**APPLICATION UNDER SECTION 144 OF THE CODE OF CIVIL PROCEDURE APPLICATION FOR RESTITUTION OF PROPERTY**

IN THE COURT OF THE....................

Civil Misc. Application No................ OF 19..............

Under Section 144 of the Code of Civil Procedure

C. D.............................................. Defendant/Applicant

in

O. S. No..................... of 19....................

A. B.................................................................. Plaintiff.

*versus*

C. D............................................................... Defendant

Sir,

The defendant/applicant most respectfully submits as under:

1. That this learned Court passed the decree in suit No..................... of 19.................... between the parties aforementioned decreeing the suit of the plaintiff for possession of the.................... in Revenue Plot No..................... situate in the village.................... of District....................

2. That the applicant appealed to the Court of the District Judge.................... and the civil appeal was numbered as Civil Appeal No..................... of 19.................... This appeal was ultimately transferred to the Court of the Ilnd Additional District Judge..................... who also dismissed the appeal vide his judgment and decree dated.................... 19....................

3. That the applicant then filed a second appeal in the High Court of ..................... which Hon’ble Court admitted the appeal for hearing but did not grant stay order for stay of execution in the matter. As such the possession of the .................... was taken by the plaintiff by executing the decree.

4. That ultimately the Hon’ble High Court allowed the second appeal and reversed the judgments and decree of this Court as well as of the learned Additional District Judge aforesaid, vide its judgment dated.................... 19....................

5. That it is expedient that the possession of the.................... may be restituted to the applicant/defendant.

**PRAYER**

It is, therefore, most respectfully prayed that this Honourable Court may be pleased to order restitution of the.................... in Revenue Plot No.................... of Village.................... to the applicant/defendant and the costs of the suit awarded by the Hon’ble High Court.

Dated.................... Counsel for the defendant/applicant.

**CASE LAW**

***Section 144***

**APPLICATION FOR RESTITUTION**

Application for restitution under this section is an application for execution of decree, and the principle of *res-judicata* applies to it. Where the name of a defendant was expunged from prior title suit by reason of compromise decree passed in subordinate suit, that defendant is entitled to re-agitate all questions in issue in that suit1

**BURDEN OF PROOF FOR MESNE PROFITS.**

The person who was in possession and the rightful party was out of possession, has the burden on him to prove the amount realised as the accountable person. Then it is for the other party to adduce evidence in rebuttal2.

**RESTITUTION OF SUIT — TRANSFEREE EXECUTING, COURT NOT COMPETENT TO ENTERTAIN RESTITUTION APPLICATION.**

A bare reading of Sub-section (1) of Section 144 does indicate that the application for restitution would lie when the decree executed is reversed or varied or modified. The doctrine of restitution is based upon the high cardinal principle that the acts of the Court should not be allowed to work in injury or injustice to the suitors. Section 144 therefore contemplates restitution in a case where property has been received by the decree-holder under the decree which was subsequently either reversed or varied wholly or partly in those proceedings or other proceedings. In those set of circumstances law raised an obligation on the party that received the benefit of such reversed judgment to restitute the property to the person who had lost it. In that behalf of Sub-Section (2) a right or suit was taken out and an application under Sub-Section (1) was contemplated for execution of the decree by way of restitution. Sub-Section (1) clearly indicates that it is a court of first instance in which the proceedings in the suit had been initiated and a decree was passed or the suit was dismissed but subsequently on appeal decreed or *vice versa.* The court of first instance would therefore mean the court which passed the decree or Order. The transferee executing court is not the court that passed the decree or Order but the decree was transmitted to facilitate execution of that decree or Order since the property sought to be executed or the person who is liable for execution is situated or residing within the jurisdiction of that executing court. Therefore, the court which is competent to entertain the application for restitution is the court of first instance that decreed the suit and not the court to which the decree was transmitted for execution3.

**RESTITUTION OF PROPERTY.**

Where decree set aside in appeal, the judgment debtor is entitled to restitution of property4.

**RESTITUTION OF PROPERTY — PURCHASER AWARE OF PENDING APPEAL AGAINST DECREE — PURCHASER CANNOT RESIST
RESTITUTION.**

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 reversed5.

**RESTITUTION OF POSSESSION.**

We are to share the view expressed by the High Court as in our considered opinion, the status of a *bonafide* purchaser in an auction sale in execution of a decree to which he was not a party stands on a distinct and different footing from that of a person who is inducted as a tenant by a decree holder-landlord. A stranger auction-purchaser does not derive his title from either the decree holder or the judgment-debtor and therefore restitution may not be granted against him but a tenant who obtains possession from the decree-holder-landlord cannot avail of the same right as his possession as a tenant is derived from the landlord.

As it is the decree-holder who has put Respondent 2 in possessions and, therefore, when the decree has been set aside he is bound to restore to the judgment-debtor what he gained under the decree and subsequently transferred to Respondent6.

**RESTITUTION JURISDICTION.**

The Law of Restitution encompasses all claims founded upon the principle of unjust enrichment. Restitutionary claims are to be found in enquiry as well as at law. Restitutionary law has many branches. The law of quasi-contract is that part of restitution which stems from the common indebitatus counts for money had and received and for money paid, and from quantum meruit and quantum valebat claims.

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.

Section 144 C. P. C. incorporates only a party of the general law of restitution. It is not exhaustive. 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 in so far as a decree or an order is varied or reversed in any appeal, revision or other proceedings or is set aside or modified in any suit instituted for the purpose............... The tenant 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 court7.

**APPLICABILITY OF THE SECTION**

The jurisdiction of the civil Court in respect of *Bhumidhari* rights has been excluded and the delivery of possession of the land in dispute to the appellant by the civil court, is itself an act without jurisdiction. It is therefore the duty of the Court to order restitution and remedy the wrong done by its decree, which has been set aside by the Court of appeal as being without jurisdiction8.

An auction purchaser is not entitled to recover possession of the entirety of the properties and is only entitled to work out his rights by way of a separate suit for partition which he should have filed for that purpose. But the co-owner who does not object to the entire property being delivered to the auction purchaser cannot seek to obtain restitution under this section. The remedy is only by way of a suit9.

**APPLICABILITY OF SUB-SECTION (1)**

Law imposes an obligation on unsuccessful party to make restitution to the successful party and this obligation arises automatically on the reversal of the erroneous decree10.

**APPLICABILITY IN CASE OF ANNULMENT OF A DECREE OBTAINED BY FRAUD.**

If a decree has been obtained by fraud, it may be possible to have it varied or reversed by another court in another suit. It cannot be said that the restitution under section 144 should be confined only to cases where the decree has been "varied or reversed" in appeal or revision and has not been varied or reversed by way of the order mode11.

The terms of this section are absolute. Restitution is a matter of right whenever the decree or order in enforcement of which money or property has been taken from a party is reversed and the discretion of the Court is only in regard to payment of interest, damages, compensation, or mense profits which are properly consequential orders. It cannot be said that suitable terms have to be imposed on the party before restitution. The section, however, does not give to the person claiming restitution any better position than that which he occupied at the time when the wrong decree was passed12.

**CONDITION FOR APPLICABILITY OF THE SECTION.**

As long as the decree for possession is not reversed or altered in the appellate Court, the benefit derived by that decree holder cannot be the subject-matter of an application under this section.

**SECTION 144-RESTITUTION**

Under Section 144-of Civil Procedure Code, where an order has been set-aside it is the court of first instance which passed original order that is competent to order restitution.13

1. Maqbool Alam v. Khodaija, A.I.R. 1966 S.C. 1194: 196 S.C. D. 1010: 1966 B. L. J. R. 566: (1966) 2 S.C. W. R. 170.

2. Rattan Lal. v. Girdhari Lal. A.I.R., 1972 Delhi 11.

3. Neelathupana Kummi Seethi Koya Phangal v. Monthara Pallia Padippua Attakova, A.I.R. 1994 S.C. 1591.

4. Chinnama! v. P. Arumugham, A. l. R. 1990 Supreme Court 1828: 1990 (1) J. T., 51: 1990 (1) S.C. R. 78: 1990 (1) S.C.C. 513.

5. Chinnamal v. P. Arumugham, A. l. R. 1990 S.C. 1828.

6. Gurjogincfer Singh v. Jaswant Kaur, 1994 (3) C.C.C. 450 (S.C. ).

7. Mrs. Kavita Trehan v. Balsara Hygiene Products Ltd., A.I.R. 1995 S.C. 441.

8. S. B. Singh v. M. M. Singh. A.I.R. 1972 Delhi 212.

9. Sundara Murthi Gramani v. Kesava Naicker, (1972) 2 M. L. J. 259: 85 L. W. 720.

10. khemchand Sharma v. Padmalochan Panda, 1973 (1) C. W. R. 530: 39 C. L. T. 435.

11. Smt. Sanalata Dasi v. Sri Moni Mohan Modak, (1971) 75 C. W. N. 927.

12. Central Bank of India v. S. Chattanath Karayalar, Aleppey, A.I.R. 1966 Ker. 225: I. L. R. (1966) 2 Ker. 87: 1966 Ker. L. T. 313: 1986 Ker. L. R. 213: 1966 Ker. L. T. 197.

13. Moosa v. Jyothi, 2001 (1) CCC 367 (Ker. ).