

(1954) 08 MAD CK 0010

In the Madras High Court

Case No : Second Appeal No. 954 of 1950

Puthiya Veettil Chandanathil Mukkayi and Others	APPELLANT
Vs	
Thottathi Parambil Pathavumma and Others	RESPONDENT

Date of Decision : 03-08-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 144(2), 151, 47
Tamil Nadu Agriculturists Relief Act, 1938 — Section 23

Citation : AIR 1955 Mad 173

Hon'ble Judges : Krishnaswami Nayudu, J

Bench : Single Bench

Advocate : N. Sundara Iyer, for the Appellant; D.A. Krishna Variar and Ravi Verma, for the Respondent

Final Decision : Allowed

Judgement

Krishnaswami Nayudu, J.—The plaintiffs are the appellants. The appeal arises in a suit instituted by them for redemption and for recovery of possession in the following circumstances. The suit property be-longed to one Koyamu, who was the brother of the plaintiffs and father of defendants 5 and 6. Kayamu mortgaged the property to the second defendant. The second defendant instituted O. S. No. 513 of 1950 on the file of the District Munsif's Court of Ponnani for enforcement of the mortgage, obtained a decree for sale, purchased the property in execution of that decree and got possession of the same on 16-1-1938. The Madras Agriculturists Relief Act (Act 4 of 1938), came to be passed soon thereafter and the plaintiffs 2 to 4 and defendants 5 and 6 applied u/s 23 of the said Act for setting aside the sale. The sale was set aside by order dated 27-7-1938. A petition was filed u/s 20 of the Act. Then further proceedings were taken under the Act for scaling down the decree.

The decree was scaled down by an order of the District Munsif of Ponnani made on 27-10-1942. The amount of the decree was reduced. For the

purpose of discharging the scaled down decree the first plaintiff for himself and as guardian of defendants 5 and 6 executed a mortgage of the same

property in favour of the first defendant for a sum of Rs. 306 out of which a sum of Rs. 260 was reserved with the first defendant for payment of

the scaled down decree in O. S. No. 513 of 1930. The second defendant assigned his decree to the third defendant and the third defendant

brought the property to sale. The first defendant not having paid the sum of Rs. 260 of the mortgage amount, the plaintiffs had to deposit a sum of

Rs. 307 & had the sale set aside and full satisfaction of the decree was entered up on 15-8-1945. The present suit therefore is to redeem the

mortgage in favour of the first defendant and also to recover possession from the first defendant, or in the alternative from the second defendant.

2. The main objection to the maintainability of the suit was that the suit was barred either u/s 47 or Section 144, C. P. C. Both the courts below

have rejected the contention founded on Section 47 and the learned Subordinate Judge in appeal, however, held that the suit is barred under

Clause (2) of Section 144, C. P. C. In so far as the objection u/s 47 is concerned, the view taken by the lower courts appears to be correct, as in

no view of the case could it be said that a proceeding to recover back possession of property in the possession of a decree-holder-purchaser

which sale in his favour was set aside u/s 23, Madras Agriculturists' Relief Act, could be a proceeding relating to execution, discharge or

satisfaction of the decree.

The observations of Patanjali Sastri J. in -- Thondam Annamalai Mudali Vs. Tiruttani Ramasami Mudali and Others, , were relied upon by the

lower courts in repelling the contention based u/s 47. A distinction was made between the case of a stranger purchaser in court auction and a

decree-holder-purchaser and it was held that where a decrees-holder purchases a property in court auction, he cannot be regarded as having got

the full fruits of his decree until he gets possession of the property purchased and the decree cannot be deemed to have been fully satisfied until

such delivery was obtained. But in the present case the second defendant had obtained delivery of possession and there was nothing that remained

to be done in furtherance of the execution of the decree and that therefore this is not a matter, which could be said to relate to the execution of the decree.

3. Apart from the fact that the decree must be deemed to have been satisfied by reason of the decree-holder-purchaser taking possession and the execution proceedings having become complete, the sale in the present case having been set aside u/s 23 of Act 4 of 1938, the effect of such a setting aside of a sale is that the sale shall be deemed not to have taken place at all. If the sale had not taken place by virtue of the statutory provision in Section 23, notwithstanding that the sale was really in execution of the mortgage decree, there is no question of any proceeding in execution pending nor could a proceeding for recovering back possession be considered to be a proceeding In execution, or execution of the decree, since the application for recovery of possession is not in pursuance of any execution of the decree. Either way, it cannot be said that the present proceeding anywhere comes within the scope of Section 47.

4. The main objection, however, is u/s 144(2), C. P. C. The contention that the suit is barred found favour with the learned Subordinate Judge in appeal and relying on certain decisions in respect of decrees which had been scaled down under the Agriculturists Relief Act, he held that recovery of possession of a property sold in execution and sale subsequently set aside u/s 23 should be by way of an application for restitution u/s 144(1), C. P. C., and not by a suit. Section 144(2) lays down that no suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under Sub-section (i), i.e., if a relief by way of restitution could be obtained under Sub-section (1) to Section 144, the relief should be obtained only by way of an application and not by a suit. It is, therefore, necessary to consider In what class of cases an application for restitution u/s 144(1), C. P. C., is maintainable. The language of Section 144(1) shows that,

Where and in so far as a decree is varied or reversed, the Court of 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.

The question, therefore, arises as to whether the setting aside of the sale was consequent, or a direct result of the variation or reversal of any

decree. Obviously it is not the result of any such variation or reversal for the reason that the sale has been set aside by reason of the relief given to

an agriculturist by the supervening statute. Act 4 of 1938, where u/s 23 a judgment-debtor who satisfies the court that he is an agriculturist entitled

to apply for scaling down can have a sale set aside, notwithstanding that the sale had been confirmed. In the case in -- Balaramdas Dakna Vs.

Umesh Mandal, , where a sale in execution was set aside without varying or reversing the decree, the restitution of the property was given under

the inherent powers of court and it was held that a suit to recover mesne profits was competent and Sub-section (2) of Section 144, C. P. C., did

not act as a bar. The observations of the learned Judge show that though the power of restitution must vest in a court, in appropriate cases an

application u/s 144, C. P. C., must be one which comes strictly within the language and scope of that section. The learned Judge observed:

In these cases it has been held that the court has inherent power to grant restitution and that inherent power is apart from the power granted by

Section 144, Sub-section (2) In its terms follows from Sub-section (1) of Section 144 and is therefore confined to those cases where Section 144,

strictly speaking, applies But, where the court is said to have acted under its inherent powers, and not u/s 144, it cannot be said that the

restrictive provisions of Sub-section (2) of that section will come into play. In the present case, the argument is that this being a case of setting

aside a sale and not of a variation or reversal of a decree, the court has granted restitution in the exercise of its inherent powers and it cannot be

argued at the same time that the suit is barred u/s 144(2).

5. Where a sale was set aside in a suit as a consequence of the decree in pursuance of the sale that took place having been held not binding on the

plaintiffs, and an application was made under Sections 147, 144 and 151, C. P. C., for a refund of the purchase-money, the Full Bench of this

court held in -- "Macha Koundan v. Kottara Koundan AIR 1936 Mad 50 (C)" that a regular suit was the proper remedy and not an application.

Where a sale was set aside under Order 21, Rule 82, C. P. C., and even in a case where a sale is held under Rules 89, 80, 91 a purchaser can

obtain refund under an application under Order 21, Rule 93, C. P. C. and it was observed that where the sale turns out to be futile by the finding in

another suit, the only remedy that a party has is by a regular suit and not by an application under Order 21, Rule 93, C. P. C. A "fortiori" there

cannot be an application u/s 144(1), C. P. C.

In K.P.S. Thangaswamy Chettiar Vs. A. Bapoo Sahib, , in an application for eviction of a tenant, the landlord got an order from the Rent

Controller for eviction and got. possession of the building in execution. On appeal to the Subordinate Judge the order of eviction was re-versesd.

The tenant applied to the Subordinate Judge's court for restitution and re-delivery and on an objection taken that an application for restitution

would not lie, it was held that notwithstanding the fact that no decree of court was reversed in appeal but only an order of the Rent-Controller, the

provisions of Section 144(1), C. P. C., applied. The following observations in the judgment may be relied upon in support of the contention on

behalf of the respondents:

There is another aspect of the matter. The contention for the appellant ignores the true nature of restitution proceedings. It is a basic Section that

the courts will not permit a suitor to suffer by reason of a wrong order it has made, and that when once the error is discovered it will so far as

possible put him in the position which he would have occupied if the wrong order had not been made. The right to restitution is not derived from

Section 144, C. P. C. That section only prescribes a method by which that right can be enforced. In -- Birendra Nath Basu Thakur and Another

Vs. Surendra Kumar Basu Thakur and Others, , which Mr. Vaidhianatha Aiyar himself cited, the following passage occurs at page 263.

The power of a court to direct restitution is inherent in the court itself. It rests on the principle that a court of justice is under a duty to repair the

injury done to a party by its act; -- "Rodger v. Comptoir D. Escompte de Paris", (1871) LR 3 PC 465 (F), and -- "Jai Berham v. Redarnath",

AIR 1922 PC 269. (G) The right of a party to have restitution and the duty of the court to give him restitution do not rest on the provisions of

Section 144, C. P. C., which defines the procedure only "in one class of cases" requiring restitution by enacting that the application for restitution is

to be made in the court. of first instance.

The portion underlined (here in " ") implies that Section 144 Is not exhaustive of the forms of procedureIt has been already mentioned that the contention of Mr. Vaidhayanatha Aiyar was that after he had succeeded to the appeal the tenant should have gone back to the Rent Controller & obtained a separate order from him granting him restitution and thereafter put this order in execution in the Sub Court or if necessary filed a separate suit. It is difficult to see how in view of the provisions of Section 144(2), C. P. C., any suit would lie.

6. What was observed in Birendra Nath Basu Thakur and Another Vs. Surendra Kumar Basu Thakur and Others, ", was that right to order

restitution is not confined to Section 144(1), C. P. C. But it is an inherent power in the court itself, where the court is under duty to set right the

injury done to a party by its act. As is clear from the observations of the learned Judges in Birendra Nath Basu Thakur and Another Vs. Surendra

Kumar Basu Thakur and Others, ", Section 144 of the Code defines the procedure only in one class of cases requiring restitution, those class of

cases being cases arising by reason of Variation or reversal of a decree. But there may be other cases where the injury that has been done has to

be repaired consequent not on the variation or reversal, but by other means. In such cases it has been uniformly held that the court has inherent

power to proceed u/s 151, C. P. C., and order restitution. That would not mean that such restitution arises by virtue of the power which the court

has u/s 144(1), C. P. C.

Since the right of the party to institute a suit is sought to be taken away by the application of Section 144(2), it is very necessary that in order to

deprive him of that right, the provisions of Section 144(1)_ must be strictly applied. It must be shown that the case comes within -the precise

language of Section 144(1), C. P. C., and whereas in the present case the setting aside of the sale is not as a result of any variation or reversal of

the decree, but by virtue of the application of Section 23 of Act 4 of 1938, it cannot be said that Section 144(1) has any application.

7. Mr. Krishna Wariar refers to the language of Section 23 where an application for setting aside the sale could be made only by a judgment-

debtor and that before an order for setting aside of the sale, is passed, the court must be satisfied that the applicant is an agriculturist entitled to the

benefits of the Act and as such an order is to be passed only after notice to the decree-holder, the Court must be deemed to have been satisfied

that not only the judgment-debtor was an agriculturist but he was entitled to a variation of the decree in an application which may be filed u/s 19 of

the Act. The argument is that the court is, therefore, called upon to give a finding that the decree will be varied or reversed and it is on that ground

alone that the sale could be set aside. What is required of the Court before setting aside a sale u/s 23 is that the applicant must show a prima facie

case that he is an agriculturist and that he is entitled to apply u/s 19 of the Act for scaling down of the decree, not that the decree will in any event

be varied and one can contemplate cases where after a sale is set aside u/s 23 of the Act, the decree may not be varied and the application of Act

4 could not arise at all. But even then it cannot be said that the setting aside of the sale is as a consequence of the variation of the decree, the

decree at any rate, not having been varied or reversed by the date of the order passed u/s 23 for setting aside the sale. The bar u/s 144(2) could,

therefore, arise only in cases where it can be strictly shown to come within the scope of Section 144(2) and arising as a direct result of a variance

or reversal of the decree and not in other cases. I am satisfied that Section 144(2) has no application to the present case.

8. The appeal is allowed with costs. The decree in so far as the second defendant is concerned will relate only to possession and to mesne profits

after suit. No leave.