
(1929) 08 PAT CK 0014

In the Patna High Court

Ram Ratan Prasad and Others

APPELLANT

Vs

Banarsi Lal and Others

RESPONDENT

Date of Decision : 06-08-1929

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 151, 47

Citation : AIR 1930 Patna 280

Hon'ble Judges : Fazl Ali, J;Dhavle, J

Bench : Full Bench

Judgement

Fazl Ali, J.—The circumstances giving rise to this appeal are briefly these:

The appellant got a decree in a rent suit against the respondent and in execution of decree 3 bighas 8 cattahs and 1 dhur of land in village Mahesia belonging to the respondent was sold and on 11th February 1927 the appellant who had purchased the land at the auction sale obtained delivery of possession. Meanwhile on 7th February 1927 .the respondent had filed an application under Order 21, Rule 90, Civil P.C., for setting aside the sale. On 29th June 1927 the sale was ordered to be set aside and on 8th May 1928 the respondent applied to the Court for being restored to possession and also for being awarded mesne profits up to the date when they were restored to possession.

2. The learned Munsiff before whom the application was made deputed a commissioner for a local investigation and the commissioner submitted a report on 23rd June 1928, in which he stated that he found the judgment-debtor to be in possession at the time, but as regards whether the appellants had at all obtained possession of the trees and fields the commissioner stated that he was unable to give any definite opinion because the parties were at variance with each other and there were witnesses to support both the parties. The learned Munsiff dismissed the application of the judgment-debtor asking for mesne profits, because in the first place, he was of opinion that it was highly improbable that the decree-holder had actually got possession during the interval that the case under Order 21, Rule 90 lasted and in the second place he held that

properly speaking no application u/s 144, Civil P.C., lay in the case, because the decree of the Court of first instance had neither been reversed nor varied. The judgment-debtor then appealed to the District Judge who vacated the order of the Munsiff and remanded the case to him in order to decide, on taking such evidence as might be adduced by the parties, whether the decree-holder had or had not actually obtained possession. The decree-holder has now preferred an appeal from this order of the District Judge and it is contended by the learned advocate for the appellant that the order of the District Judge was entirely without jurisdiction because the order passed by the learned Munsiff was not appealable at all.

3. Now the question which arises for consideration is whether the provision of Section 144, Civil P.C., will apply where a sale in execution of a decree is set aside under Order 21, Rule 90 and the judgment-debtor applies for restitution and for mesna profits. Now looking to the language of Section 144 it is clear that a duty is cast upon the Court to order restitution only where and in so far as a decree is varied or reversed. In this particular case it is clear that although the sale was set aside, the decree remained intact and it was neither varied nor reversed. This being so, the case in my opinion does not come within the purview of Section 144. I do not, however, mean to suggest for a moment that where the decree is not reversed or varied the Court will be entirely powerless to order restitution even though the ends of justice may require it, because, as has been held in a number of cases, the Court has inherent jurisdiction to make such orders as are necessary in furtherance of the ends of justice. The view was clearly enunciated in the "case of Sukhdeo Das v. Rito Singh [1917] 2 Pat. L.J. 361. In that case a sale in execution of a decree was set aside at the instance of the auction purchaser on the ground that the judgment-debtor had no saleable interest in the property as his interest had been previously sold in execution of another decree. The sale was confirmed in appeal but in the meantime the auction purchaser had withdrawn the purchase money from the Court. The executing Court ordered him to refund the money and on his objecting to do so attached his moveable property. This order was set aside by the lower appellate Court upon which a second appeal was preferred and it was held by this Court that the order did not fall within Section 144, Civil P.C., 1908, but that the order of the executing Court must have been made u/s 151, of the Code. Similarly it was held in *Chinnasubbamma v. P.G. Chennayya* [1917] 41 Mad. 467 that where an order passed under Order 21, Rule 90, Civil P.C. refusing to set aside a sale held in execution of a decree was reversed on appeal, Section 144, Civil P.C., did not in terms apply as no decree was varied or reversed but only an order under Order 21, Rule 90 was reversed on appeal.

4. It was, however, suggested in that case also that it may be a case to which the provisions of Section 151 might apply. Again in *S.M. Amirannessa Chowdhurani v. S.M. Kuaimannessa Chowdhurani* 18 C.W.N. 1299 it was held that where a sale in execution of a decree is set aside on the ground of fraud on the part of the decree-holder as well as auction, purchaser, the Court in setting

aside the sale can in the exercise of its powers u/s 151, Civil P.C., direct the auction-purchaser to make over to the judgment-debtor the profits realised from the property, having got hold of the property by an abuse of the Court's process. It appears from the judgment of the High Court in that case that the question as to whether Section 144 would apply to a case like that was actually raised, but their Lordships, although they did not choose to decide the point, expressed themselves as follows:

It is contended that having regard to the definition of the word "decree" in Section 2(2) of the Code an order for sale is a decree. We are not satisfied that the case falls within the terms of Section 144. What was set aside was the sale itself, the transfer of the property, It is difficult to say that a transfer is a decree

5. In my opinion therefore the decree not being reversed or varied the provisions of Section 144 did not apply to the case and the Munsiff could only act u/s 151, Civil P.C., in the exercise of the (inherent jurisdiction of the Court.

6. The learned advocate for the respondent, however, contends that even though a case may not come within the letter of Section 144, a Court may order restitution and the order of restitution thus passed would be deemed to be an order u/s 144, Civil P.C., and the learned advocate relies upon two well-known cases. It appears, however, that all that was said in one of these cases, *Kamlanath Jha v. Mobit Jha* AIR 1924 Pat 880, was that the power of a Court to order restitution was by no means confined to the terms of Section 144, Civil P.C., and that it was the inherent right of a Court to do what was right and proper under the circumstances which have happened. In the other case again *Jai Berhma v. Kedar Nath Marwari* AIR 1922 P.C. 269 their Lordships of the Judicial Committee expressed themselves as follows:

It is the duty of the Court, u/s 144, Civil P.C., 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.

7. Now, I do not find anything in either of these two decisions to warrant the proposition of law that even though an order for restitution may be passed by a Court in cases where there has been no reversal or variation of the decree, it must necessarily be deemed to be an order passed u/s 144 On the other hand in both these decisions the inherent powers to the Court have been referred to side by side with Section 144, Civil P.C. If then it is held, as I am inclined to hold, that this was not a case to which the provisions of Section 144 would apply and that if any restitution was to be ordered or mesne profits were to be awarded it should have been done u/s 151, Civil P.C., it is clear that no appeal would lie from the order passed by the learned Munsiff. This result will follow from an examination of Section 104, Civil P.C., and Order 43, Rule 1, Civil P.C., and if any authority is needed for that proposition it is to be found in the case which I have already

referred to Sukhdeo Das v. Rito Singh [1917] 2 Pat. L.J. 361 where it was clearly held that the order of the executing Court was not a decree and therefore no second appeal lay.

8. It is, however, argued, and this is what seems to have been suggested by the learned District Judge also, that this is a case to which Section 47, Civil P.C. will apply. This section says that all questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. The question, therefore, is whether an application for restitution following a sale being set aside would be a matter relating to the execution of the decree. Now, in my opinion, it cannot be treated as a matter; relating to the execution of the decree without somewhat stretching the expression and some of the decisions to which I have referred also seem to support me indirectly in this view. As I have already said it has been held in these cases that an order for restitution where no decree has been varied or reversed would fall u/s 151, Civil P.C. The jurisdiction of the Code, however, u/s 151 is a discretionary jurisdiction, while Section 47, Civil P.C. says that all questions which relate to the execution etc. shall be determined by the Court, implying thereby that if these questions are raised, it will be obligatory upon the Court to decide them.

9. In my opinion the point raised by the learned advocate for the appellant that the learned District Judge acted entirely without jurisdiction in entertaining an appeal against an order of the Munsiff must prevail and the order of the learned District Judge must be set aside.

10. It is also contended by the learned advocate for the respondents that no second appeal will lie to this Court for two reasons. In the first place, because no appeal originally lay to the District. Judge and secondly, because the order of the District Judge being an order of remand, no appeal will lie from such an order. It has, however, been held in a series of cases that if the District Judge! entertains an appeal which does not lie to his Court a second appeal lies against his decision-see for example Sagar Mull Vs. Hira Maharaj and Others, . It is clear that if it is held that the order of the District Judge was entirely without jurisdiction, then whatever the nature of that order may be, it will be competent for this Court to vacate that order. The appeal is therefore allowed and the order of the District Judge vacated, but in the circumstances of the case there will be no order as to costs.

11. In view of the order passed by me in this case the application for the stay of proceedings becomes infructuous and is withdrawn by the appellant.

Dhavle, J.

I agree.