Bhikchand S/O Dhondiram Mutha ... vs Shamabai Dhanraj Gugale (Deceased) ... on 14 May, 2024

Author: Prashant Kumar Mishra

Bench: Prashant Kumar Mishra, Hrishikesh Roy

1

2024 INSC 411 REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5026 OF 2023

BHIKCHAND S/O DHONDIRAM MUTHA (DECEASED)
THROUGH LRS. …. APPELLANT

VERSUS

SHAMABAI DHANRAJ GUGALE (DECEASED)
THROUGH LRS. ...RESPONDENT

JUDGMENT

PRASHANT KUMAR MISHRA, J.

1. The legal issue in this appeal, concerns restitution of a judgment debtor on a decree being varied, reversed, set aside or modified as it is statutorily recognised in Section 144 of the Code of Civil Procedure, 1908.1 The decree passed by the Trial Court in the present case was varied by the appeal court. 'CPC' However, in the meantime, the decree was executed by sale of the judgment debtor's property on 23.09.1985 in favour of the decree holders, including respondent Nos. 1 and 2.

2. After the decree was varied by the Appellate Court, the appellant/judgment debtor applied for restitution by invoking Section 144 CPC. The Trial Court, Appellate Court and the second Appellate Court as well, under impugned judgment have rejected the appellant/Judgment debtor's application for restitution inter alia on the ground that the original decree was modified to the extent of interest

payable and the judgment debtor not having deposited any amount in the court after the original decree and the property was put in auction, is not entitled to restitution.

3. Before proceeding to deal with the legal issue, few relevant facts need to be referred which are stated intra:

3.1. Dhanraj, the husband of the original plaintiff -

Shamabai Dhanraj Gugale advanced loan of Rs. 8,000/- to the original defendant – appellant/judgment debtor in the year 1969. Upon his failure to repay the debt, the original plaintiff instituted a Special Civil Suit No. 255 of 1972 for recovery of Rs. 10,880/- (Rs.8,000/- as principal amount + Rs. 2880/- as accrued interest) along with interest @ 12% per annum pendente lite and post decree and for other ancillary reliefs and costs. On 15.02.1982, the 4th Joint Civil Judge, Senior Division, Pune partly decreed the suit by awarding the principal amount; pre-suit accrued interest; pendente lite and further interest at the rate of 12% per annum till realization of the principal amount and costs. The original plaintiff-decree holder preferred appeal against rejection of part of the claim. In this appeal (C.A. No. 1293 of 1986), the judgment debtor preferred cross objections. During the pendency of the above first appeal, the plaintiff-decree holder also preferred execution application which came to be transferred to the court of Civil Judge, Senior Division, Ahmednagar because the property belonging to the judgment debtor against which the decretal amount was to be recovered fell within the jurisdiction of Ahmednagar court. A special Darkhast No. 100 of 1982 came to be filed in the Ahmednagar court on 20.09.1982. In these execution proceedings, the decree holder sought attachment and sale of the following properties of the judgment debtor for satisfaction of the decree:

(1). The land situate at Mauje Davtakli, Taluka Shevgaon, District Ahmednagar at Gut No. 72, admeasuring approximately 9 Hectares 55 Are. (approximately 24 acres);

(2). land situate at Mauje Davtakli, Taluka Shevgaon, District-Ahmednagar at Gut No. 280, admeasuring approximately 0 Hectare 48 Are. (3). Three House Property bearing nos. 13, 23 and 8 situate at Mauje Devtakli, Taluka Shevgaon, District Ahmednagar.

3.2. The civil appeal preferred by the original plaintiff came to be dismissed by the district court on 02.08.1988 and at the same time the defendant's cross objections were allowed to the extent of interest and cost. The appellate court reduced the interest from 12% per annum to 6% per annum for both pre-suit and pendente lite/future interest and further directed the parties to bear their own costs. As a result, the appellate decree, while retaining the principal decretal amount of Rs. 8,000/-, reduced the pre-suit interest from Rs. 2880/- to Rs. 1440/- and the pendente lite interest from Rs. 15360/- to Rs. 7680/- and denied costs of Rs. 1454/- altogether. The total decretal amount of Rs.27694/- thus stood reduced to Rs. 17120/-.

3.3. Before the decision rendered by the appellate court reducing the decretal amount, as above, the plaintiff/decree holder executed the decree and the properties of the defendant/judgment debtor as

mentioned (supra) were put to auction and were purchased by the original plaintiffs/decree holders themselves for a sum of Rs. 34000/- in the auction dated 09.08.1985 which was confirmed by the Executing Court i.e. 2nd Joint Civil Judge, Senior Division, Ahmednagar in Special Darkhast No. 100 of 1982 on 23.09.1985. The first property in auction admeasuring 24 acres was subsequently sold by the plaintiff in favour of respondent no. 3 herein vide registered sale deed dated 17.07.2009 for a sum of Rs.3.9 Lakhs. 3.4. on 29.01.1990, the present appellant/judgment debtor moved an application for restitution under Section 144 CPC on the ground that the original decree having been varied, substantially, the execution sale deserves to be set aside and reversed by way of restitution. The appellant/judgment debtor also deposited the entire decretal amount (as finally decreed by the appeal court) in the Trial Court. As noted above, the courts below have concurrently rejected the appellant/judgment debtor's application for restitution basing the reasoning that he had not deposited any amount in court, when the suit was originally decreed and the decree was put in execution, and not even a part of the amount which was finally decreed by the appeal court was deposited, hence, the principle of restitution is not invokable.

4. Mr. D.N. Goburdhan, learned senior counsel appearing for the appellant/judgment debtor has strenuously urged that the auction purchaser, being the decree holder, in the present case, is not entitled to any equity, which a bona fide auction purchaser with no knowledge of the litigation, or the pending appeal would have in such matter. Reliance is placed on Binayak Swain vs. Ramesh Chandra Panigrahi & Anr2. & Chinnamal & Ors. Vs. Arumugham & Anr3. It is further argued that even an assignee of a decree holder/auction purchaser (respondent no. 3 herein) cannot be equated with a bona fide purchaser for value without notice. Reference is made to the decision of this Court in Padanathil Rugmini Ama Vs. P.K. Abdulla4. It is then argued that where a decree holder himself is an auction purchaser, the sale cannot stand not only in the case of reversal of a decree but also on any variation or AIR 1966 SC 948 AIR 1990 SC 1828 (1996) 7 SCC 668 modification of it. It is submitted that the judgment debtor's right under Section 144 CPC is ignited immediately after reversal or modification of the decree. Referring to South Eastern Coalfields Ltd. Vs. State of M.P. & Ors.5, it is argued that the principles enshrined in Section 144 CPC have to be given the widest possible meaning, therefore, even in case of variation or modification of decree, restitution must follow. Reference is also made to Chinnamal (supra).

5. Learned senior counsel for the appellant would highlight that the decree holder in the present case enjoyed harvesting 24 acres of land for over 25 years and then sold the said land for a sum of Rs. 39 lakhs on 17.07.2009 to respondent no. 3 who was gambling on the litigation. He had full knowledge of the litigation which is reflected from the recital in the sale deed (in para 4 of the sale deed) wherein he agreed that if the decree holder loses the litigation, Rs. 39 lakhs would be paid back to him (to the purchaser) without interest. This crucial point was not noticed by the courts below as probably, the said information was not made available to the court. Such subsequent purchaser can never be treated as bona fide (2003) 8 SCC 648 purchaser as held in the matter of Chinnamal (supra), Gurjoginder Singh vs. Jaswant Kaur & Anr.6 & Padanathil (supra).

6. Per contra, Mr. Vinay Navare learned senior counsel appearing for respondent nos. 1 and 2 would submit that even assuming that the modified decree was for Rs. 17120/-, auction sale by the Executing Court was inevitable and the appellant cannot claim for setting aside the sale and his only

right is to recover the amount of difference i.e. Rs. 10574/- under Section 144 CPC. It is argued that the appellant/defendant remained absent during the proceedings, and he entered into two agreements to defraud the respondent/plaintiff which has been noted by the Executing Court while rejecting his objections to the attachment and sale of the said property. Insofar as the valuation of the property mentioned in the attachment Panchanama under Rule 54 of Order XXI it is argued that the rule itself does not contemplate valuation at the time of attachment. It is then argued that the contention regarding hurried auction cannot be raised in the proceedings under Section 144 CPC for which there are various provisions in Order (1994) 2 SCC 368 XXI CPC which can be invoked in the course of the execution proceedings. The appellant having not invoked any such provisions, the same cannot be raised in proceeding under Section 144 CPC. It is also submitted that Order XXI is a self- contained code and Principal of Estoppel would apply because the appellant, having accepted the conclusion of auction proceedings and choosing not to challenge the same, is now estopped from questioning the validity of the auction.

7. Learned counsel would further submit that the judgments referred by the appellant in the matter of South Eastern Coal Field (supra) has no application in the facts of the present case. It is further put forth that difference in the value of the property in the year 1985 and 2009 also cannot be allowed to be raised, as it is alien to jurisprudence under Section 144 CPC. According to the learned counsel, the provisions contained in Section 144 CPC need to be read in correct perspective and restitution can be ordered in appropriate case, when decree is set aside, but restitution is not the only way of compensating the party under Section 144 CPC. Laying emphasis on the words “restitution or otherwise” in Section 144 CPC, it is vehemently argued that the wordings clearly show such legislative intention that restitution is not the only way of compensating the party and the judgment debtor can be granted relief by way of compensation or interest, in appropriate case.

8. Mr. K. Parameshwar learned counsel appearing for respondent no. 3 would submit that the said respondent had purchased the subject property vide sale deed dated 17.07.2009 as a bona fide purchaser for value. He would refer to the conduct of the appellant throughout the litigation including the execution proceedings wherein he did not prefer any appeal against the trial court’s decree nor against the confirmation of sale by the Executing Court. It is argued that the cases relied upon by the appellant/judgment debtor are in respect of reversal of decree whereas the present is one of variation of the decree and not of reversal.

9. Mr. Parameshwar would submit that the appellant/judgment debtor is not entitled for restitution, and he had no means to pay the reduced decretal amount, therefore, the sale was inevitable. Reference is made to Kuppa Sankara Sastri & Ors. Vs. Kakumanu Varaprasad & Anr.7 so also Lal Bhagwant Singh vs. Sri Kishen Das8 & South Eastern Coalfields Ltd. (supra).

10. It is next argued by Mr. Parameshwar that the appellant/judgment debtor is not entitled to restitution against respondent no. 3 who purchased the property from the decree holder. Reference is made to Chinnamal (supra) & Padanathil (supra). Alternatively, it is argued by Mr. Parameshwar that extent of variation in the decree/order is an important factor to be considered by the Court in view of the language employed in Section 144 CPC providing restitution will be made “so far as may be ”in the context of“ insofar as a decree is varied or reversed”. It is argued that the restitution to the

judgment debtor shall be in proportion to the variation/modification made in the decree so that equitable justice is done to subsequent purchaser as well. The conduct of the party and lapse of time from the date of variation of decree and when the restitution is going to be ordered as well as the third-party interest are other factors which need to be considered while ordering restitution. AIR 1948 MAD.12 (1953) SCR 559 ANALYSIS

11. The statutory mandate for restitution is contained in Section 144 CPC which is reproduced hereunder:

> "144. Application for restitution.—(1) Where and in so far as a decree [or an order] is [varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order] shall, on the application of any party entitled in 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 order] or [such part thereof as has been varied, reversed, set aside or modified]; 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, reversal, setting aside or modification of the decree or order].
>
> [Explanation.—For the purposes of sub-section (1) the expression "Court which passed the decree or order" shall be deemed to include,— (a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the Court of first instance; (b) where the decree or order has been set aside by a separate suit, the court of first instance which passed such decree or order; (c) where the Court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.] (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)." The principle behind the order of restitution made after the original decree is reversed or varied or modified has been explained by this Court in the matter of South Eastern Coal Fields (supra) in the following words in paras 26, 27 & 28:
>
> "26. In our opinion, the principle of restitution takes care of this submission. The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the court or in direct consequence of a decree or order (see Zafar Khan v. Board of Revenue, U.P. [1984 Supp SCC 505 : AIR 1985 SC 39]) In law, the term "restitution" is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; and (iii) compensation or reparation for the loss

> caused to another. (See Black's Law Dictionary, 7th Edn., p. 1315). The Law of Contracts by John D. Calamari & Joseph M. Perillo has been quoted by Black to say that "restitution" is an ambiguous term, sometimes referring to the disgorging of something which has been taken and at times referring to compensation for injury done:
>
> "Often, the result under either meaning of the term would be the same. ... Unjust impoverishment as well as unjust enrichment is a ground for restitution. If the defendant is guilty of a non-tortious misrepresentation, the measure of recovery is not rigid but, as in other cases of restitution, such factors as relative fault, the agreed-upon risks, and the fairness of alternative risk allocations not agreed upon and not attributable to the fault of either party need to be weighed." The principle of restitution has been statutorily recognized in Section 144 of the Code of Civil Procedure, 1908. Section 144 CPC speaks not only of a decree being varied, reversed, set aside or modified but also includes an order on a par with a decree. The scope of the provision is wide enough so as to include therein almost all the kinds of variation, reversal, setting aside or modification of a decree or order.

The interim order passed by the court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of a final decision going against the party successful at the interim stage. Unless otherwise ordered by the court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the court at the stage of final decision, the court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

27. Section 144 CPC is not the fountain source of restitution, it is rather a statutory recognition of a pre- existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the court has inherent jurisdiction to order restitution so as to do complete justice between the parties. In Jai Berham v. Kedar Nath Marwari [(1922) 49 IA 351: AIR 1922 PC 269] Their Lordships of the Privy Council said: (AIR p.

271) "It is the duty of the court under Section 144 of the Civil Procedure Code to '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'. 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." Cairns, L.C. said in Rodger v. Comptoir D'Escompte de

Paris [(1871) 3 PC 465: 7 Moo PCC NS 314: 17 ER 120]:

> (ER p. 125) "[O]ne 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." This is also on the principle that a wrong order should not be perpetuated by keeping it alive and respecting it (A. Arunagiri Nadar v. S.P. Rathinasami [(1971) 1 MLJ 220]). In the exercise of such inherent power the courts have applied the principles of restitution to myriad situations not strictly falling within the terms of Section 144.

28. That no one shall suffer by an act of the court is not a rule confined to an erroneous act of the court; the "act of the court" embraces within its sweep all such acts as to which the court may form an opinion in any legal proceedings that the court would not have so acted had it been correctly apprised of the facts and the law. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the court would act in conjunction with what is real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated by award of interest at a suitable reasonable rate for the period for which the interim order of the court withholding the release of money had remained in operation."

12. The principle explained by this Court in South Eastern Coal Fields (supra) as extracted above is to the effect that Section 144 CPC statutorily recognises a pre-existing rule of justice, equity and fair play. That is why it is often held that even away from Section 144 the court has inherent jurisdiction to order restitution so as to do complete justice between the parties as held by Privy Council in Jai Berham vs. Kedar Nath Marwari9. It is also explained that the factor attracting applicability of restitution is not the act of the court being AIR 1922 PC 269 wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned.

13. In the matter of Binayak Swain (supra), this Court held that the obligation for restitution 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 action had displaced them from.

14. Drawing the distinction between a decree holder who himself is the auction purchaser and a third-party auction purchaser, this Court in Binayak Swain (supra) approved an earlier judgment of Privy Council in the matter of Zain-Ul- Abdin Khan vs. Muhammad Asghar Ali Khan10 to reiterate that "great distinction between the decree-holders who came (1888)ILR 10 ALL 166 (PC) in and purchased under their own decree, which was afterwards reversed on appeal, and the bona fide purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order". It is categorically held that where the decree holder is himself the auction purchaser, the sale cannot stand, if the decree is subsequently set aside.

15. In the matter of Chinnamal (supra), this Court again dealt with the distinction between the decree holder who purchased the property in execution of his own decree, which is afterwards modified or reversed, and a person who is not a party to the decree. This Court held thus in paras 10 and 11:

> "10. There is thus a distinction maintained between the decree holder who purchases the property in execution of his own decree, which is afterwards modified or reversed, and an auction purchaser who is not party to the decree. Where the purchaser is the decree holder, he is bound to restore the property to the judgment debtor by way of restitution but not a stranger auction purchaser. The latter remains unaffected and does not lose title to the property by subsequent reversal or modification of the decree. The courts have held that he could retain the property since he is a bona fide purchaser. This principle is also based on the premise that he is not bound to enquire into correctness of the judgment or decree sought to be executed. He is thus distinguished from an eo nomine party to the litigation.
>
> 11. There cannot be any dispute on this proposition, and it is indeed based on a fair and proper classification. The innocent purchaser whether in voluntary transfer or

> judicial sale by or in execution of a decree or order would not be penalised. The property bona fide purchased ignorant of the litigation should be protected. The judicial sales in particular would not be robbed of all their sanctity. It is a sound rule based on legal and equitable considerations. But it is difficult to appreciate why such protection should be extended to a purchaser who knows about the pending litigation relating to the decree. If a person ventures to purchase the property being fully aware of the controversy between the decree holder and judgment debtor, it is difficult to regard him as a bona fide purchaser. The true question in each case, therefore, is whether the stranger auction purchaser had knowledge of the pending litigation about the decree under execution. If the evidence indicates that he had no such knowledge he would be entitled to retain the property purchased being a bona fide purchaser and his title to the property remains unaffected by subsequent reversal of the decree. The court by all means should protect his purchase.

But if it is shown by evidence that he was aware of the pending appeal against the decree when he purchased the property, it would be inappropriate to term him as a bona fide purchaser. In such a case the court also cannot assume that he was a bona fide or innocent purchaser for giving him protection against restitution. No assumption could be made contrary to the facts and circumstances of the case and any such assumption would be wrong and uncalled for."

16. Whether a third-party auction purchaser who had the knowledge of the pending proceedings can resist restitution has been answered against such auction purchaser in paras 14, 16 & 17 of Chinnamal (supra) "14. This proposition, we are, however, unable to accept. In our opinion, the person who purchases the property in court auction with the knowledge of the pending appeal against the decree cannot resist restitution. His knowledge about the pending litigation would make all the difference in the case. He may be a stranger to the suit, but he must be held to have taken calculated risk in purchasing the property. Indeed, he is evidently a speculative purchaser, and, in that respect, he is in no better position than the decree holder purchaser. The need to protect him against restitution, therefore, seems to be unjustified. Similarly, the auction purchaser who was a name lender to the decree holder or who has colluded with the decree holder to purchase the property could not also be protected to retain the property if the decree is subsequently reversed.

16. This is also the principle underlying Section 144 of the Code of Civil Procedure. It is the duty of all the courts as observed by the Privy Council "as aggregate of those tribunals" to take care that no act of the court in the course of the whole of the proceedings does an injury to the suitors in the court. The above passage was quoted in the majority judgment of this Court in A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602, 672: 1988 SCC (Cri) 372] . Mukharji, J., as he then was, after referring to the said observation of Lord Cairns, said: (SCC p. 672, para 83) "No man should suffer because of the mistake of the court. No man should suffer a wrong by technical procedure of irregularities. Rules or procedures are the handmaids of justice and not the mistress of the justice. Ex debito justitiae, we must do justice to him. If a man has been wronged so long as it lies within the human machinery of administration of justice that wrong must be remedied."

17. It is well to remember that the Code of Civil Procedure is a body of procedural law designed to facilitate justice and it should not be treated as an enactment providing for punishments and penalties. The laws of procedure should be so construed as to render justice wherever reasonably possible. It is in our opinion, not unreasonable to demand restitution from a person who has purchased the property in court auction being aware of the pending appeal against the decree."

17. In the matter of Padanathil Ruqmini Amma (supra), this Court while dealing with somewhat similar fact situation (as in the case in hand) wherein a decree holder himself became the auction purchaser and later on leased out the property to a third party who in turn sold to another one and then this man again sold out to a fourth person, held thus in paras 10, 11, 14, 15,16 and 17:

> "10. It is, however, contended by the respondent that he is a lessee from the decree-holder auction-purchaser. The appellant cannot seek restitution of properties leased to him by the decree-holder auction-purchaser. The lease in his favour is protected, he being a third party to the court proceedings and the auction sale. This contention has been upheld by the Kerala High Court and is challenged before us. Now, under Section 144 of the Civil Procedure Code where and insofar as a decree or an order is varied or reversed or is set aside, the court which passed the decree or order, 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 order. For this purpose, the court may make such 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, reversal, setting aside or modification of the decree or order.
>
> 11. In the present case, as the ex parte decree was set aside, the judgment-debtor was entitled to seek restitution of the property which had been sold in court auction in execution of the ex parte decree. There is no doubt that when the decree-holder himself is the auction-purchaser in a court auction sale held in execution of a decree which is subsequently set aside, restitution of the property can be ordered in favour of the judgment-debtor. The decree-holder auction-purchaser is bound to return the property. It is equally well settled that if at a court auction sale in execution of a decree, the properties are purchased by a bona fide purchaser who is a stranger to the court proceedings, the sale in his favour is protected and he cannot be asked to restitute the property to the judgment-

debtor if the decree is set aside. The ratio behind this distinction between a sale to a decree-holder and a sale to a stranger is that the court, as a matter of policy, will protect honest outsider purchasers at sales held in the execution of its decrees, although the sales may be subsequently set aside, when such purchasers are not parties to the suit. But for such protection, the properties which are sold in court auctions would not fetch a proper price and the decree- holder himself would suffer. The same consideration does not apply when the decree-holder is himself the purchaser and the decree in his favour is set aside. He is a party to the litigation and is very much aware of the

vicissitudes of litigation and needs no protection.

14. In the case of Satis Chandra Ghose v. Rameswari Dasi [AIR 1915 Cal 363: 20 CWN 665], the Calcutta High Court relied upon these observations of the Privy Council and held that the decree-holders and those who claim under decree-holders will form one class as against strangers to the decree who purchase in a court auction sale. The title of a purchaser from one who has bought at the sale in execution of his own decree is liable to be defeated when the decree is subsequently set aside. The Calcutta High Court said:

> "The Court as a matter of policy has a tender regard for honest purchasers at sales held in execution of its decrees though the sales may be subsequently set aside, where those purchasers are not parties to the suit and the decree has not been passed without jurisdiction. But the same measure of protection is not extended to purchasers who are themselves the decree-
>
> holders; nor can the purchasers from such decree- holders claim that the Court owes them any duty...." The policy which prompts the extension of protection to the strangers who purchase at court auctions is based on a need to ensure that proper price is fetched at a court auction. This policy has no application to sales outside the court. The purchasers from a decree-holder auction-purchaser have bought from one whose title is liable to be defeated. The title acquired by the purchaser from the decree-holder is similarly defeasible. The Court further observed: "... the defeasibility of a decree-holder's title where the decree is ex parte is of such common occurrence that the plea of a purchaser for value without notice hardly applies".

15. The same view has been reaffirmed by the Calcutta High Court in the case of Abdul Rahman v. Sarat Ali [AIR 1916 Cal 710: 20 CWN 667] where it has been held that the assignee of a decree-holder auction-purchaser stands in no better position than his assignor. The special protection afforded to a stranger who purchases at an execution sale is not extended to an assignee of the decree-holder auction- purchaser.

16. The distinction between a stranger who purchases at an auction sale and an assignee from a decree-holder purchaser at an auction sale is quite clear. Persons who purchase at a court auction who are strangers to the decree are afforded protection by the court because they are not in any way connected with the decree. Unless they are assured of title; the court auction would not fetch a good price and would be detrimental to the decree-holder. The policy, therefore, is to protect such purchasers. This policy cannot extend to those outsiders who do not purchase at a court auction. When outsiders purchase from a decree-holder who is an auction-purchaser clearly their title is dependent upon the title of decree-holder auction-purchaser. It is a defeasible title liable to be defeated if the decree is set aside. A person who takes an assignment of the property from such a purchaser is expected to be aware of the defeasibility of the title of his assignor. He has not purchased the property through the court at all. There is, therefore, no question of the court extending any protection to him. The doctrine of a bona fide purchaser for value also cannot extend to such an outsider who derives his title through a decree-holder auction-purchaser. He is aware or

is expected to be aware of the nature of the title derived by his seller who is a decree-holder auction-purchaser.

17. The High Courts of Patna, Madras and Kerala, however, appear to have taken a different view. They have equated an assignee from a decree-holder auction-purchaser with a stranger auction-purchaser on the basis that an assignee from a decree-holder auction-purchaser has to be considered as a bona fide purchaser for value who should not be allowed to suffer on account of the mistakes or irregularities committed in a court of law. It is difficult to see how an assignee from a decree-holder auction-purchaser can be equated with a bona fide purchaser for value without notice. He is aware of the nature of the title of his seller or assignor. He is also aware that the title of his assignor or seller is subject to the doctrine of restitution if the decree is ultimately set aside particularly in a case where the decree is an ex parte decree and there is a greater possibility of such a decree being set aside. The reasons which prompt the courts to protect strangers who purchase at court auction sales also do not apply to assignees or purchasers from a decree-holder auction purchaser. They purchase outside the court system and cannot expect any protection from the court. Their title is liable to be defeated if the title of their seller or assignor is defeated. The view, therefore, expressed by the Patna High Court in the case of Gopi Lal v. Jamuna Prasad [AIR 1954 Pat 36:1 BLJ 406] , the Madras High Court in S. Chokalingam Asari v. N.S. Krishna Iyer [AIR 1964 Mad 404 : ILR (1964) 1 Mad 923] and the cases cited therein as also by the Kerala High Court in the case of Parameswaran Pillai Kumara Pillai v. Chinna Lakshmi [1970 Ker LJ 450] is not the correct view. The High Court, therefore, was not right in protecting the lease created in favour of the respondent by Mohammed Haji who was a decree-holder auction-purchaser at the sale in execution of the ex parte decree which was subsequently set aside."

18. The judgment in Padanathil Ruqmini Amma (supra), completely answers the argument raised by Mr. K. Parameshwar, learned counsel for respondent no. 3 who has purchased the property from decree holder on 17.07.2009 with full knowledge of pending restitution proceedings as the same is contained in the recital in para 4 of the sale deed. Thus, the purchaser or the assignee from the decree holder is not entitled to object restitution on the ground that he is a bona fide purchaser.

19. We shall now deal with the arguments raised by Mr. Navare, learned senior counsel that the valuation of the attached properties as shown in the attachment panchanama cannot be the basis to hold that the property of the judgment debtor valued much more than the decretal sum has been sold in execution. According to him, Rule 54 of Order XXI CPC does not contemplate valuation at the time of attachment. This argument is raised in answer to court's query that when only a sum of Rs. 27,694/- was to be realised why all the properties i.e. three houses approximately valued at Rs. 25,700/-, 9 H 55 Are land valued at Rs. 75,000/- and third property admeasuring 0 H 48 Are valued at Rs. 5,000/- were put to auction.

20. The above stated three properties were attached under Order XXI Rule 54 CPC and thereafter the Executing Court vide its order dated 22.10.1982 (Annexure P/4) issued sale notice under Order XXI Rule 66 CPC for sale of the attached property by public auction. The object of attachment of immovable property in course of execution of decree is for realisation of the decretal amount by way of the sale of the attached property under Order XXI Rule 66 CPC. The said rule (Order XXI Rule 66

CPC) provides for proclamation of sale by public auction. Sub- rule (2) of Rule 66 CPC needs reference which is reproduced hereinbelow:

> "(2) Such proclamation shall be draw up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible-
>
> (a) the property to be sold or, where a part of the property would be sufficient to satisfy the decree, such part;
>
> (b) the revenue assessed upon the estate or part of the State, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;
>
> (c) any incumbrance to which the property is liable;
>
> (d) the amount for the recovery of which the sale is ordered; and
>
> (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property:
>
> Provided that where notice of the date for settling the terms of the proclamation has been given to the judgement- debtor by means of an order under rule 54, it shall not be necessary to give notice under this rule to the judgment- debtor unless the Court otherwise directs:
>
> Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given, by either or both of the parties."

21. The above quoted provisions contained in sub-rule (2) of Rule 66 of Order XXI CPC clearly mandates that the sale proclamation should mention the estimated value of the property and such estimated value can also be given under Rule 54 Order XXI CPC. The fact that the Court is also entitled to enter in the proclamation of sale its own estimate of the value of the property clearly demonstrates that whenever the attached immovable property is to be sold in public auction the value thereof is required to be estimated. In between Rule 54 to Rule 66 of Order XXI CPC, there is no other provision requiring assessment of value of the property to be sold in auction.

22. It is also important to bear in mind the provisions contained in Rule 54(1) Order XXI read with Rule 66 of Order XXI CPC wherein it is provided that either whole of the attached property or such portion thereof as may seem necessary to satisfy the decree shall be sold in auction. If there is no valuation of the property in the attachment Panchanama and there being no separate provision for valuation of the property put to auction, it is to be understood that the valuation of the property

mentioned in attachment Panchanama prepared under Rule 54 can always provide the estimated value of the property otherwise the provisions enabling the court to auction only a part of the property which would be sufficient to satisfy the decree would be unworkable or redundant. In the case in hand, the assessed value of all the attached properties is Rs. 1,05,700/- whereas the original decretal sum was Rs. 27,694/- which is about 26.2% of the total value of the property. Therefore, when only one of the attached properties was sufficient to satisfy the decree there was no requirement for effecting the sale of the entire attached properties.

23. In the matter of Balakrishnan vs. Malaiyandi Konar11 this Court observed thus:

> "9. The provision contains some significant words. They are "necessary to satisfy the decree". Use of the said expression clearly indicates the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. (See Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma [(1977) 3 SCC 337: AIR 1977 SC 1789].) In all execution proceedings, the court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial (2006) 3 SCC 49 whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This is not just a discretion, but an obligation imposed on the court. The sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction.

(See Ambati Narasayya v. M. Subba Rao [1989 Supp (2) SCC 693].) The duty cast upon the court to sell only such property or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored. Similar view has been expressed in S. Mariyappa v. Siddappa [(2005) 10 SCC 235].

10. In S.S. Dayananda v. K.S. Nagesh Rao [(1997) 4 SCC 451] it was held that the procedural compliance with Order 21 Rule 64 of the Code is a mandatory requirement. This was also the view expressed in Desh Bandhu Gupta v. N.L. Anand [(1994) 1 SCC 131]."

24. In Ambati Narasayya vs. M. Subba Rao12 this Court has held that in auction sale this is obligatory on Court that only such portion of property as would satisfy decree is sold and not the entire property. This court observed thus in paras 6, 7 & 8:

> "6. The principal question that has been highlighted before us relates to the legality of the sale of 10 acres of land without considering whether a portion of the land could have been sold to satisfy the decree. It is said that the total sum claimed in the execution was Rs 2395.50. The relevant provision which has a bearing on the question is Rule 64 Order XXI of the Code of Civil Procedure and it reads as follows: -

> "Order XXI Rule 64: Power to order property attached to be sold and proceeds to be paid to persons entitled.—Any court executing a decree may order that any property attached by it and 1989 supp (2) SCC 693 liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same."
>
> 7. It is of importance to note from this provision that in all execution proceedings, the court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one, or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction.
>
> 8. In Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma [(1977) 3 SCC 337, 340] this Court after examining the scope of Rule 64 of Order XXI CPC has taken a similar view: (SCC p. 340, para 3) "Under this provision the executing court derives jurisdiction to sell properties attached only to the point at which the decree is fully satisfied. The words 'necessary to satisfy the decree' clearly indicate that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. In other words, where the sale fetches a price equal to or higher than the amount mentioned in the sale proclamation and is sufficient to satisfy the decree, no further sale should be held, and the court should stop at that stage."

25. It is, thus, settled principle of law that court's power to auction any property or part thereof is not just a discretion but an obligation imposed on the Court and the sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. In the case at hand, the Executing Court did not discharge its duty to ascertain whether the sale of a part of the attached property would be sufficient to satisfy the decree. When the valuation of three attached properties is mentioned in the attachment Panchanama, it was the duty of the Court to have satisfied itself on this aspect and having failed to do so the Court has caused great injustice to the judgment debtor by auctioning his entire attached properties causing huge loss to the judgment debtor and undue benefit to the auction purchaser. The fact that the properties were sold for a sum of Rs. 34,000/- would further demonstrate that the decree holder who himself is the auction purchaser has calculatedly offered a bid at Rs. 34,000/- despite being aware that the value of the attached properties is Rs. 1,05,700/-.

26. In view of the above discussion, we are satisfied that the present is a case where the decree is subsequently modified/varied, and the decretal amount was reduced from Rs. 27,694/- to Rs. 17,120/-, the sale of all the three attached properties was not at all required and further in the facts and circumstances of the case variation of the decree read together with the sale of the properties at a low price has caused huge loss to the judgment debtor where restitution by setting aside the execution sale is the only remedy available. It is not a case where the restitution can be ordered appropriately or suitably by directing the decree holder to make payment of some additional amount to the judgment debtor to compensate him for the loss caused due to sale of his properties. Doing so would perpetuate the injustice suffered by the judgment debtor.

27. It has been argued that the execution sale cannot be set aside at this stage when the judgment debtor has not paid any amount to satisfy the original decree or the modified decree nor he has challenged the legality of the auction sale on any permissible ground as contemplated in Order XXI CPC. However, we are not convinced with this submission made on behalf of the learned counsel for the respondents for the reason that we are not per se setting aside the execution sale as if the present is the proceedings challenging the execution of the decree by way of sale of the attached immovable properties of the judgment debtor. We are concerned herewith and we have confined ourselves to the core issue as to whether the present is a fit and suitable case for exercising power under Section 144 CPC directing restitution in favour of the judgment debtor by placing the parties in the position which they would have occupied before such execution and for this purpose the Court may make any order, as provided under Section 144 CPC. It is in exercise of this power that we have considered the aspect of execution of the decree by attachment of whole property when part of the property could have satisfied the decree. This examination was necessary to ascertain the extent of injury the judgment debtor has suffered at the time of execution of the original decree for Rs. 27,694/- opposite to the modified decree for Rs. 17,120/-. The execution of a decree by sale of the entire immovable property of the judgment debtor is not to penalise him but the same is provided to grant relief to the decree holder and to confer him the fruits of litigation. However, the right of a decree holder should never be construed to have bestowed upon him a bonanza only because he had obtained a decree for realisation of a certain amount. A decree for realisation of a sum in favour of the plaintiff should not amount to exploitation of the judgment debtor by selling his entire property.

28. For the foregoing, the appeal is allowed. The order dated 05.06.2017 passed by the High Court is set aside and the appellants' application under Section 144 CPC is allowed and the sale of the attached properties belonging to the judgment debtor is set aside and the parties are restored back to the position where the execution was positioned before the attachment of the immovable properties of the judgment debtor. The execution of the modified decree, if not already satisfied, shall proceed in accordance with law.

.....J. (HRISHIKESH ROY) ..... J.

(PRASHANT KUMAR MISHRA) NEW DELHI;

May 14, 2024