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Question:

What is restitution? What conditions are necessary for making an application for restitution?

Answer:

RESTITUTION:

It is a fundamental principle of law that an act of a court should not injure any person. PLD 1989 SC 146. This principle is also applicable to quasi-judicial tribunals. 1992 MLD 1409. Section 144 which codifies the principle of restitution, is based upon this principle. 1992 CLC 1432. Section 144 recognises the inherent power of every court to order restitution, and lays down the procedure for effecting restitution, but it does not confer any new substantive right. 1988 CLC 665. This section does not apply unless the property was lost in execution of the decree or directly in consequence of that decree. It is the duty of the court to order restitution where the circumstances so demand, and to restore the parties to the same position they were in, prior to the decree that has been varied or reversed, and to make all consequential orders and not to refer the parties to a suit. Any benefit received by a decree holder under a decree which has been varied or reversed is refundable or returnable, as the case may be, to the party entitled to benefit by restitution consequent on the variance or reversal of the decree. The principle applies whether restitution has or has not been directed in the appellate decree.

INHERENT POWERS:

The right to obtain restitution does not rest on Section 144 alone. In cases not strictly covered by the provisions of Section 144, the court has inherent power to order restitution. This section is not applicable where an order, as distinguished

from a decree is varied or reversed. But in such cases restitution may be ordered in exercise of inherent powers. Restitution can also be ordered where a Rent Controller's ejection order is reversed or varied.

CONDITIONS:

The following conditions must be fulfilled in order that the provisions of Section 144 be applicable:-

1. The restitution sought must be in respect of the decree which has been varied or reversed.
2. The party applying for restitution should be entitled to a benefit under a reversing or varying decree.
3. The relief claimed must be properly consequential on the reversal or variation of the decree.

RESTITUTION SOUGHT MUST BE IN RESPECT OF DECREE VARIED OR REVERSED:

No order of restitution can be made under Section 144 if the original decree remains intact. PLJ 1974 Kar. 432. The variance or reversal should be by a competent court, by means of a remedy in the same proceedings, as for instance, an appeal, revision or review and not through collateral proceedings, as for instance a separate suit. The variation or reversal may be either by the same court, or by a superior court in the same proceedings. It is enough if the reversal or variation is by a competent court, irrespective of whether the matter has been determined finally up to the highest court. Accordingly where the decree is varied by private compromise, this section is inapplicable, unless the compromise is incorporated in the decree of the appellate court. Where an ex-parte decree is set aside under Order 9 rule 13, the court can order restitution. Restitution is also to be ordered where abatement takes place. Where the provisions of Section 144 are not attracted, restitution can be ordered under Section 151, or a suit may lie for obtaining restitution. Upon the reversal of a decree, all dependant or connected decrees or orders fall with it.

PARTY APPLYING FOR RESTITUTION SHOULD BE ENTITLED TO SOME BENEFIT:

Any party to the decree that is varied or reversal, being entitled to some benefit consequential on the reversal or variance, may apply for restitution, even though the decree may not specifically state that such party is entitled to restitution. 1994 CLC 1432. Restitution may also be ordered in favour of a person who was not a party to the appeal, revision or review, provided such adjudication is in effect and substance in favour of such a person. Even the representatives, assignees, or persons claiming under such persons are entitled to demand restitution. On restitution being ordered, the auction purchaser is entitled to apply for refund of the auction price, if the court has made restitution conditional upon repayment.

AGAINST WHOM ORDERED:

Restitution can be ordered against the holder of the decree, varied or reversed, who has benefited under such decree, as well as against his transferee or assignee, even though such person may not have been a party to the proceedings in which the decree was varied or set aside. PLD 1970 Kar. 220. However, restitution is not ordered against a bona fide purchaser for value, such as an auction purchaser, unless the decree holder himself is the purchaser, or is a transferee of such decree-holder purchaser. However, execution sale can be set aside and restitution ordered against the auction-purchaser, on grounds such as want of jurisdiction to sell the property, fraud, want of saleable interest of judgment debtor, or the doctrine of lis pendens. Where a decree is reversed the sale will not be set aside, but where it is varied, it will be set aside only if the judgment debtor establishes that he could have paid off the reduced amount. Restitution cannot be ordered against a stranger, i.e., a person who was neither a party to the decree nor a representative of, nor claiming under such person.

RELIEF CLAIMED SHOULD BE PROPERLY CONSEQUENTIAL:

The object of restitution is to place the parties in the same position as they were, prior to the order or to restore status quo ante. PLD 1970 Kar. 220. The section is mandatory, and the court has no discretion in the matter. It is not

necessary that the reversing decree should contain a direction as to restitution. In terms of Section 144, an order of restitution should place the parties in the same position which they would have occupied but for the decree or such part thereof as has been varied or reversed, irrespective of any other rights accruing to any of them during litigation. For this purpose the court must order refund of costs, or payment of interest, damages, compensation or mesne profits. Restitution is a duty for the discharge of which the Code has properly armed the court. Restitution should be property consequential to the variance or reversal. The party should be restored all that it had been deprived of.

CONSEQUENCES OF A VARIED OR REVERSED DECREE:

Where a decree is reversed or varied, the possession transferred under such decree becomes wrongful possession, and as such, the court is to assess the mesne profits from the date of the transfer of possession to the date of actual restitution becomes wrongful only from the date of the reversal of the decree. The mesne profits will be the amount that the person in wrongful possession actually realized or could have with due diligence realized. The liability is only with respect to the net profits. Where a sum of money is paid under a decree, which is subsequently reversed, the judgment debtor, is entitled to recover such sum together with interest on such amount, upto the date of realization. The rate of interest is in the discretion of the court, but is must be specifically awarded.

COURT OF FIRST INSTANCE:

Upon variation or reversal of the decree the right to restitution arises automatically and is claimable before the court of first instance. It is not necessary for the appellate court to specifically direct restitution. It is not to be granted by the executing court. No particular form is prescribed. Where the trial court has ceased to exist as lost jurisdiction, restitution can be ordered by the court, which would have jurisdiction over the suit at the time of the reversal or variation of the decree.

SUIT BARRED:

A suit for any relief which could be claimed by application under subsection is barred. However, where restitution cannot be obtained under Section 144, as for instance, where an order has been varied or reversed, a suit would not be barred. Also if compensation claimed is not consequential, on variation or reversal, a separate suit will not be barred. In appropriate cases restitution can also be ordered under Section 151 in which case a separate suit would not be barred.

LIMITATION:

According to some courts proceedings under this section are not execution proceedings and Section 141 is applicable to them. As such for purposes of limitation an application for restitution would be governed by Art. 181 of the Limitation Act, 1908. According to another view, restitution proceedings are in the nature of execution proceedings, in which case Article 182 of the Limitation Act would be applicable.
