

ALLAHABAD HIGH COURT

Jagendra Nath Singh

Vs

Hira Sahu

(Malik, J.)

08.05.1947

JUDGMENT

Malik, J.

1. The facts of this case are given in the referring order dated 15th April 1946.

2. One Fateh Bahadur Singh had executed a simple mortgage for Rs. 1700 in favor of Nandan Sahu on 26th May 1911. The mortgagee filed a suit, No. 825 of 1923, against Fateh Bahadur Singh and obtained a preliminary decree on 7th April 1924. A final decree for sale was passed on 24th February 1925, for Rupees 37,525 odd. Jogendra Nath Singh, son of Patch Bahadur Singh, then filed a suit, No. 77 of 1927, for a declaration that the property included in the mortgage was joint family property, that the mortgage was without legal necessity and that he joint family was not, therefore, bound by the decree or liable for payment of the mortgage debt. During the pendency of that suit the whole of the mortgaged property was sold in execution of the decree in suit No. 325 of 1923 and was purchased by the decree-bolder. The suit of Jogendra Nath Singh was dismissed by the trial Court on 10th April 1928, and the auction sale was thereupon confirmed and the auction purchaser got possession of the property on 28th December 1928.

3. Jogendra Nath Singh filed an appeal (First Appeal No. 252 of 1928) in this Court on 21st June 1928. This appeal was allowed on 12th April 1932. The decree of this Court, so far as it is relevant for our purposes, is as follows: It is ordered and decreed that this appeal be allowed, that the decree of the Subordinate Judge of Basti be set aside and that a decree be and it hereby is passed in favor of the plaintiff for a declaration that the decree dated 7th April 1924, passed in suit No. 325 of 1923 by the Court of the Subordinate Judge of Basti is valid for recovery of Re. 1,700 with simple interest thereon at the rate of Rs. 18 per cent, per annum, calculated up to 7th October 1924, the date fixed for payment of the said decree and pendente lite interest as directed in the aforesaid decree upto the date of realisation, that the final decree which was subsequently passed in the said suit on 24th February 1925 is also valid for the amount calculated in the manner stated above and capable of execution by sale of the mortgaged property in suit for

satisfaction of that amount, that the aforesaid decrees are invalid as regards interest in excess of the amount which will be arrived at on calculation in the manner already mentioned above and that the auction held on the basis of the said final decree during the pendency of this appeal shall not stand.

4. As a result of this decision the sale was set aside and possession was delivered back to the joint family consisting of Fateh Bahadur Singh and Jogendra Nath Singh on 26th April 1933.

5. An application was filed on 2nd March 1936 by Jogendra Nath Singh for the relief that Nandan Sahu be directed to pay the profits in respect of the property which he had purchased at the auction and which had remained in his possession from 29th June 1927 which, it is now admitted, was a wrong date and should have been 28th December 1928 up to the 26th April 1933. This application is headed as being under Sections 151 and 144, Civil P.C.

6. The facts, so far set out, are not denied. It is not denied that Nandan Sahu had purchased the property at auction in execution of his decree in suit No. 325 of 1923 and had got possession of the same on 28th December 1928. It is further not denied that, as a result of the decree in First Appeal No. 252 of 1928, the auction Bale was set-aside and he had to restore possession on 26th April 1933. He had, therefore, remained in possession from 28th December 1928, to 26th April 1933, under an auction sale which had been expressly set aside on the ground that the decree in execution of which the property had been sold was not binding on the joint Hindu family of Fateh Bahadur Singh and his son Jogendra Nath Singh.

7. This application was opposed on the ground that Section 144, Civil P.C., did not apply to a case where a decree had not been set aside or modified by a superior Court, either in appeal or revision arising out of the same proceedings.

8. The learned Civil Judge agreed with this contention and held that the application could not be entertained under Section 144.

9. As regards the argument that the Court, should, in the exercise of its inherent jurisdiction, restore the applicant to the position that he would have occupied if a decree had not been passed against Fateh Bahadur Singh and the property had not been sold in execution thereof and the joint family had not been dispossessed of the property, the learned Judge held that the applicant had not come to Court with clean, hands and had not paid the amount due from him under the decree which was passed in appeal by this Court and the Court was, therefore, not prepared to aid a dishonest litigant and there was therefore no occasion for the Court's interference *ex debito justitias*.

10. Evidently the ground on which the learned Judge "took this view was that Jogendra Nath Singh had applied under the U.P. Encumbered Estates Act and in accordance with the provisions

of that Act a simple money decree would be passed, in favor of Fateh Bahadur Singh and the amount would be paid by the Collector, in due course.

11. I do not think that the learned Judge was right in his view that, if Jogendra Nath Singh took advantage of the Debt Acts and applied under the U.P. Encumbered Estates Act, as he had probably a right to do, it could be said that he did not come to Court with clean hands; nor am I prepared to uphold his view that a person trying to take advantage of a Debt Act must be deemed to be a dishonest litigant. It may be that from the higher standards of morality a man must meet his liabilities-according to the terms of his contract, but if the Legislature, in its wisdom, has thought it fit to give a debtor an opportunity of going back on his contract and get certain reliefs which the law gives him, the Courts of law would not be justified in condemning such a debtor as dishonest.

12. If I were not of the opinion that Section 144, Civil P.C., applies to this case, I would have held that the applicant is entitled to the relief claimed under the inherent powers of the Court. The matter has been considered by their Lordships of the Judicial Committee in several cases and their Lordships have laid down that it is not only the right but the duty of the Court to see that a person does not suffer by its wrong decision.

13. In the leading case of *Jai Berham v. Kedar Nath*¹ their Lordships held: It is the duty of the Court under Section 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. As was said by Cairns L.C. in *Rodger v. Comptoir d'Escompte de Paris*² 'One 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 any intermediate Court of Appeal, but the act of the Court as a whole from the last Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.

14. In the referring order we expressed some doubt whether in case the application did not lie under Section 144 but relief could be granted to the applicant only under the Court's inherent jurisdiction, on the trial Court having refused to exercise such jurisdiction, whether the applicant could come up in appeal to this Court, the appeal being a creature of statute and there being no special provision for an appeal against such an order. But I find that in *Jai Berham v. Kedar Nath*³ the Sub-ordinate Judge had exercised his jurisdiction and ordered restitution and there was an appeal to the High Court of Judicature at Patna which upset the decision of the Subordinate Judge and there was a further appeal to His Majesty in Council who restored the decision of the trial Court. Their Lordships in the observations quoted by me above have made it clear that the duty was not only of the primary Court but also of the appellate Courts which had finally

disposed of the case. I further notice that in the Full Bench case in *Bindeshri Prasad v. Badal Singh*⁴ though the Court did not rely on Section 144 and relied on the provisions of Section 47, Civil P.C., and in the alternative on the inherent powers of the Court under Section 151, the jurisdiction of the appellate Court was not questioned and the appeal was allowed.

15. As I am however, of the opinion that this case clearly comes' under Section 144 and as we did not hear any arguments on the question whether an appeal would lie from an order refusing to grant restitution under the inherent powers of the Court, I do not wish to express any definite opinion on the point.

16. The contention of learned counsel for the respondents that Section 144 does not apply in the circumstances of the case is based on the language of the section. The relevant portion of Section 144 (Act 5 [v] of 1908) is as follows:

(1) Where and in so far as a decree 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....

(2) No such suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under Sub-section (1).

17. The first argument is that Courts of equal jurisdiction cannot "reverse" or "vary" each other's decree and a decree is "reversed" or "varied" only when it is modified or set aside in the same proceedings by a superior Court. That when a Court holds that a decree passed by another Court is not valid or binding, in whole or in part, it only gives a declaration to that effect but it does not either "reverse" or "vary" the previous decree.

18. The second argument is that the words "Court of first instance" contemplate that the variation or reversal of the decree is made by a superior Court.

19. In support of his argument learned Counsel has cited various authorities. But before I come to discuss these authorities, I may mention that a decree may be varied or reversed in various ways. The most common method is to file an appeal or, where the decree is not appeal able, a revision in a superior Court which may either affirm, set it aside or modify the decree. In that case, no doubt the decree has been either "affirmed", "varied", or "reversed". A Court, may also review its own decree and in that case it sets aside its previous decree. It will be noticed that there is no question then of a superior and; an inferior Court as the Court had itself passed the decree. If a decree has been obtained by fraud or has been obtained against a person who was not properly represented or has been passed by a Court that had no jurisdiction, it may be possible to have it varied or reversed by another Court. There seems to be no reason why restitution under Section

144 should be confined only to the case where the decree has been "varied" or "reversed" in appeal or revision and has not been "varied" or "reversed" by any Court by any of the other modes.

20. To my mind, the words "Court of first instance" in Section 144 only make it clear that the application for restitution should be made to the first Court and not to any of the superior Courts. For example, if a suit had been dismissed by the trial Court and then on appeal the plaintiff's Suit had been decreed but it was later held that, the decree was vitiated by fraud or want of jurisdiction or for any other cause, the application for restitution, if any, would have to be made to the first Court, even though the decree had been passed in favor of the plaintiff by the appellate Court. I do not see why the words "varied" or "reversed", though commonly applicable to a case where a decree has been set aside on appeal or revision by a superior Court, could not be applied to a case where the decree had been set aside or varied by some other Court even if that other Court under the exceptional circumstances some of which have been mentioned by me above, had the right to vary or set aside the decree.

21. Learned Counsel for the respondents has drawn our attention to Section 574 of the old Code of Civil Procedure (Act 11 [XIV] of 1882) which provided that "the judgment of the appellate Court shall state, when the decree appealed against is reversed or varied the relief to which the appellant is entitled". He has urged that it is clear that it is only the appellate Court that can reverse or vary the decree. I have already said that ordinarily that is so, but there is no reason why, where a decree has been held to be invalid, in whole or in part, by another Court of competent jurisdiction which was entitled by reason of the peculiar circumstances under which the decree was passed to give a decree to that effect, it should not be deemed by its order to have varied or reversed the decree. In the case before us, this Court by its decree, which I have quoted above, has expressly purported to vary and modify the previous decree.

22. Our attention has also been drawn to, Section 583 of the old Code and it is urged that that section clearly applies only to a case where a decree has been modified or reversed in appeal. Section 583 reads as follows: When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits. This section, as I understand, refers only to execution and the Court to which the application for execution has to be made. The language of Section 144 of the new Code is materially different, and I do not see why, when the section was being redrafted, the Legislature should have intended to confine it only to a reversal or variation by an appellate Court and not to every kind of variation or reversal wherever such reversal or variation was possible.

23. A large number of cases have been cited at the bar, but it does not appear to be necessary to

discuss all of them. In *GOPAL PASORI V. SWARNA BEWA* (31) 18 A.I.R. 1931 CAL. 14 in execution of a rent decree the plaintiff had purchased a certain holding in the year 1915. A suit was brought by certain persons claiming that the holding belonged to them and they claimed possession. The suit was dismissed by the trial Court but was decreed by the lower appellate Court in 1917. In 1921 the High Court allowed the appeal. The defendants after the suit was decreed by the lower appellate Court had obtained possession of the holding before the High Court had allowed the appeal. The plaintiff then applied for restitution under Section 144. On the facts of that case, Section 144 was clearly applicable as the plaintiff had to part with possession of the property under a decree which had been set aside on appeal. The observations of the learned Judges were, therefore, obiter, but Rankin C.J., with whom C.C. Ghose J agreed, observed:

But if decree is set aside either by a proceeding in the suit itself or if it is set aside by a decree in another suit altogether, or if without being set aside by such a decree, is superseded - to use the language of Turner L.J., in a Privy Council case - these are matters which are not within the words of the section. "Varied or reversed" has a quite definite meaning for lawyers in this country and it appears to me that the observations in *Subrayudu v. Swshasami*⁵ failed to take account of the correct use of language in this matter. With great respect to the learned Judges, as I have already said, the point did not arise before them, and though I am prepared to admit that the words "varied" or "reversed" ordinarily apply to a case where the variation or reversal is by a superior Court, it does not follow that a decree cannot be varied or reversed by the same Court or any other Court of concurrent jurisdiction where grounds exist for such variation or reversal.

24. In *Bhawani Shankar v. Mahmud Ali* 24 A.I.R. 1937 All. 232 Harries J., dealing with this point held that "the use of the phrase 'Court of first instance' contemplates that the variation or reversal of the decree is made by a superior Court" and said that the "section clearly applies where a decree has been reversed or varied upon appeal, revision or by a review." If I may point out with great respect, review is not granted by a superior Court and, as I have already said above, to my mind, all that the Legislature intended was that the application under Section 144 should be filed in the Court of first instance whichever Court might have passed the decree, which had been reversed or superseded. Harries J., went on to hold that Courts of equal jurisdictions could not reverse or vary each other's decrees, although in a suit a Court might hold that an earlier decree passed by another Court was not binding upon the plaintiff before it by reason of fraud, collusion or other cause. The result of accepting this view would be that while if a decree has been reversed on appeal or revision restitution would be granted under Section 144 and the order passed would be a decree which would be appealable, while in other cases the Court would have to grant it under its inherent jurisdiction. I am not prepared to hold that the result of a decision that a particular decree is void, as it is vitiated by fraud or want of jurisdiction, does not in effect amount to its variation or reversal.

25 In *Ashutosh Nandi v. Kundai Kamini Dasi*⁶ the facts were very peculiar. Defendant 8 filed a

suit for arrears of rent against defendant 4 and obtained a decree and in execution of the decree he purchased the holding. Defendants 1 and 2 filed a suit against defendants 3 and 4 and obtained a decree that they were the owners and not defendants. They then filed an application under Section 144, Civil P.C., as against defendants 3 and 4 that the holding of which defendant 3 had taken possession should be given to them. It cannot be said that any decree was in that case reversed or varied. Reliance was placed in that case on the decision in *Shama Purshad Roy v. Hurro Prasad Roy*⁷ (P.C.) and the point urged was that the decree obtained by defendants 1 and 2 against defendants 3 and 4 superseded the decree obtained by defendant 3 against defendant 4. The Court, however, relied on the judgment" of their Lordships of the Privy Council in *Naganna Naidu v. Venkatappayya*⁸ Where their Lordships had pointed out that the decision in *Jogesh Chunder Dutt v. Kalichurn*¹⁰ depended upon the interpretation put on the Order in Council in that case and their Lordships had accepted the reasonings and conclusions set forth in the dissentient judgment of Garth C.J. in *Jogesh Chunder Dutt v. Kalichurn*⁹ I do not think the point now under consideration really arose for decision in *Ashutosh Nandi v. Kundai Kamini Dasi*¹¹

26. Similarly, in *Shivappa Dhondappa v. Ramlingappa Shivappa*¹² a suit had been filed by certain persons for partition against one Somanna and his transferees and a preliminary decree was passed. The preliminary decree provided that as far as possible the lands in possession of the transferees from Somanna should be allotted to the share of Somanna. Two days after the preliminary decree, Somanna sold the rest of his share to his brother in law Sabu who brought a separate suit for partition Sabu obtained a decree for partition. "When the preliminary decree in the first suit was sent to the Collector to effect partition, the Collector found that Somanna had transferred the entire property and therefore it was not possible to effect partition in such a manner as to allot to the share of Somanna the lands in possession of his transferees. The Collector, therefore, divided the lands equally between Somanna and the plaintiff to that suit and a final decree for partition was passed Then a third suit was filed to have 'the preliminary decree in the suit filed by Sabu set aside. The plaintiff to the first suit was not a party to the third suit. It was not clear whether : Somanna was or was not a party, but ultimately 'this suit was decreed and the decree in the suit filed by Sabu was set aside. It was after this that an application was filed that the property should be re-partitioned in such a manner that the lands alienated to the alienees should be allotted to the share of Somadna by way of restitution under Section 144. It would appear that no Court had purported to interfere in any way with the decree in the first suit No. 347 of 1919 and therefore there was no question of restitution either under the inherent jurisdiction of the Court or under Section 144, Civil P.C.

27. Again in *Anant Baburao v. Vyasacharya Madhvacharya*¹³ the plaintiff, had obtained a decree against defendants 1 to 6 for arrears of rent. The suit was contested by defendant 7 and the plaintiff withdrew his suit against this defendant. The District Judge granted the plaintiff an opportunity to bring another suit on the same cause of action. After the suit was withdrawn defendant 1 filed an application for restitution under Section 144 alleging that the suit had been withdrawn as against him. Under a misapprehension that the suit was withdrawn as against

defendant 1 the trial Court passed an order granting restitution. The plaintiff appealed and the order was set aside and the application for restitution was dismissed. It was against that order that defendant 1 filed an appeal in the High Court in which he urged that the suit had been withdrawn not only against defendant 7 but against all the defendants. The High Court held that the suit had been withdrawn only against defendant 7 and not against all the defendants and the plaintiff decree-holder had, therefore, the right to realise the amount from the other defendants and he could not be directed to restore what he had received. The' observation that the power of the Court to allow restitution is not limited to the terms of Section 144 and that the Court would have inherent power to direct restitution, even though the decree was not reversed or varied in appeal, was merely obiter as the point did not arise in the case.

28. In *Brij Mohan Singh v. Rameshar Singh*¹⁴ the point again did not arise. In that case in execution of a simple money decree certain properties were sold and were purchased by one Eameshar Singh who got possession of the property. The sale was set aside by the Commissioner. A suit was then filed by Bameshar Singh that the Commissioner's order setting aside the sale was void. The suit was decreed by the learned Munsif but was dismissed by the Chief Court. Rameshwar Singh had gob possession of the property after the auction sale" and had remained in possession of the property after the order of the Commissioner setting aside the sale and after the decision of the learned Munsif. When the Chief Court ultimately dismissed the suit and thereby affirmed" the order of the Commissioner setting aside the sale the? judgment-debtors applied to the Munsif for delivery of possession under his inherent jurisdiction under Section 161, Civil P.C. It was not a case where possession had been delivered of the property by reason of a wrong Order of the Munsif and it was, therefore, a case to which Section 144 was really not applicable. The learned Munsif refused to grant the application and the Chief Court held that an order passed under Section 151 was not an appealable order. The observations in the judgment as regards the scope of Section 144 that it applies to a case where a decree or order has been varied or reversed in appeal appear to be obiter, nor has the point been discussed at any length in the judgment.

29. The only case cited from Lahore is *Alfred Zahir v. Sirajuddin*¹⁵ In that case too the question did not arise. One Sirajuddin had filed a suit for restitution of conjugal rights and his wife Aziz Begum had filed a suit for her dower of Rs. 1,000. Both the suits were decreed on the same date. The wife transferred her decree to one Miraj Din. The husband filed a suit that the transfer was fictitious. While that suit was pending Miraj Din transferred his rights to one Alfred Zahir. Both the transfers were held to be invalid. While the proceedings for holding the transfer to be in valid were pending Alfred Zahir had applied for execution. The decree was executed, certain properties were sold and they were purchased by him. After it was held that the transfers were fictitious Sirajuddin filed an application under Section 144 for restitution. It is obvious from the facts stated above that no decree or order had ever been varied or reversed. All that had happened was that a transfer by the decree-bolder had been held to be invalid and the High Court held that the decree not having been varied or reversed the application was not maintainable. Any

observations in that judgment that the variation or reversal should be by a Court of appeal are, therefore, purely obiter. The High Court ultimately held that under Section 161 Alfred Zahir should be made to restore the property which he had purchased under a fictitious or fraudulent transfer.

30. The facts of the above case are very similar to the facts of the case in *Chintaman Singh v. Chiuni Sahu*¹⁶ There too a decree had been transferred to the appellant. The transferee executed the decree and realised the amount under the decree. Then a suit was instituted for a declaration that the transfer was bad and the suit was decreed. Then an application was filed for realisation of the amount which the appellant had realised in execution by reason of the transfer in his favor. The High Court held that the language of Section 144 was wide enough to cover a case of that kind. Learned Counsel for the appellant has relied on the observations in this case that the language of Section 144 should be liberally construed and should not be confined to a case where the decree is varied or reversed in appeal.

31. Learned Counsel for the respondents has also relied on the decision in *Chintaman Singh v. Chiuni Sahu* (16) 3 A.I.R. 1916 Pat. 299(SUPRA), where a decree had been passed ex parte and the decree-holder had obtained possession, and realised some profits out of the property. The ex parte decree was then set aside on an application for restoration and an application was filed under Section 144, Civil P.C. for refund. Chamier C.J. and Jwala Prasad J. held that, the section contemplated a variation or reversal by a superior Court and where an ex parte decree had been set aside by that very Court Section 144 did not apply. When Order 9 gives the Court a right to set aside its own ex parte decree, on sufficient cause being shown, I fail to see why the words "set aside" in Section 144 must be confined to the setting aside by a superior Court.

32. In *Rameshwar Lal v. Ramgopal Madhoprasad* (38) 25 A.I.R. 1933 Pat. 447(SUPRA) where an application had been filed by the auction purchaser for refund of the amount paid by him after a suit under Order 21, Rule 63, Civil P.C. had been decreed and it had been held that the property did not belong to the judgment-debtor it was held to be a case to which Section 144 did not apply and to which Section 151 was applicable. In such a case also no decree or order is set aside, but the application for restitution is made on the ground that the consideration has failed in its entirety. Certain observations in the said judgment that the variation or reversal of a decree or order must be by a Court of appeal appear to me to be obiter and the question did not really arise for decision.

33. These are the cases relied on by learned Counsel for the respondents and except for the decision of Harries J. in *Bhawani Shankar v. Mahmud Ali* 24 A.I.R. 1937 All. 232(Supra) to my mind the observations in all the other cases appear to be mere obiter.

34. Learned Counsel for the appellant has relied on the case in *Subrayudu v. Swshasami* 4 A.I.R. 1917 Mad. 293. I have already said above that the observations in that case, though in favor of

the appellant, were also obiter.

35. In *Bindeshri Prasad v. Badal Singh*¹⁴ a suit had been brought, on a mortgage and a final decree for sale had been obtained. The mortgaged property was sold and was purchased by a stranger to the-suit and the sale was confirmed. After the confirmation of the sale a suit was brought on behalf of a minor for a declaration that he had not been properly represented in the previous suit and that neither the mortgage, nor the decree, nor the auction sale held thereunder was binding on him. The suit was decreed and the minor obtained possession of the property, by an application under Section 144, Civil P.C. It would be noticed that his right to apply under Section 144 was not challenged. In any case, the point did not arise before the Court. The auction purchaser then applied that he having lost possession of the property was entitled to a refund of the price paid by him. This application was filed under Section 47 of the Code. The point whether a variation or reversal under Section 144 must be by a superior Court in the same proceedings was not a question for decision and the point was left open, though their Lordships observed that the words were "more applicable to a proceeding by way of appeal, revision or review than to a separate suit declaring that a decree is not binding on a particular party." Refund was, however, granted under Section 47, Civil P.C. and under the inherent powers of the Court. The decision in that case is therefore not helpful for our purposes.

36. In *Amba Lal v. Ramgopal Madhoprasad*¹⁸ a decree had been obtained against three brothers from the Bombay High Court, but the suit had been dismissed as against the other three brothers who had before the decision of the Bombay High Court brought a suit for partition. In execution of the decree, three-seventh share of the judgment-debtors in various items of the property was sold and was purchased by the decree-holder for Rupees 31,290/- out of which Rs. 4279-129 was paid to certain other decree-holders on their application for rateable distribution, but before the sale some of the items of property had been allotted to the brothers against whom the suit had been dismissed and to their mother who was not a party to the Bombay suit. The mother filed a suit that the property allotted to her could not be sold in execution of the decree and the brothers against whom the suit was dismissed by the Bombay High Court filed applications to the same effect under Section 47, Civil P.C. These objections were allowed and the suit was decreed with the result that the properties that had been allotted to their share were exempted. The decree-holder then filed an application that as a large amount of property that had been purchased by him had now gone out of his hands he was not liable for rateable distribution to the extent of Rs. 4,279-12-9 to the other decree-holders and they must be asked to refund the amounts paid to them in excess. This application was headed under Sections 144 and 151, Civil P.C. Their Lordships held that it was open to the Court to grant restitution under Section 151 and that it was not necessary to go into the question whether Section 144 was applicable, though in one part of the judgment they were inclined to accept the view that Section 144 was more appropriately applicable to a case where the decree had been varied or reversed by a superior Court in appeal or revision.

37. The decision of Harries and Misra JJ. in *Badrudin Khan v. Mahyar Khan* 26 A.I.R. 1939 All. 66(Supra), does not appear to be very relevant to the point that has arisen before us. In that case a decree had been obtained for specific performance of a contract to sell certain property. In accordance with the terms of the decree money was deposited. The judgment-debtors, however, filed certain objections to the effect that the terms of the decree had not been complied with. The first Court allowed the objection with costs, with the result that the sale deed was not executed nor was possession of the property delivered to the decree-holders who had also to pay the costs of the other side. On appeal by the decree-holders the objections were set aside and it was held that the money had been deposited in accordance with the terms of the decree. A claim was then made by the decree-holders under Section 144, Civil P.C. for damages, for the delay caused in the delivery of possession and the execution of the sale deed, by reason of the improper objection made by the judgment-debtors and for the repayment of the costs realised by them from the decree-holders. The High Court held that restitution under Section 144, meant restoration of property which had been recovered under an erroneous decree which had been set aside and the words "damages, compensation and mesne profits" in the section related to the mesne profits for the period during which the applicants were kept out of possession. The claim for the restitution of the costs, realised by the judgment-debtors objectors under the order which was set aside on appeal, was allowed.

38. Two other cases have been cited which I need mention. One is the decision of Mockett and Happell JJ. in *Venkataraja v. Suryanarayana* 30 A.I.R. 1943 Mad. 248(Supra). In that Case in execution of a money decree certain properties had been attached. An objection was filed that the property did not belong to the judgment, debtors but to the objector. The objection to the attachment was rejected with costs. Thereupon a suit was filed under Order 21, Rule 63, Civil P.C. for a declaration that the property belonged to the objector plaintiff. The suit was decreed with costs, but no mention was made in the decree about the costs that had been paid by the objector to the attaching creditors in accordance with the order rejecting his objection under Order 21, Rule 58, Civil P.C. with costs. The objector filed an application for restitution under Section 144 for the costs paid by him. The main decision turns on the question whether the order passed under Order 21, Rule 58 could be deemed to have been set aside by the decree in the suit under Order 21, Rule 63, and the learned Judges were of the opinion, following a decision of their Lordships of the Judicial Committee in *Phul Kumari v. Ghanshyam Misra* ('08) 35 Cal. 202, that the decree had that result. Then they further considered the question whether the application was maintainable under Section 114, as the order had not been varied or reversed on appeal, but by an independent proceeding. The Court observed:

The section does not provide that, for an order of restitution to be made, the decree must have been varied or reversed in any particular form of proceeding or by any particular Court, and the learned Subordinate Judge has rightly stated that Section 144 is not confined to cases where the orders are reversed on appeal : vide *Subrayudu v. Swshasami* 4 A.I.R. 1917 Mad. 293(supra).

The view expressed by the Bench supports the view which has been expressed by me above.

39. The last case to which I need make any reference is the decision in *Rajjabali Khan v. Faku Bibi* 19 A.I.R. 1932 Cal. 29(Supa). In that case certain shares in a village property had been sold in execution of a rent decree and had been purchased by the opposite parties Nos. 1 to 11. The opposite parties 1 to 10, executed a lease of the property after the purchase in favor of Rajjabali. Rajjabali was not able to get possession of the property and he filed a suit for possession against the petitioners. He got an ex parte decree against them and then applied for delivery of possession and possession was delivered to him. After the delivery of possession Rajjabali sublet the property to opposite parties, Nos. 18 to 23 and put them in possession thereof. The petitioner then filed an application for setting aside the ex parte decree which was granted and the suit was thereafter dismissed for default. The petitioners then made an application under Section 144, Civil P.C. for restoration of possession of the property, the possession of which they had lost under the ex parte decree which had been set aside. The question whether Section 144 applied was not decided as their Lordships (Mukerji and Guha JJ.) were of the opinion that the question whether Section 144 applied or whether restitution should be under the inherent jurisdiction of the Court was of no practical importance in that case. They, however, carefully considered the question whether restitution could be granted against the opposite parties 18 to 23 who had got a sub-lease from Rajjabali after the ex parte decree. Their Lordships held that opposite parties Nos. 13 to 28 were strangers to the litigation and were in no sense the legal representatives of Rajjabali and no order of restitution should have been made as against them.

40. In the case before us Jogendranath was in possession of the property as a member of a joint Hindu family. He was dispossessed by 'Nandan Sahu, who had obtained a decree against Fateh Bahadur Singh, had put the property to sale and had purchased it himself. That decree having been set aside, Nandan Sahu must restore back possession of the property to Jogendra Nath. If the property had been purchased by a third party or if Nandan Sahu had after his purchase transferred the property to a third party, the position would have been different. But Nandan Sahu having retained possession of the property, to my mind, Section 144, Civil P.C. is applicable.

41. The result, therefore, is that, in my opinion, this appeal must be allowed, the order of the lower Court must be set aside and the case sent back to that Court for determination of the amount of mesne profits recoverable by the appellant. The costs to abide the result.

Wali Ullah, J.

42. I agree with the judgment of Malik J. and the order proposed by him.

Mootham, J.

43. The facts of this case have been fully stated by Malik J., and I need not repeat them. I think it

is important however to observe that, by its decree dated 12-4-1932, this Court did in terms vary the decree of the Subordinate Judge of Basti. The application for restitution made by the respondent therefore falls, *prtm* facie, directly within the terms of Section 144, Civil P.C.

44. It has, however, been argued that this section can have no application because the decree of the Subordinate Judge of Basti was not varied or reversed on an appeal from that decree or on an application in revision, the argument being that the use in Section 144 of the expressions "varied or reversed" and "Court of first instance" which have, it is said, a well-understood technical meaning, indicates that the variation or reversal contemplated by that section must be by a superior Court on an appeal from, or on an application for revision of, the decree in question. This was the view taken by Harries J., as he then was, in *Bhawani Shankar v. Mahmud Ali* 24 A.I.R. 1937 All. 232(*supra*), the only express decision of this Court upon the section in question. That learned Judge concedes however that the provisions of the section will apply when a decree is varied or reversed on an application for review; but this concession appears to me, if I may say so with the greatest respect, to destroy the whole argument, for the only Court which can review a decree is the Court which passed it - in other words, it is conceded that a decree may be varied or reversed within the meaning of Section 144 by a Court which is not superior to that which made the decree and otherwise than on appeal or in revision.

45. Every Court has a paramount duty to ensure that it does no injury to any litigant, and the provisions of Section 144, - as was pointed out by Mukerji, J. in *Sohan Bibi v. Baihnath Das* 15 A.I.R. 1928 All. 293(*Supra*) - lay down a procedure whereunder effect can be given to that general provision of the law. In my opinion the Court should be slow so to construe this section as to impose a restriction upon its obligation to act "rightly and fairly according to the circumstances towards all parties involved."

46. In *Jai Berham v. Kedar Nath* 9 A.I.R. P.C. 269(*Supra*) a sale in execution of a decree was set aside against a purchaser who was a stranger to the decree. The purchaser was held to be entitled, before restoring the pro-perty, to be paid the excess of the purchase price over the mesne profits, the Privy Council holding that the Court's duty to order restitution arose under Section 144, as well as under its general jurisdiction. This decision is, in my opinion, authority for the view that the provisions of Section 144, have not to be narrowly construed. As I have said, the decree of the Subordinate Judge in the present case has been varied by a subsequent decree of this Court : and I do not think there is any good ground, either on principle or authority for not holding that the application of the appellant for restitution comes within the ambit of Section 144. I agree with the judgment of Malik J. and the order proposed by him.

47. This appeal is allowed. The order of the lower Court is set aside and the case is sent back to that Court for determination of the amount of mesne profits recoverable by the appellant. The costs will abide the result.

Cases Referred.

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