

Sanjay Sharma Vs. Ajay Sharma and ors.

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Court : Delhi

Decided On : Jan-24-2013

Judge : Manmohan

Appellant : Sanjay Sharma

Respondent : Ajay Sharma and ors.

Advocate for Pet/Ap. : Mr. Akhil Sibal, Mr. Arun Khosla

Judgement :

\$~ * IN THE HIGH COURT OF DELHI AT NEW DELHI + CS(OS) 911/2007
SANJAY SHARMA Through Plaintiff Mr. Arun Khosla with Ms. Shreeanka
Kakkar, Advocates versus AJAY SHARMA AND ORS. Defendants Through
Mr. Akhil Sibal with Mr. Narhari Singh, Mr. Rajat Sehgal, Mr Jatin Mongia and Mr.
Amit Agrawal, Advocates for D-7/Applicant. Reserved on :

15. h January, 2013. Date of Decision:

24. h January, 2013. % CORAM: HON'BLE MR. JUSTICE MANMOHAN
JUDGMENT MANMOHAN, J : I.A. 12964/2012 IN CS(OS) 911/2007 1. Present
application has been filed under Section 151 CPC by the defendant no. 7 seeking
compensation from the plaintiff by way of restitution in the amount of Rs. 84,000/-
per month for the period starting from 22nd May, 2007 till 8th December, 2011.

2. The relevant facts of the present case are that on 15 th May, 2007, the plaintiff
filed the present suit for partition, rendition of accounts and permanent injunction

along with an application under Order 39 Rules 1 and 2 CPC being I.A. No. 5867/2007 for temporary injunction, alleging that various properties, including Shop No. G-4/17, CC, Gulmohar Park, were ancestral/HUF properties in the hands of the plaintiffs late father.

3. This Court passed an ex parte ad-interim order dated 22nd May, 2007 directing the defendants to maintain status quo in respect of possession and title of the suit property.

4. On 21st May, 2008, defendant no. 7/applicant, wife of defendant no. 1, Mr. Ajay Sharma, filed an application under Order 39 Rule 4 being I.A. No. 6437/2008 seeking vacation of the interim order dated 22 nd May, 2007 in respect of the aforesaid Shop on the ground that she was its real and absolute owner. It was asserted that the said Shop was purchased from her own savings and from those of her husband and with the aid of loans from her sister and two brothers.

5. On 28th January, 2009, this Court to ensure that no properties are vexatiously and coercively included in litigation, ordered the plaintiff to file an undertaking in the form of an affidavit to pay to defendant no. 7 by way of compensation a sum of Rs. 30,000/- per month for the period of the suit in the event of being unsuccessful in establishing that the Shop was also a joint property. The relevant portion of the said order is reproduced hereinbelow: xxx xxx xxx What has transpired in the Court on the last date and today also indicates the rigid stand taken by the plaintiff. One of the properties of which partition is claimed is a Shop at Gulmohar Enclave. It is in the name of the defendant No. 7, who claims to be the sole owner thereof. The plaintiff claims the said shop to have been acquired from joint funds. Vide ex parte order dated 22nd May, 2007, the parties were directed to maintain status quo qua possession and title of the properties in dispute. It is stated that the said shop is lying closed and cannot be dealt with owing to the stay order obtained by the plaintiff in the present suit. The said shop is stated to be admeasuring 300 sq. feet and capable of fetching Rs. 30,000/- per month as a rent. The same cannot be let out because of the said order which has been in force for the last over 1-1/2 years. The other properties in this suit are subject matter of Will of which probate is pending. The process of this court cannot be permitted to be misused. Though

the remedy of claiming damages for wrongly involving a property in litigation is available but after long litigation, the succeeding party is hardly known to resort in another round. As such it is deemed expedient to obtain an undertaking to this court from the plaintiff to pay to the defendant No.7 by way of damages a sum calculated @Rs.30,000/- per month for the period of this suit in the event of being unsuccessful in establishing that the said property is also joint. The senior counsel for the plaintiff has urged that he will take instructions on the prevalent rent of the shop; that the defendant No.7 could have applied for permission to let out the shop; that the defendants are also in use of other properties of which partition is claimed and lastly that there should be corresponding direction to the defendants also. As far as the first of the aforesaid submissions, though the counsel for plaintiff had in court enquired from the plaintiff present in person the rate of rent, but the rate informed by defendant No. 1 also present in Court was not controverted immediately. Re. the second submission, even if permission to let is granted, as long as the property remains subject matter of suit, even if there is no interim order, the same cannot be dealt with at market price owing to Section 52 of the Transfer of Property Act. Taking a vague undertaking from the plaintiff will be ineffectual. Some formula has to be devised. I find the aforesaid formula reasonable. The purpose is that no properties are vexatiously and coercively included in litigation. Re. the third submission, as far as other properties are concerned, while framing issues, issue with respect to mesne profits if any under Order 20 Rule 18 CPC shall be struck. Lastly, there is no property of the plaintiff which the defendants have till date included in litigation. If the defendants make a counterclaim as aforesaid, and if the same is found to be prima facie untenable, the defendants shall also be directed to furnish such undertaking. The plaintiff to file undertaking in form of affidavit within two weeks 6. On 2nd March, 2009, defendant no. 7 filed an application being I.A. No. 3029/2009 under Order 39 Rule 4 read with Section 151 CPC stating that the amount of Rs. 30,000/- per month as the prevalent rental was recorded by the Court on the basis of a statement by defendant no. 1, husband of defendant no. 7, but on subsequent enquiry it was found that the actual monthly rent of the Shop was Rs. 83,795/- or Rs. 84,000/-. Defendant no. 7 accordingly, sought compensation at the enhanced rate. In support of the figure of Rs. 84,000/-, a valuation report dated 25th February, 2009

of the Government Approved Valuer was filed along with the said application.

7. In the meantime, the plaintiff challenged the order dated 28th January, 2009 by way of an appeal being FAO(OS) 90/2009 before a Division Bench of this Court. The Division Bench vide order dated 20th March, 2009 dismissed the appeal with costs, and clarified that the decision rendered by them would not affect the right of defendant no. 7 to have its claim of rental of Rs. 84,000/- adjudicated by the Single Judge.

8. The plaintiff challenged the Division Bench order dated 20th March, 2009 by way of an SLP being SLP No. 11917/2009 before the Supreme Court. On 12th March, 2010, the said SLP was dismissed. Thus, the order of learned Single Judge of this Court dated 28th January, 2009 attained finality.

9. On 5th April, 2010, the plaintiff filed an affidavit before this Court wherein he undertook to pay a sum of Rs. 30,000/- per month for the period of suit in the event of being unsuccessful in establishing that the Shop was also a joint property. The relevant portion of said undertaking is reproduced hereinbelow:2. That vide order dated 28.01.2009 this Honble Court was pleased to direct the plaintiff to file an undertaking to this Honble Court to pay to the Defendant No.7 by way of damages a sum calculated at the rate of Rs. 30,000/- per month for the period of the suit in the event of being unsuccessful in establishing that the property bearing Shop No. G-4/17 CC, Gulmohar Enclave, New Delhi is also joint.

3. That the plaintiff preferred a Special Leave Petition being SLP[C] No. 11917/2009 against the said order of the Honble High Court, and vide order dated 12.3.2010 the Honble Supreme Court was pleased to dismiss the said SLP and granted the petitioner (Plaintiff herein) to file an undertaking, as directed by the Honble Court of Delhi within three weeks in terms of the order dated 12.3.2010 passed by the Honble Supreme Court of India.

4. That I undertake to pay to the Defendant No. 7 a sum of Rs. 30,000/- per month towards the damages for the period of the suit in the event of being unsuccessful in establishing that the said property (referred in para 2 above) is also joint.

10. However, on 8th December, 2011, plaintiff unconditionally withdrew his suit, which along with the pending applications stood disposed of accordingly. The order dated 8th December, 2011 is reproduced hereinbelow: Learned counsel for the plaintiff states that he wants to withdraw the present suit. The suit is accordingly dismissed as withdrawn. Pending applications stand disposed of accordingly.

11. Thereafter on 28th May, 2012, the present application was filed by defendant no. 7 seeking a direction to the plaintiff to recompense the defendant no. 7 at the rate of Rs. 84,000/- per month for the period from 22nd May, 2007 to 8th December, 2011.

12. On 17th September, 2012, this Court recorded that counsel for the plaintiff did not wish to file any reply to I.A. 12964/2012. The order dated 17th September, 2012 is reproduced hereinbelow: I.A. 12964/2012 The counsel for the plaintiff states that he does not wish to file reply to this application which is not maintainable in law. The counsel for the defendant No. 7 seeks time to cite case law. At the request of the counsel for the defendant No. 7, adjourned to 27th November, 2012.

13. Mr. Akhil Sibal, learned counsel for the applicant/defendant no. 7 submitted that the present application was in the nature of restitution. According to him, a party who had received any benefit under an order of the Court was bound to restore to the other party what the latter lost as a result of the said order/act of the Court on the same being reversed or set aside. In this connection, he relied upon a judgment of the Supreme Court in *South Eastern Coalfields Ltd. v. State of M.P. & Ors.*, (2003) 8 SCC 64 wherein it was held as under: 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.*). 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*, 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*: (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*). 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.

14. On the other hand, Mr. Arun Khosla, learned counsel for the plaintiff/ non-applicant stated that neither on 19th October, 2011 nor on 8th December, 2011 did the defendants oppose the prayer for the withdrawal of the suit or plead for its continuation as plaintiffs inasmuch as suit was for partition of inherited properties. He submitted that the defendants having acquiesced in the dismissal of the suit, had waived their right to prosecute the same. Mr.Khosla pointed out that where a partition suit had been dismissed as withdrawn the defendant could have sought to be transposed as plaintiff in the face of an application under Order 23 Rule 1 CPC moved by the original plaintiff. In support of his submissions, he relied upon

Supreme Courts judgment in R. Ramamurthi Aiyar (dead) by L.Rs. vs. Raja V. Rajeswararao, AIR 197.SC 643.

15. Mr. Khosla also submitted that this Court had become functus officio and did not have the jurisdiction to entertain any application or any proceedings. He stated that after the order dated 8th December, 2011 this Court was barred by Order 20 Rule 3 CPC to either alter or add to the same, save as provided by Section 152 CPC or on review.

16. Mr. Khosla clarified that the plaintiff had no quarrel with the doctrine of restitution urged on behalf of the defendant no. 7 but contended that there was no instance of the said doctrine being invoked after the disposal of the lis.

17. Mr. Khosla relied upon a judgment of Supreme Court in Hari Singh Mann Vs. Harbhajan Singh Bajwa and Ors., AIR 200.SC 4. wherein it has been held that once a matter is finally disposed of by Court, the said Court becomes functus officio and disentitled to entertain any fresh application. Mr. Khosla stated that Section 362 Cr.P.C. is verbatim the same as Order 20 Rule 3 CPC and the Supreme Court had repeatedly expressed its indignation at the lower Courts entertainment of any application for any relief after the disposal of the main suit or petition.

18. Consequently, Mr. Khosla submitted that the instant application was not maintainable as the applicant had acquiesced to the dismissal of the suit, waiving its statutory right to prosecute the same and this Court had become functus officio. He also submitted that the recompense predicated on the plaintiffs affidavit was not maintainable as adjudication of the status of the said property was not prosecuted by either of the parties herein and no right therefore vested in the defendant no. 7 to urge restitution after having consented to the dismissal of the suit.

19. Having heard learned counsel for the parties this Court is of the view that Section 144 CPC itself contemplates an application for restitution being preferred before the Court which passed the decree or order only after such order had been varied, set aside, reversed etc. Section 144 CPC is reproduced hereinbelow:144.

Application for restitution. (1) Where and insofar 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 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] 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). (emphasis supplied) 20. A learned Single Judge of Bombay High Court in Bhaurao v. Savitribai & Ors., AIR 199.Bom. 55 has held as under: 5. One of the main contentions of Mr. Mohta appearing on behalf of the applicant/tenant is that the non-applicants/landlords had initiated the proceedings for ejectment and possession in Special Civil Suit No. 346 of 1983 without obtaining permission from the Rent Controller to determine the tenancy of the applicant/tenant. Therefore, he contended that the decree in that suit was a nullity. In my view, it is not possible to entertain this argument in the present proceedings which have their origin to Regular Civil Suit No. 1134 of 1984 which was withdrawn. I have already pointed out that the decree in Special Civil Suit No. 346 of 1983 was challenged by the applicant/tenant by way of first appeal before this Court which was dismissed on 14-2-1985. Thereafter, the matter was agitated

before the Supreme Court by way of Special Leave Petition which was also dismissed. In view of this background, it is not possible to entertain the argument that the decree in Special Civil No. 346 of 1983 is a nullity, apart from the fact that present proceedings have not arisen out of that suit. The suit out of which the present proceedings have arisen was withdrawn by the applicant/tenant and, therefore, he cannot retain the benefit which he got on account of the order of temporary injunction passed in the present proceedings in pursuance of which he dispossessed the non-applicants/landlords of the first floor. This Court had already observed that in view of the withdrawal of Civil Suit No. 1134 of 1984, the order of injunction also stands vacated. The non-applicants/landlords were already in possession of the first floor before filing of Civil Suit No. 1134 of 1984 in their capacity as owners thereof. Because of the order passed by the trial Court on an application for an injunction filed by the applicant/tenant that the non-applicants/landlords lost possession of the first floor. That injunction order having been vacated as a consequence of the withdrawal of the Civil Suit No. 1134 of 1984, the benefit which the applicant/tenant had obtained cannot be retained by him. From the close scrutiny of the above section, it is clear that it is an obligation on the Court that it shall on the application of any party entitled to any benefit by way of restitution, cause such restitution to be made in so far as it may place the party in the position which it could have occupied, but for such order as has been varied. In the facts and circumstances of the present case, application for restitution is the only remedy available to the non-applicants since a fresh suit is barred in view of sub-section (2) of S. 144 of the Code of Civil Procedure. The Courts below were, therefore, perfectly justified in directing the applicant/tenant to restore possession of the first floor to the non-applicants/landlords. (emphasis supplied) 21. In view of the aforesaid Section as well as the judgments of the Supreme Court in *South Eastern Coalfields Ltd.*(supra) and *Bhaurao* (supra), this Court is of the opinion that the plaintiffs submission that the present application for restitution could not be entertained because the suit had been withdrawn is untenable in law.

22. In fact, this Court is of the opinion that more often than not restitution application would only be filed after the suit has been disposed of. For instance, if any plaintiff were to file an injunction suit against a statutory authority seeking stay

of construction of a flyover on the ground that plaintiff is the owner of the land on which the proposed construction is to be carried out and if the Court were to grant an interim injunction, then it is only after the dismissal of the suit on merits, would the statutory authority be entitled to move an application for restitution. Also in the above illustration if the plaintiff after obtaining an ex parte order stopped appearing in the matter, then in such an eventuality, the Court would have to first dismiss the suit for non-prosecution and then only the defendant-statutory authority would have the right to file an application for restitution.

23. It is also well settled that where proceedings filed by any person have come to an end, then such person is bound to reconstitute the benefit which he had received under the interim orders or compensate for the loss suffered by the other party. In *DTC Vs. M/s. International Avenues*, 2010 (2) R.A.J.

153(Del) a Division Bench of this Court has held as under:⁷ We, are therefore, called upon to decide the following aspects: (i) Whether a petitioner who has obtained ex parte orders and enjoyed the benefit thereof can be permitted to withdraw his petition without directions for performance of his contractual obligations and restitution of the benefit which the petitioner has received pursuant to interim orders in his petition; (ii) Whether compensation can be granted by this court or in other words can the court order restitution of the benefit received under interim orders in a petition which has been voluntarily withdrawn by the petitioner; (iii) Whether the appellant is entitled to file and seek orders in CM 1497/2009 although the main appeal was disposed of vide order dated 26.11.2008? ⁸ The principle of law is well established that where proceedings filed by any person have come to an end whether by withdrawal or by the same being dismissed then such person is bound to reconstitute the benefit which he has received under interim orders which he was successful in seeking during the pendency of the proceedings. This principle is unexceptionable because otherwise a person would simply take benefit of interim orders and thereafter not pursue either the interim proceedings or the final proceedings till its conclusion because the same may go against him and consequently he may prefer to quietly withdraw the proceedings and pocket the benefit derived out of interim orders which he had obtained in his favour. In fact, even if, proceedings are not withdrawn but are ultimately

unsuccessful i.e., the same are dismissed, even then the principle of restitution will govern the parties. xxxxx xxxxx xxxxx xxxxx 15. Accordingly, we hold that any person who withdraws proceedings without seeking adjudication of the same, or equally, even when proceedings are dismissed, such plaintiff/applicant/petitioner is bound to retribute the benefit which it has received under interim orders of the court and a simplicitor withdrawal of proceedings without restitution of benefit cannot be granted by the court. In fact, even on non-appearance by a person who is the initiator of the litigation, the proceedings need not be dismissed for non appearance or non- prosecution, and the court can and indeed must suo moto ensure that restitution, which the opposite party claims and deserves from the applicants/petitioner/plaintiff who has obtained the interim orders. Since this court has inherent powers of restitution we hold that CM 1497/2009 is maintainable in the disposed off FAO(OS) 448/2008. (emphasis supplied) 24. Consequently, in the opinion of this Court, to accept the plaintiffs plea that this Court had become functus officio and could not entertain the restitution application would be both impractical and amount to placing premium on fraud/misrepresentation.

25. The Supreme Court in Kavita Trehan (Mrs) & Anr. v. Balsara Hygiene Products Ltd., (1994) 5 SCC 380.has also held that Section 144 CPC incorporates only a part of the general law of restitution and is not exhaustive. The relevant portion of the aforesaid judgment is reproduced hereinbelow:22. The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words: Where and insofar 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 instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every court. (emphasis supplied) 26. Further, the plaintiffs reliance upon Hari Singh Mann (Supra) is misconceived as it is based upon provisions of Code of Criminal Procedure (Cr. P.C.) and not Code of Civil Procedure (CPC). It is pertinent to mention that in Cr. P.C. there is no provision like Section 144 of CPC which explicitly provides for an application for restitution.

27. Mr. Khoslas other submission that the defendant no. 7/ applicant should have pursued the present partition suit by transposing herself as plaintiff, as in a suit for partition every party is a plaintiff, is contrary to facts and untenable in law. Defendant no. 7 is not a legal heir of deceased father of plaintiff and only a legal heir can insist on pursuing a suit for partition. Consequently, the Supreme Courts judgment in R. Ramamurthi Aiyar (supra) is inapplicable to the facts of the present case.

28. The plaintiffs further contention that as there was no adjudication of the status of the aforesaid Shop, the defendant no.7 had no right to file a restitution application is erroneous. The order dated 28th January, 2009 as well as the undertaking given by the plaintiff specifically stipulate that Rs.30,000/- per month is to be paid in the event of plaintiff being unsuccessful in establishing that the aforesaid Shop is joint property. In the opinion of this Court, the plaintiff by abandoning his suit has been unsuccessful in establishing that the aforesaid shop is joint property. It may be noted that while in sub-rule (1) of the former Rule 1 of Order XXIII of the CPC, the words withdraw his suit had been used, in the new sub-rule (1) of Rule 1 of Order XXIII of the Code, the words abandon his suit have been used. The Supreme Court in catena of cases has also held that whoever waives, abandons or disclaims a right, will lose it forever and would be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. Consequently, this Court is of the opinion that plaintiff by abandoning his suit has been unsuccessful in establishing that the aforesaid Shop was joint property.

29. Though no reply affidavit has been filed in the present application and this Court would be entitled to accept the defendant no.7/applicants contention that the market rental of the aforesaid Shop was Rs.84,000/- per month, but as an application being I.A. 3029/2009 for increase of damages had been dismissed by this Court on 08th December, 2011 and no steps have been taken to either seek its recall or to challenge it in appeal, this Court is of the opinion that restitution should be granted only @ Rs.30,000/- in accordance with the undertaking given by the defendant no.7/applicant.

30. To conclude, this Court is of the view that plaintiff having voluntarily abandoned its contention of joint ownership of the aforesaid Shop, has by necessary implication failed to establish that the said Shop is joint property. Accordingly, the plaintiff is directed to adhere to the undertaking given by him to this Court on 05th April, 2010 and to compensate defendant no.7 by way of restitution by paying Rs.30,000/- per month for the period starting from 22nd May, 2007 till 08th December, 2011 within two months from today.

31. With the aforesaid directions, present application stands disposed of. CS(OS) 911/2007 & I.A. No. 15099/2012 List the matter for consideration of pending application on 07th February, 2013. MANMOHAN, J JANUARY 24 2013 rn/js

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