APPELLATE CIVIL.

Before S. K. Ghose J.

BALARAMDAS DAKNA

v.

UMESH MANDAL.*

1930

May 30.

Mesne profits—Suit to recover mesne profits—Restitution of property—Code of Civil Procedure (Act V of 1908), s. 144 (2).

Where, on a sale in execution being set aside without varying or reversing the decree, property was restored under the inherent powers of court,

held that a suit to recover mesne profits was competent and sub-section (2) of section 144 of the Code of Civil Procedure did not act as a bar.

Jai Berhma v. *Kedar Nath Marwari* (1) distinguished.

APPEAL FROM AN APPELLATE DECREE by defendant No. 1.

In 1911, the defendants Nos. 1 to 5 obtained a rent decree against the plaintiffs; and, at a sale in execution of that decree, purchased the lands in suit. In 1919, the plaintiffs had the sale set aside under the provisions of Order XXI, rule 90 of the Code of Civil Procedure. Thereafter, in 1922, the plaintiffs obtained an order for restitution of the property and, in July, 1924, obtained possession thereof. Subsequently, in September, 1925, the present suit was brought for mesne profits. The suit was defended, one of the contentions being that the suit was not maintainable by reason of section 144, sub-section (*2*) of the Code of Civil Procedure.

The Munsif dismissed the suit and, on an appeal therefrom, to the District Judge, the suit was decreed in part. Thereupon, the present appeal was filed in the High Court.

Hemendrachandra Sen for the appellant.

Mukundabehari Mallik for the respondent.

*Appeal from Appellate Decree, No. 2217 of 1928, against the decree of R. C. Sen, District Judge of Jessore, dated May 4, 1928, modifying the decree of Birendrachandra Sen Gupta, Munsif of Narail, dated Nov. 17, 1926.

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S. K. GHOSE J. This appeal arises out of a suit for mesne profits for the years 1329-1330 B.S. and it was brought under the following circumstances. Defendants Nos. 2 to 5, the Chakravartis, who are the landlords, got a rent decree against the plaintiffs in 1911. In 1912, they auction-purchased the holding in execution of that decree; and subsequently they let out to defendant No. 1. In 1919, the plaintiffs got the sale set aside under Order XXI, rule 90 of the Code. In 1922, they obtained an order for restitution upon an application purporting to be under section 144 of the Code. There was an appeal and it was dismissed in December, 1922. Plaintiffs took formal possession in July, 1924. The present suit for mesne profits was brought in September, 1925, praying for mesne profits for Bhadra to Falgun and Chaitra of 1329 and 1330. The suit is defended by defendant No. 1. His defence is that the suit is not maintainable and that the plaintiffs were in possession during the period, in respect of which mesne profits are claimed. The learned Munsif dismissed the suit, holding that the plaintiffs had recovered possession before the period in suit. On appeal, the learned Judge in the court below decreed the suit in respect of 1329 and dismissed it in respect of 1330. Hence this Second Appeal by defendant No. 1.

It is contended in the first place that the suit is not maintainable under section 144(*2*) of the Code of Civil Procedure and that the plaintiffs should have asked for mesne profits at the time of the application for restitution in 1922. The learned Judge in the court below took the view that this objection could not prevail, as the decree was not varied or reversed, but only the sale was set aside. It is contended that this is not sufficient, because the court's power of granting restitution is not confined to cases where the decree is varied or reversed, and reference is made to the class of the cases of which the case of *Jai Berhma* v. *Kedar Nath Marwari* (1) is a type. In these cases it has been held that the court has inherent power to

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grant restitution and that inherent power is apart from the power granted by section 144. Sub-section (*2*), in its terms, follows from sub-section (*1*) of section 144, and is, therefore, confined to those cases where section 144, strictly speaking, applies. As an illustration of this, see the case of *Gopal Paroi* v. *Swarna Bewa* (1). But where the court is said to have acted under its inherent powers, and not under section 144, it cannot be said that the restrictive provisions of sub-section (*2*) of that section will come into play. In the present case, the argument is that this being a case of setting aside a sale and not of a variation or reversal of a decree, the court has granted restitution in the exercise of its inherent powers and it cannot be argued at the same time that the suit is barred under section 144(*2*).

On the merits, it is contended that the findings of the learned Judge are inconclusive and that, therefore, the appeal should be remanded, so that proper findings of fact may be arrived at. No doubt, the findings of the learned Judge might have been better expressed, but, at the same time, I do not think that this is a case which requires further investigation by a remand. Difficulties arose because the learned Judge agreed with the Munsif in holding that the possession of the plaintiffs must be traced back to the time of the preparation of the record-of-rights, but at the same time the learned Judge did not agree with the learned Munsif in his ultimate decision. It is clear, however, that the learned Munsif was wrong in holding that the plaintiffs recovered possession after the harvest time of 1328, while at the same time holding that the plaintiffs' possession began in January, 1923. The latter period will be equivalent to the harvest time of 1329 B.S., which is a different matter. If it is found that the plaintiffs recovered possession after the harvest time of 1329 B.S., then the defendants must be held to have reaped the harvest and consequently they will be liable for the period to the plaintiffs. The learned Judge has found that the

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appeal in the restitution case was dismissed in Pous, 1329, and the plaintiffs came into possession after the disposal of that appeal; that is to say, the plaintiffs came into possession after the harvest time of 1329. This clearly follows from the findings that were arrived at by the learned Judge. In this view the decision of the learned Judge is correct.

The appeal is dismissed with costs.

Appeal dismissed.

N. G.