APPELLATE CIVIL.

Before Mukerji and Guha JJ.

1930

Dec. 8, 17.

RAJJABALI KHAN TALUKDAR

v.

FAKU BIBI.*

Restitution—Principle—Court—Jurisdiction—Inherent powers—Code of Civil Procedure (Act V of 1908), s. 144 and (Act XIV of 1882), s. 583—Code of Criminal Procedure (Act V of 1898), s. 145.

Under the words of section 144, Civil Procedure Code, as also under the general jurisdiction of the court, rights or benefits acquired by third parties, strangers to the decree or order, that has been subsequently varied or reversed, cannot be interfered with by an order for restitution, which is a duty on the part of a court as well as an obligation on the party against whom such variation or reversal has taken place.

Rodger v. *The Comptoir D'Escompte de Paris* (1) referred to.

Section 583 of the Code of 1882 and section 144 of the present Code recognise the principle that, on the reversal of a judgment, the law raises an *obligation on the party to the record*, who received the benefit of the erroneous judgment, to make restitution to the other party for what he had lost and it is not merely in the power of the courts, but it is a duty cast upon them to enforce that obligation.

Shama Purshad Roy Chowdery v. *Hurro Purshad Roy Chowdery* (2) and *Hurro Chunder Roy Chowdhry* v. *Soorodhonee Debia* (3) followed.

Dorasami Ayyar v. *Annasami Ayyar* (4) discussed.

From these decisions the proposition may well be deduced that restitution can only be had in respect of matters done under the decree or as an immediate consequence of it.

If it is the legal effect of a decree that is to be executed, it is no less the effect of a decree of reversal that the party, against whom the decree was given, is to have restitution of all that he has been deprived of under it.

As regards restitution under the inherent powers of a court, it is only reasonable that the same principle should apply.

Furthermore, in proceedings relating to restitution, it is only a summary enquiry that is contemplated and such an enquiry may be wholly unsuited for adjudicating upon complicated questions that may arise if the rights, which strangers may have acquired in the meantime, are to be investigated

*Appeal from Appellate Order, No. 158 of 1929, against the order of Kaminikumar Datta, Subordinate Judge of Bakarganj, dated Oct. 6, 1928, reversing the order of Hiralal Das Gupta, Munsif of Patuakhali, dated Aug. 27, 1927.

(1) (1871) L. R. 3 P. C. 465.
(2) (1865) 10 M. I. A. 203.
(3) (1868) B. L. R. Sup. Vol. 985.
(4) (1899) I. L. R. 23 Mad. 306.

into, though, of course, there would be no justification on the part of the court to refuse to investigate all questions, simple or complicated, once the case comes directly within the provisions of section 144, Civil Procedure Code.

With reference to section 145 of the Code of Criminal Procedure, restitution validly made by a court should be regarded as eviction made in due course of law.

APPEAL FROM APPELLATE ORDER by the opposite party, objectors.

Bimalchandra Das Gupta for the appellant.

Gunadacharan Sen and *Prasantabhushan Gupta* for the respondents.

Birajmohan Majumdar for the Deputy Registrar representing the minor respondents, Faku Bibi and two others.

Cur. adv. vult.

MUKERJI AND GUHA JJ. This is an appeal from an order of the Subordinate Judge, 1st court, Bakarganj, reversing an order of the Munsif, 3rd court at Patuakhali, on an application made under section 144 of the Code of Civil Procedure. The facts are somewhat complicated, but, ignoring those that are not relevant at the present stage, they may be stated thus quite shortly.

One Khatejan Bibi and others, who, for the sake of brevity, may be called the petitioners in view of the application that was made by them under section 144, Civil Procedure Code, are holders of certain shares in a *raiyati* holding, which was purchased in execution of a rent decree by the opposite parties Nos. 1 to 11, who are co-sharers landlords, a 12 annas share being purchased jointly by the opposite parties Nos. 1 to 10 and the remaining 4 annas share by the opposite party No. 11. After their purchase, the opposite parties Nos. 1 to 10 gave a lease of their 12 annas purchased share to one Rajjabali: Rajjabali was resisted by the petitioners in his attempt to take possession and he then instituted a title suit, No. 105 of 1922, against the petitioners and their co-sharers in the holding, and, having obtained an *ex-parte* decree on the 10th January, 1923, obtained delivery

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of possession of the lands of the entire holding on the 21st February, 1923. The petitioners then applied for setting aside the *ex parte* decree and obtained an order for rehearing of the suit, and eventually the suit was dismissed for default on the 16th June, 1925. The sale held in pursuance of the *ex parte* decree was also set aside, but with that we need not concern ourselves. Rajjabali had, in the meantime, sublet the lands to the opposite parties Nos. 13 to 23. From the judgment of the Subordinate Judge, it only appears that he had done so after instituting his suit, but the appellants say, and this is not controverted, that he had done so after obtaining possession in execution of the decree; and we shall decide the case on that footing. After the suit was dismissed, as aforesaid, proceedings under section 145, Criminal Procedure Code, arose, as the result of which the possession of opposite parties Nos. 12 to 23, that is to say of Rajjabali and his sub-lessees, was declared. *Interim* receivers had been appointed during the pendency of the said proceedings and they had taken possession under an order made by the court.

In 1927,—the date is not material,—the petitioners made the present application for restoration of possession in the *raiyati* holding. They impleaded, as opposite parties to the application, the opposite parties Nos. 1 to 11—the co-sharer landlords; No. 12—the aforesaid Rajjabali—, Nos. 13 to 23—the sub-lessees of the said Rajjabali, and Nos. 24 to 41 —their own co-sharers in the holding.

The Munsif disallowed the application. The Subordinate Judge has reversed the Munsif's decision and has ordered that "the petitioners along with "opposite parties Nos. 24 to 41 should get *khâs* "possession of the lands of the holding on eviction "of the opposite parties Nos. 12 to 23 therefrom and "also mesne-profits from them from 1330 B. S." It may be mentioned here that Ashâr 1330 B. S. was the time when the receivers were appointed by the criminal court in the proceedings under section 145, Criminal Procedure Code.

Some amongst the opposite parties, Nos. 12 to 23, are the appellants in this appeal, No. 12—Rajjabali —, being one of them. The contentions urged in support of the appeal are four in number.

The first contention urged is that the application for restitution was not maintainable, as the *ex-parte* decree, in execution of which possession was obtained by Rajjabali, was not reversed by a superior court and consequently an application for restitution does not lie under sub-section (*1*) of section 144. There is undoubtedly a certain amount of conflict of judicial opinion on this question, as has been pointed out in a recent decision of this Court in the case of *Ramanath Karmakar* v. *Asanulla* (1). But, after the decision of the Judicial Committee in the case of *Jai Berhma* v. *Kedar Nath Marwari* (2), the question is hardly of any practical importance, except where a question arises under sub-section (*2*) of section 144. The duty or jurisdiction of the court, in respect of restitution, does not arise merely under the section, but is inherent in the general jurisdiction of the court. The contention, therefore, need not be further considered.

The second argument is that the petitioners are not entitled to restitution, inasmuch as, subsequent to the delivery of possession under the *ex parte* decree, Rajjabali and his sub-lessees obtained an order in their favour under section 145 of the Code of Criminal Procedure, and the civil court, by making an order for restitution, cannot interfere with the possession, which they are enjoying under the said order under section 145, Criminal Procedure Code. Now, the order made by a criminal court under section 145, sub-section (*6*), Criminal Procedure Code, is only a declaratory order in favour of a party, who is either found to be in actual possession or is, in the case of forcible and wrongful dispossession within two months before the proceedings, regarded in law as in actual possession, and in the latter case the criminal

(1) (1930) 34 C. W. N. 746. (2) (1922) I. L. R. 2 Pat. 10; L. R. 49 I. A. 351.

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court is competent to give effect to the declaration by restoring the party dispossessed to actual possession. Nevertheless, the order lasts only until the party, in whose favour it is made, is evicted in due course of law. A suit for regaining possession is not in all cases necessary, and we do not see why restitution validly made by a court should not be regarded as eviction made in due course of law. There is authority for the proposition that, as regards restitution, the parties must be placed in the position, in which they previously were, irrespective of any other rights accruing to any of the parties during the litigation [*Gunga Prosad* v. *Brojo Nath Das* (1)]. Some argument was addressed to us to the effect that it was the *interim* receivers appointed in the proceedings under section 145, Criminal Procedure Code, who actually dispossessed the petitioners. But the possession, which the *interim* receivers exercised, may justly be regarded as possession on behalf of the party who eventually succeeded, and that party was Rajjabali and his sub-lessees [*Abinash Ch. Chowdhury* v. *Tarini Charan Chowdhury* (2)]. The argument, therefore, does not help the appellants in any way. It was contended further that, in the application, which the petitioners made, they put down the date of their dispossession as the date, on which the *interim* receivers took possession; but this we cannot regard as an admission that they were not dispossessed in execution of the *ex parte* decree. The contentions of the appellant under this head must be overruled.

Thirdly, it was argued that the petitioners, not being the owners of the entire interest in the *raiyati* holding were not competent to maintain the application for restitution. This argument has very little substance, seeing that the petitioners made their co-sharers in the *raiyati* holding parties to the application and the order, that has been made, is one granting their restitution jointly with their co-sharer.

(1) (1907) 12 C. W. N. 642. (2) (1925) 30 C. W. N. 541.

The fourth contention, that has been raised, involves a question of some importance and is one, on which there is not much authority. The question is whether the petitioners were entitled to restitution as against the opposite parties Nos. 13 to 23, the sub-lessees inducted on the lands by Rajjabali after he had obtained possession in execution of the *ex parte* decree, on the setting aside of which the right of the petitioners to restitution has arisen. The words in section 144 are: "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, *as far as may be*, place the parties in the "position which they would have occupied but for "such decree, *etc.*" Under the words of the section, as also under the general jurisdiction of the court the question is whether rights or benefits acquired by third parties, strangers to the decree or order, that has been subsequently varied or reversed, can be interfered with by an order for restitution. It is clear that restitution is a duty on the part of a court, as well as an obligation on the part of the party, against whom such variation or reversal has taken place. In the case of *Rodger* v. *The Comptoir D'Escompte de Paris* (1), it was pointed out by the Judicial Committee that a court of appeal, when it reverses a judgment of a subordinate court, has an inherent jurisdiction to order restitution of everything, which may have been improperly taken *because taken in execution of a decree.* The same principle was affirmed by their Lordships in the case of *Shama Purshad Roy Chowdery* v. *Hurro Purshad Roy Chowdery* (2) and has been recognised by the legislature in section 583 of the Code of 1882 and section 144 of the present Code. The principle has been enunciated in several decisions as being that on the reversal of a judgment the law raises an *obligation on the party to the record*, who received the benefit of the erroneous judgment, to make restitution to the other party for what he had lost and it is not merely

(1) (1871) L. R. 3 P. C. 465. (2) (1865) 10 M. I. A. 203.

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in the power of the courts but it is a duty cast upon them to enforce that obligation [*Hurro Chunder Roy Chowdhry* v. *Soorodhonee Debia* (1), *Dorasami Ayyar* v. *Annasami Ayyar* (2)]. The general trend of decisions in this country, so far as the question of restitution is concerned, has proceeded upon a consideration of this duty on the part of the court arising from the fact that property was taken in execution of its order or decree and of the obligation on the part of the party to the record, including, of course, his representatives to restore property so taken. We have not been able to find any case excepting one, to which we shall presently refer, in which a more extended view has been taken of this duty and this obligation. That one decision is *Dorasami Ayyar* v. *Annasami Ayyar* (2). There, the trustees of a temple having been removed from office, a suit was brought against them by the newly appointed trustees and a decree obtained restraining them from interfering with the affairs of the temple. In accordance with that decree, property of the temple was taken from them by process of the court and handed to the new trustees. On appeal to the High Court, however, the decree was reversed and restitution was now applied for by the survivor of the late trustees from whom the property had been taken. In the meanwhile, a third party had been appointed an additional trustee to the newly appointed trustees. Subrahmania Ayyar J. in his judgment in that case observed as follows:

"Passing next to the question of restitution "against innocent third parties, it is hardly necessary "to say that the well recognised rule that a *bonafide* "purchaser at a sale held under a court's decree or "order which is subsequently reversed is not affected "by the reversal, is based on public policy which has "special reference to judicial sales. As regards the "law applicable to the case of innocent third parties "in the position analogous to that said to be occupied "by Sivasami Ayyar, I have not come across any

(1) (1868) B. L. R. Sup. Vol. 985. (2) (1899) I. L. R. 23 Mad. 306, 311.

"Indian or English authority dealing with the point "explicitly. *Quan Wo Chung Co.* v. *Laumeister* (1), "an American case, is however in point and the view "therein laid down seems to be worthy of being "followed, having regard to the sound reasons on "which it rests. There the company resisting the "claim for restitution was not a party to the decision in "consequence of which the restitution was claimed. "The company's case was that it held peaceable "possession under a title derived from an independent "source and adverse to both the parties to the suit "and that the company was not in collusion with "either. It was held that the rule that a plaintiff, in "an action to recover land cannot, by his writ of "restitution or assistance, dispossess a stranger to the "proceeding holding possession on an independent "title or claim of title and not in collusion with the "defendant does not apply where the party seeking "to be restored to possession has been wrongfully "dispossessed by the agency of a court. The "observations of the court on the point were as "follows: In support of this proposition (*viz.*, the "company was not liable to be ejected) they cited "numerous cases, in which it has been held that the "plaintiff in an action of ejectment or other suit to "recover possession of real property cannot, by his "writ of restitution or assistance, dispossess a stranger "to the proceeding holding the premises under an "independent title or claim of title and not in "collusion with the defendant. But the cases have no "application where the party seeking to be restored to "the possession has been wrongfully dispossessed by "the agency of the court. He does not stand in the "position of the actor in a suit, who seeks the aid of "a court to regain any possession lost by his own "negligence or misfortune. On the contrary he is "out of possession only because the court has "wrongly put him out, and, whoever is in, is there "only because the court has wrongfully made room for "him to get in. All that the one has gained and all

(1) (1890) 17 American State Report 261, 263.

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"that the other has lost is due to the agency of the "court and therefore no injustice is done in restoring "the party wrongfully dispossessed without stopping "to investigate the rights of the party who has "thereby gained the possession. He is in no worse "position after his being put out by the court than he "would have been if the court had never acted, and "the court cannot, without putting him out, undo its "own wrong. If he has a superior right to the "possession he can, after going out, assert it with the "same effect as if he had never been in and he loses "nothing but the advantage of holding the premises "pending the litigation—an advantage to which he "was never entitled."

That restitution, such as it may be had either under section 144, Civil Procedure Code, or under the inherent powers of a court, is not always meant to be a complete remedy is clear from decisions in cases of what may be said to be a converse type to the present one. The case of *Kedarnath Marwari* v. *Jai Berhma* (1) was one, in which the purchaser, at an auction sale, had paid into court the purchase money, out of which certain decree-holders were paid off and their debts discharged, and thereafter paid off two bonds secured on the property purchased. The High Court of Patna, in ordering restitution, disallowed the payments made on the two bonds, holding that the courts can only replace the parties in the position which they actually occupied at the time of the order reversed and that they cannot consider all the various subsequent positions taken up voluntarily by the parties as to the remote consequences of the order. This decision was affirmed by the Judicial Committee in *Jai Berhma* v. *Kedar Nath Marwari* (2). Their Lordships also disallowed the payments on the two bonds, holding that they were not made under any order of the court, and further that the purchasers had by making the payments succeeded to the security. In the case of *Baikuntha Nath Chattoraj* v.

(1) [1917] C. W. N. Pat. Sup. 153. (2) (1922) I. L. R. 2 Pat. 10 (16); L. R. 49 I. A. 351 (356).

Prosannamoyi Debi (1), the facts were as follows: One B had applied for letters of administration to the estate of one M deceased, while one P had, on the other hand, set up a will, as having been left by M. During pendency of the case before the District Judge, a commissioner appointed by the court took certain moveables from P into his custody. The District Judge granted letters of administration and refused probate. The High Court, on appeal, reversed the District Judge's decision and granted probate of the will to P and dismissed the application of B for the letters of administration. On P's application, the articles were made over to P. On appeal to the Judicial Committee, the decision of the High Court was reversed and that of the District Judge was restored. B then applied for restitution in respect of the articles. It was held that B was not entitled to restitution, and the articles were never in his possession and were not taken out of his possession by any decree or order of the court. From these decisions the proposition may well be deduced that restitution can only be had in respect of matters done under the decree or as an immediate consequence of it. In Freeman on Judgments, Vol. 2, s. 482, the proposition has been put thus: "If it is the legal "effect of a decree that is to be executed, it is no less "the effect of a decree of reversal that the party, "against whom the decree was given, is to have "restitution of all that he has been deprived of under "it."

So far as restitution under section 144 of the Code is concerned, we think the question is now concluded by authority. Their Lordships of the Judicial Committee in the case of *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (2), in which restitution was sought for against a surety, have observed thus: "Sections 47 and 144 provide for the decision of "questions relating to the execution, discharge or "satisfaction of the decree, and for restitution

(1) (1923) I. L. R. 51 Calc. 324. (2) (1919) I. L. R. 42 All. 158 (166); L. R. 46 I. A. 228 (236).

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"including the payment of mesne profits when a decree "has been varied or reversed; and they enact that such "questions shall be determined in the suit and not by "a fresh suit. But these sections apply only to the "parties or the representatives of the original parties "and do not apply to sureties." As regards restitution under the inherent powers of a court, as a result of the considerations noticed above, it seems to us only reasonable to hold that the same principle should apply. Furthermore, in proceedings relating to restitution, it is only a summary enquiry that is contemplated and such an enquiry may be wholly unsuited for adjudicating upon complicated questions that may arise if the rights, which strangers may have acquired in the meantime, are to be investigated into; though of course there would be no justification on the part of the court to refuse to investigate all questions, simple or complicated, once the case comes directly within the provisions of section 144, Code of Civil Procedure.

Our conclusion, therefore, is that the sub-leases was created by Rajjabali in favour of the opposite parties Nos. 13 to 23, not under the decree nor as a direct or immediate consequence of it, and, as the said defendants were strangers to the litigation and were in no sense the legal representatives of Rajjabali, no order of restitution should have been made as against them.

The result is that, in our opinion, the order of the court below in so far as it is against the opposite parties Nos. 13 to 23 should be set aside, and the petitioners left to seek out their remedy, if any, in a suit properly instituted for the purpose. The appeal thus succeeds in part, but there will be no order for costs.

Appeal allowed in part.

G. S.