held that since the properties were not in the possession of the appellant, they could not have been taken out of his possession and made over to the respondent under any decree or order of the court, and, therefore, Section 144 was not applicable. In this regard it was observed as follows: "Now in the present case. the properties were never in the possession of the appellant, they were not taken out of his possession and made over to the respondent under any decree or order of court. They were in the possession of the respondent at the time. and it was because the respondent had opposed the commissioner in making an inventory of the article that they were locked up in a room under seal, the keys remaining with the Commissioner. That

custody of the Commissioner was removed upon the application of the respondent and the properties delivered to her upon the application of the respondent when the probate case was decided in her favor by the High Court. It is to be observed that no administrator pendente lite has been appointed by the court. The probate court could not, after the decision of His Majesty in Council, direct the properties to be made over to the appellant by way of restitution, because they had never been in his possession nor taken out of his possession. The appellant is in the same position which he would have occupied but for the order of the High Court which has been reversed by His Majesty in Council...". Learned counsel for the defendant has invited my attention to few authorities relating to the doctrine of restitution. They do not deal with a situation similar to the one in hand, where the possession of the goods was with a party who secured an order from the court which was ultimately set aside.

(18) Having regard to the above discussion the restitutions in terms of making over the sale proceeds of the goods to the defendant cannot be ordered because the defendant was not in possession of the goods at the time of the passing of the aforesaid ex-parte interim order.

(19) But it does not mean that the injury inflicted by the interim order of the court should remain untreated. Dismissal of the suit has the effect of automatic dissolution of the interim order. But what is the use of setting aside or reversing a wrong order of the court if a party who has suffered as a consequence thereof remains seething with pain of injustice even when the order is knocked down? Healing touch in such a case is a must. The stain of injustice must be removed, at least bleached if it is not possible to totally eradicate it. In the present case, at least the money value of the goods which have been sold by the plaintiffs should be secure and available in the event of the plaintiffs' failure to establish their Lien in a suit which Mr. Sahai, learned counsel for the plaintiffs says has been instituted by them in a court at Chandigarh or in any other appropriate proceedings which the parties may be instituted within the time imperative prescribed by law.

(20) A litigant is not to suffer because of wrongful act of the court. There are large number of authorities to support this doctrine. A few cases need be cited. In *Jang Singh Vs. Brijlal and Others*, the Supreme Court held as follows: There is no higher principle for the guidance of the court than the one that no act of courts should harm a litigant and it is the bounden duty of courts to see that if a person is harmed by a mistake of the court he should be restored to the position, he would have occupied but for that mistake. In *India Exports House Pvt. Ltd. Vs. J.R. Vohra*, it was held as follows: "10. To throw out the occupant on the road and make him move to other premises and then to hear his objections is to prejudge the matter and will do violence" to the provisions of law as interpreted by the Supreme Court. If a party is required to be heard before giving vacant possession under the *Saw*, then to do so is not a mere violation of principles of natural justice, but is a violation of the statute itself. Post decisional remedial

hearing is permissible in cases on which the action taken is urgent and could not have brooked any delay without irreversible result. Eviction of a tenant is not at all an urgent matter and he cannot be ousted on the assurance that he will be heard after the damage has been done. The principles of natural justice cannot.. be allowed to be by passed in this matter. Speed in justice is desirable but haste is depreciable. "To issue a warrant for recovery of possession without a show cause notice and without holding an adequate inquiry into the objections, if any, of the tenant is a mistake made by the court and where the court has made a mistake, the mistake should be rectified by the court and the party should be relegated to the position as it stood before. Actus curiae neminem gravabit act of the court should do not harm to the litigants". To the same effect is the decision of the Supreme Court in *Johri Singh Vs. Sukh Pal Singh and Others*, .

(21) The single stand running through all these decisions is that no litigant should be prejudiced and made to suffer because of a wrong order of the court. The principle has been crystallised in the maxim *actus curiae neminem gravabit*. This salutary principle has held sway for a very long time and cannot be allowed to be diluted in the instant case. Besides the court have vest inherent powers to do complete justice between the parties and it will not hesitate to pass appropriate orders to undo the mischief or perpetration of injustice.

(22) The court while reversing or setting aside an order is bound to put the parties in the same position which they occupied in relation to each other anterior to passing of the erroneous order by it, is another fact of the same doctrines referred above. This is the principle of very wide application which is aimed treating the parties justly, fairly, rightly and equitably so that no one is harmed or prejudiced by a wrong act of the court. A party can only get back what he had lost because of the mistake of the court and nothing more or nothing less than that. In a case where a person in possession of the property is dispossessed because of a wrong order the sufferer must be relegated or put back in possession on order being set aside or reversed, if the property comes to the hand of the persons as whose instance he lost possession pursuant to the order of the court or where the situation permits, for example when the property is brought by the auction purchaser with notice of the appeal by the judgment debtor. There is no doubt that the cases of this nature would be covered by Section 144, CPC. But in a case where a party was not in possession but nevertheless has suffered the injury and the same would in fact get aggravated, if no remedial measure is taken to set right the wrong after setting aside the offending order of the court, the aforesaid principles would also operate in such a case, with innovations depending upon the circumstances of the case, as otherwise the court will be a mute helpless spectator after causing injustice and prejudice to a party. It will not be justified to say that though the interests of a litigant have been harmed by its act. it cannot undo the wrong as the sufferer did not have possession of the property over which he had undoubted title. May be possession cannot be restored but any other prejudice, harm and suffering caused to him which is capable of being removed or at least mitigated could

bedirected to be so removed or mitigated.

(23) In *Binayak Swain Vs. Ramesh Chandra Panigrahi and Another*, the court applied the principles contained in Section 144, Cpc to undo the injustice inflicted by an erroneous judgment of the court. In this regard it was held as follows : "4. The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. This obligation arises automatically on the reversal or modification of the decree and necessarily carries with it the right to restitution of all that has been done under the erroneous decree and the court in making restitution is bound to restore the parties so far as they can be restored, to the same position, they were in at the time when the court by its erroneous act on had displaced them from..." This decision is no doubt rendered in a case where section 144 was applicable but there is no reason by principle underlying the said provision should not be applied in the present case with such modifications and adaptations as the situation demands. Even when Section 144, CPC is not applicable in a given case Section 151, CPC would be applicable for doing complete justice to the parties. Section 144, CPC is not the only provision for undoing the ill effects of a wrong order of the court on being set aside,

(24) I respective of the controversy whether Section 144, CPC applies or not, justice has to be done to the parties and they have to be treated, justly, fairly and reasonably.

(25) Decisions of the Panta and Labour High Courts in *Banarasi Prasap and Baikuntha Nath Chatteraj* (supra) relied upon by the learned counsel for the plaintiffs merely lay down that where a party does not lose possession as a result of the wrong orders of the court restitution in terms of making over possession after the order is set aside, is not to be directed These authorities do not however lay down that Bo relief which is possible according to circumstances of the case should be given to the injured party who has suffered as a result of the mistake of the court just because Section 144, CPC does not apply in a given case In any event horizons of law are ever expanding for law does not remain static. Precedents are not halting places, if justice demands that a party to the litigation should be put in the position which he would have occupied but for the wrong order of the court, an obligation is cast on the court to repair the wrong to the extent possible, whether u/s 144, CPC if his case comes within its ambit and scope or in the event of the case not falling within the language of Section 144 then court should act under its inherent powers which also inheres the power to neutralise the baneful effects of a mistake of the court. This line of reasoning is not opposed to the view expressed by the Calcutta High Court in the case of *Baikunatha Nath* (supra) which observed as follows: "...In the case of *Jai Berhma v. Kedar Nath Marwari* Air 1922 Pc 2 the judicial Committee observed :- "It is the duty of the court, u/s 144 of the Civil Procedure Code, to place the parties in the parties in the position which they would have occupied, but 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 Code to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns, L.C. in *Rodger v. Comptoir D. Escompte de Paris*. (1871) L.R. 3P.C.465 One of the first and highest duties of all courts is to take 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." In *Lal Bhagwant Singh Vs. Rai Sahib Lala Sri Kishen Das*, the Supreme Court noticed that no wrong was done to the judgment debtor which their Lordships were called upon to redress u/s 144, LPC. However, the following observations made in that case are in consonance with the view I am taking in the present case : ".....It is true that it is one of the first and highest duty of a court to take care that its acts do not injure any of the suitors and if any injury was caused to the judgment- debtor by the sale held in February 1939 it was our duty to undo the wrong caused to him".

(26) In the case in hand the plaintiffs claim a lien on the goods to the defendant on the ground that his commission was outstanding. It may be mentioned that the lien does not arise when the possession of the property is acquired by an agent, where a contract expressly or impliedly shows a intention. In the last agreement between the parties it is specifically provided that the plaintiffs will not have any lien over the goods of the defendant However, I am not in a position to give any categorical finding on this aspect of the matter as this position is disputed by the learned counsel for plaintiff who says that the said agreement has come to an end by efflux of time. Be that as it may, u/s 221 of the Contract Act the lien of an agent extends only to the retention of the property till his dues are paid Section 221 of the Contract Act does not provide for sale of property for satisfaction of the agent's dues. Lien over the principal's property is of a very limited nature and is confined to mere right of retainer which may be used as a defense to any action for the recovery of the property brought- against him by the principal. Lien in the ordinary sense means a right to keep possession of moveable and Immovable properties belonging to a person in debt until the same has been paid off. Lien cannot give any right interest or title in the goods or Immovable property. The holder of the lien cannot sell the property. Even at common law a legal lien merely confers on the holder of the articles in respect of which it was claimed, a passive right to detain the articles until the debts were paid. Such a lien cannot be enforced by sale of the goods. Sometimes only in rare cases sale could be effected by the order of the court (See Halsbury's Laws of England, Fourth edition para 542).

(27) In *Lumsden Club, Rambagh Gardens, Amritsar Vs. Punjab State*, it was held as follows: "20. This agent's lien does not give unrestricted authority to the agent to deal with the property in any manner the agent may like. The right

which the lien confers upon the agent is limited in nature; it enables the agent to retain the property till his dues are paid by the principal. This right can be availed of as a defense if the principal brings an action for the recovery of the property in the possession of the agent or it may afford him a ground to reclaim the property, if the agent has been unlawfully dispossessed of it. But this confers no authority on the agent to sell or otherwise dispose of the property without the consent of the owner (principal) in order to satisfy his line. See *Bala Mal v. Budhumal* Air 1926 Lah 9-i(B). In *Mulchand Shib Dhan v. Sheomal Shewo Prasad* Air 1929 Lah 666(C), Shadilal C.J. has observed that : "Where plaintiffs purchase certain goods on behalf of the defendants from whom certain money was due to them, they are entitled to retain possession as agents of the goods until the money is paid, but, without being directed by the defendants to sell [hem, and in the absence of a mercantile custom authorising them to do so, they are not entitled to sell the goods. If they sell them, however, they are liable for the loss sustained by the defendants on account of such unauthorised sale." "21. To this position of the agent's lien, may be added another stride which the law took and which appears to have extended the limits of the agent's lien. It is said that although "an agent pure and simple may not be justified in selling the principal's goods without his authority, yet where the agent has spent money from his own pocket in purchasing the goods on behalf of the principal, the agent is in the position of a tacit pledgee and can recover as much of his outlay as possible by selling the goods which are in his custody". See *Bar Dukan v. Gopal Singh*, Air 1928 Lah 747(D). 22. Although the case does not say that the agent in such circumstances should first serve a notice on the principal before selling the goods, but since the agent's position has been akin to that of a pawnee (he is regarded as a tacit pledgee), I think the logical conclusion of assumption of that position is that like a pledged (pawnee) where there is default in payment of the sum due, the agent can sell the goods only after giving reasonable notice of the sale to the principal." Lahore High Court has been of the same view as is manifest from its decision in *Firm of Balla Mal Rakhha Mal v. Budhu Mal Prabh Dial*. Air 1926 Lahore 94, wherein it was as follows :

".....THE law on the subject is contained in S. 221 of the Indian Contract Act- That section provides that in the absence of a contract to the contrary the agent is entitled to retain goods and other property, moveable or immovable, of the principal received by him until the amount due to himself for commission, disbursement and services in respect of the same has been paid or accounted for to him. It will be observed that under this section the rights conferred upon an agent who has a lien on the principal's property are of a very limited nature and seem to be confined to the mere right of retainer which may be used as a defense to any action for the recovery of the property brought against him or as a matter of title to reclaim the property by action, if he has been unlawfully dispossessed of it."

(28) In the present case the defendant has suffered at the hands of the plaintiffs as a result of the sale of goods and stocks belonging to it. As already pointed out

the goods and stocks were not liable to be sold u/s 221 of the Contract Act. The goods having been metamorphosed into money by the wrongful act of the plaintiffs under the protective umbrella of the order of the court, to which it was not revealed by the plaintiffs that their partnership was not registered as required under law, money equivalent of goods must be kept in tact so that remedy of account is effectively available to the defendant against the plaintiffs and is not ultimately frustrated and defeated by the one who by virtue of being an agent occupied a position of trust and confidence with his principal qua goods and stock of the latter. This court while adjusting equities and granting relief cannot shut its eyes to the fact that the plaintiffs have taken the advantage of that position and cannot be allowed to retain money representing the value of the goods. According to the statement of Prem Nath Trehan, attorney of the plaintiffs recorded on April 3, 1991 sales are not even reflected in the books of accounts of the firm. An agent is under an obligation to maintain proper accounts. It also needs to be noticed that order dated March 27, 1989 was passed without notice to the defendants despite the fact that the same was of a very drastic nature. What is the use of hearing a party after restraining him from interfering with sale of his goods. Surely, it was not a matter which could not brook any delay. It was a case where one of the main reliefs prayed for in the plaint at the interlocutory stage was granted on the day of institution of the suit.

(29) In view of the above discussion the suit is dismissed with costs which are quantified at Rs. 3,000.00 and the plaintiffs are also directed to take out an Fdr from a nationalised bank in the sum of Rs 25 40 lacs in the name of the Registrar of this court for a period of one year, in the first instance which would be subject to further orders of this court depending upon the outcome of the proceedings pending before the court at Chandigarh and to the result of a claim, if any, made before a competent court by the defendant, if so advised, within the period prescribed by law. The Fdr will be deposited in this court within a period of thirty days. On deposit of the Fdr with the Registrar, the security bond dated July .8, 1989 furnished by the plaintiffs to the tune of Rs. 16 lacs will stand discharged. Both parties would be at liberty to bring the outcome of the proceedings to the notice of this court and for seeking appropriate directions.