BINAYAK SWAIN

v.

RAMESH CHANDRA PANIGRAHI AND ANOTHER

December 10, 1965

[P. B. GAJENDRAGADKAR, C.J., K. N. WANCHOO, V. RAMASWAMI AND P. SATYANARAYANA RAJU, JJ.]

Code of Civil Procedure, s. 144—Property of defendant sold in execution of decree—Subsequently decree set aside and case remanded—Application for restitution by defendant—Fresh decree passed against defendant—Application for restitution whether to be allowed.

A money-suit against the appellant was dismissed by the trial court but the first appellate court passed an *ex-parte* decree against him. The appellant's property was sold in execution and purchased by the decree-holder. The appellant went to the High Court which set aside the *ex-parte* decree and remanded the suit. The appellant then filed an application for restitution under s. 144 of the Code of Civil Procedure. It was stayed pending proceedings in the main suit. The suit was finally decided against the applicant, by the High Court. Thereafter the trial court allowed the appellant's application for restitution. After intermediate proceedings the High Court decided in Letters Patent Appeal that the appellant was not entitled to restitution. He appealed to this Court by special leave.

HELD: The application for restitution was filed by the appellan before the passing of a fresh decree by the High Court in second appeal. At the time of the application therefore the appellant was entitled to restitution because on that date the decree in execution of which the properties were sold had been set aside. The appellant was therefore entitled to restitution notwithstanding anything which happened subsequently. [27 C-E]

The principle of the doctrine of restitution is that on the reversal of a decree the law imposes an obligation on the party to the suit who received the benefit of the erroneous decree to make restitution to the other party for what he has lost. 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. [27 E-F]

Zainal-Abdin Khan v. *Muhammad Asghar Ali Khan*, I.L.R. 10 All 166, relied on.

Set Umedmal & Anr. v. *Srinath Ray & Anr.* I.L.R. 27 Cal. 810, *Raghu Nandan Singh* v. *Jagdish Singh*, 14 C.W.N. 182, *Abdul Rahaman* v. *Sarafat Ali*, 20 C.W.N. 667 and *Shivbai Kom Babya Swami* v. *Yesoo*, I.L.R. 43 Bom. 235, referred to.

Lal Bhagwant Singh v. *Rai Sahib Lala Sri Kishen Das*, [1953] S.C.R. 559, distinguished.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 804 of 1963.

Appeal by special leave from the judgment and decree, dated January 3, 1961 of the Orissa High Court in Appeal under Orissa High Court Order No. 3 of 1959.

A *K. R. Chaudhuri,* for the appellant.

C. B. Aggarwala, B. Parthasarathy, J. B. Dadachanji, O. C. Mathur, and *Ravinder Narain,* for respondent No. 1.

The Judgment of the Court was delivered by

B **Ramaswami, J.** This appeal is brought by special leave on behalf of the judgment-debtor against the judgment of the Orissa High Court, dated January 3, 1961 in Letters Patent Appeal No. 3 of 1959.

The deceased plaintiff filed Original Suit No. 500 of 1941 C against the appellant-defendant in the Court of the Additional Munsif, Aska claiming Rs. 970 on the basis of a promissory note. The suit was dismissed on August 17, 1942. The plaintiff preferred an appeal No. 178 of 1942 before the District Judge who allowed the appeal and set aside the decree of the Munsif and decreed the suit *ex parte* on March 9, 1943. Against this decree D of the appellate Court, the appellant filed Second Appeal No. 100 of 1943 in the Orissa High Court which set aside the decree of the District Judge on November 11, 1946 and remanded the suit to the lower appellate court for disposal. The lower appellate court in its turn remanded the suit to the trial court by its judgment, dated April 11, 1947. In the meantime the original plaintiff died E and the present respondents were brought on record as his legal representatives. The suit was again dismissed by the trial court on November 29, 1947 but on appeal the Additional Subordinate Judge set aside the judgment and decree of the Munsif on November 30, 1948. The appellant carried the matter in Second Appeal No. 12 of 1949 to the Orissa High Court which dismissed F the appeal on August 27, 1954.

After the *ex parte* decree was passed in appeal No. 178 of 1942 by the District Judge on March 9, 1943, the plaintiff executed the decree, attached the properties in dispute and himself purchased the properties in Court auction. The plaintiff also took G delivery of the properties on May 17, 1946 and since that date the respondents have been in possession of the properties and enjoying the usufruct. After the decree of the High Court, dated November 11, 1946 in Second Appeal No. 100 of 1943 the appellant made an application for restitution in the Court of the Additional Munsif in Miscellaneous Judicial Case No. 34 of 1947. The plaintiff H obtained a stay of the hearing of the Miscellaneous Judicial Case from the Court of the Additional District Judge but on March 30, 1948 the order of stay was discharged. In Civil Revision No. 75

of 1948 the High Court also granted interim stay in the proceedings in the Miscellaneous Judicial Case at the instance of the plaintiff but the order of stay was vacated by the High Court on April 28, 1949. Thereafter the present appellant got the Miscellaneous Judicial Case stayed till disposal of his Second Appeal after remand. On July 12, 1956 the Miscellaneous Judicial case was allowed by the Munsif and an order of restitution was made in favour of the appellant. The respondents filed an appeal before the Subordinate Judge of Berhampur who allowed the appeal and set aside the order of restitution. The appellant took the matter before the High Court in Miscellaneous Appeal No. 24 of 1958 which was allowed by P. V. Balakrishna Rao, J. on October 3, 1958 and it was ordered that the restitution of the properties should be made to the appellant subject to the condition that he must deposit the amount decreed in favour of the plaintiff-decree holder. The order of the learned Single Judge was, however, set aside in Letters Patent appeal by a Division Bench which held that the appellant was not entitled to restitution of properties sold in the execution case.

The question presented for determination in this case is whether the appellant was entitled to restitution of his properties purchased by judgment-debtor in execution of the decree passed by the District Judge on the ground that the decree was set aside by the High Court and the suit was remanded for re-hearing and fresh disposal under the provisions of s. 144 of the Civil Procedure Code which states as follows :

> "144. (1) Where and in so far as a decree or order 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; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

On behalf of the respondents Mr. Aggarwala made the submission that after the suit was re-heard a decree was passed in favour of the respondents and that decree was eventually affirmed by the High Court, and the appellant was, therefore, not entitled to

A restitution under the provisions of this section. We are unable to accept this argument as correct. The properties of the appellant were sold in execution at the instance of the respondents who were executing the *ex parte* decree passed by the District Judge on March 9, 1943. In this execution case, the properties of the B appellant were sold and the respondents got delivery of possession on May 17, 1946. It is true that the suit was eventually decreed after remand on August 27, 1954 by judgment of the High Court, but we are unable to accept the argument of the respondents that the execution sale held under the previous *ex parte* decree which was set aside by the High Court, is validated by the passing of the C subsequent decree and therefore the appellant is not entitled to any restitution. It is evident that the application for restitution was filed by the appellant in 1947 in Miscellaneous Judicial Case No. 34 of 1947 before the passing of a fresh decree by the High Court in the Second Appeal. At the time of the application for restitution, therefore, the appellant was entitled to restitution, D because on that date the decree in execution of which the properties were sold had been set aside. We are of the opinion that the appellant is entitled to restitution notwithstanding anything which happened subsequently as the right to claim restitution is based upon the existence or otherwise of a decree in favour of the plaintiff E at the time when the application for restitution was made. The principle of the doctrine of restitution is that on the reversal of a decree, the law imposes an obligation on the party to the 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 F 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. It should be noticed, in the present case, that the properties were purchased G by the decree-holder himself in execution of the *ex-parte* decree and not by a stranger auction-purchaser. After the *ex-parte* decree was set aside in appeal and after a fresh decree was passed on remand, the sale held in execution of the *ex-parte* decree becomes invalid and the decree-holder who purchased the properties in execution of the invalid decree is bound to restore to the judgment-debtor H what he had gained under the decree which was subsequently set aside. The view that we have expressed is borne out by the decision of the Judicial Committee in *Zain-Ul-Abdin Khan* v.

Muhammad Asghar Ali Khan(1) in which a suit was brought by the judgment-debtor to set aside the sale of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. The judgment-debtor sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were *bona fide* purchasers at other sales, under the same decree, who were no parties to it. The Judicial Committee held that, as against the latter purchasers, whose position was different from that of the decree-holding purchasers, the suit must be dismissed. At page 172 of the Report, Sir B. Peacock observed as follows :

> "It appears to their Lordships that there is a great distinction between the decree-holders who came 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."

The same principle has been laid down by the Calcutta High Court in *Set Umedmal and another* v. *Srinath Ray and another*(2) where certain immovable properties were sold in execution of an *ex-parte* decree and were purchased by the decree-holder himself. After the confirmation of the sale, the decree was set aside under s. 108 of the Civil Procedure Code, 1882 at the instance of some of the defendants in the original suit. On an application under s. 244 of the Civil Procedure Code, 1882 having been made by a prior purchaser of the said properties in execution of another decree, to set aside the sale held in execution of the *ex-parte* decree the defence was that the application could not come under s. 244 of the Civil Procedure Code, 1882, and that the sale could not be set aside, as it had been confirmed. It was held by the Calcutta High Court that the *ex-parte* decree having been set aside the sale could not stand, inasmuch as the decree-holder himself was the purchaser. At page 813 Maclean, C.J. stated :

> "As regards the second point, *viz.*, whether, notwithstanding the confirmation, the sale ought to be set aside,

(1) I.L.R. 10 All. 166.

(2) I.L.R. 27 Cal. 810.

A the fact that the decree-holder is himself the auction-purchaser is an element of considerable importance. The distinction between the case of the decree-holder and of a third party being the auction purchaser is pointed out by their Lordships of the Judicial Committee in the case of *Nawab Zainal-abdin Khan* v. *Mahommed Asghar* B *Ali* (I.L.R. 10 All., 166), and also in the case of *Mina Kumari Bibee* v. *Jagat Sattani Bibee* (I.L.R. 10 Cal., 220), which is a clear authority for the proposition that where the decree-holder is himself the auction-purchaser, the sale cannot stand, if the decree be subsequently set aside. I am not aware that this decision, which was C given in 1883, has since been impugned."

The same view has been expressed in *Raghu Nandan Singh* v. *Jagdish Singh*(1) where it was held that if an *ex-parte* decree has been set aside, it cannot by any subsequent proceeding be revived and if a decree is passed against judgment-debtors on re-hearing, D it is a new decree and does not revive the former decree. The same opinion has been expressed in *Abdul Rahaman* v. *Sarafat Ali*(2) in which it was pointed out that as soon as an *ex-parte* decree was set aside, the sale, where the decree-holder was the purchaser, falls through and was not validated by a fresh decree subsequently made. The same principle was reiterated by the E Bombay High Court in *Shivbai Kom Babya Swami* v. *Yesoo.*(3). In that case, an *ex-parte* decree was passed against the defendant, in execution of which the defendant's house was sold and purchased by the plaintiff decree-holder. The *ex-parte* decree was subsequently set aside; but at the retrial, a decree was again passed in plaintiff's favour. In the meanwhile, the defendant applied to F have the sale of the house set aside. It was held, in these circumstances, by the Bombay High Court that the previous sale of the house in execution under the previous decree which had been set aside should itself be set aside as being no longer based on any solid foundation; but subject in all the circumstances to the condi- G tion that the defendant should pay up the amount due under the second decree within a specified time.

On behalf of the respondents reference was made to the decision of this Court in *Lal Bhagwant Singh* v. *Rai Sahib Lala Sri Kishen Das.*(4) But the ratio of that case has no application to the present case. It should be noticed that the decree in that case was H affirmed at all stages of the litigation except that the amount of

(1) 14 Calcutta Weekly Notes, 182. (2) 20 Calcutta Weekly Notes, 667.
(3) I.L.R. 43 Bom. 235. (4) [1953] S.C.R. 559.

the decree was slightly altered from Rs. 3,38,300 and odd to Rs. 3,76,790 and odd which amount was ultimately decreed by the Privy Council in the appeal which the judgment-debtor preferred from the decision of the Oudh Chief Court which restored the decree of the trial Judge who decreed a sum of Rs. 3,88,300. It was held by this Court that the Privy Council had merely restored the amended decree without altering the provisions as to payment by instalments or extending the time for payment by instalments and its decree did not in any way alter the position of the parties as it stood under the amended decree, and, the sale was not in consequence of any error in a decree which was reversed on appeal by the Privy Council and so the judgment-debtor was not entitled to restitution. In the present case the material facts are manifestly very different.

For the reasons expressed, we are satisfied that the appellant is entitled to restitution of the properties sold in execution of the *ex-parte* decree subject to equities to be adjusted in favour of the respondent-decree holders. We order that the appellant should be restored back to possession of the properties sold in the execution case subject to the condition that he deposits the amount of Rs. 970 in the Court of the Munsif, Aska within two months from this date. If no deposit is made within this time this appeal will stand dismissed with costs. But if the appellant makes the deposit within the time allowed the sale of the properties in the execution case will be set aside and the respondents will make over the possession of the properties sold to the appellant. The appellant will not be entitled to any past mesne profits but if the respondents do not deliver the possession of the properties the appellant will be entitled to the future mesne profits from the respondents from the date of deposit till the actual date of delivery of possession. Learned Counsel for the appellant has informed us that the deposit has already been made by the appellant in pursuance of the order of the learned Single Judge of the High Court, dated October 3, 1958. If the deposit has already been made the appellant will be entitled to take possession of the properties through the executing court and to future mesne profits from the date of this judgment till the actual date of delivery of possession.

We accordingly allow the appeal to the extent indicated above. In the circumstances of the case we do not propose to make any order as to costs.

Appeal allowed in part.