

APPELLATE CIVIL.

Before Mr. Justice Curgenvven and
Mr. Justice Pakenham Walsh.

M. P. PALANIAPPA CHETTIAR AND FIVE OTHERS
(PETITIONERS NOS. 1 TO 3 AND 5 TO 7), APPELLANTS,

1934,
January 12.

v.

S. A. RAMANATHAN CHETTIAR AND ANOTHER
(RESPONDENT AND FOURTH PETITIONER), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), ss. 144 and 151—Restitution—Money improperly drawn out under a decree—Restitution—Power to order—Declaratory decree of another Court modified in appeal—Necessity for restitution arising from—Applicability of sec. 144—Inherent power to order restitution—Court to which application for restitution to be made.

The appellants obtained a decree upon a promissory note in the Court of the Subordinate Judge of Ramnad and pursuant to that decree the judgment-debtors paid a sum of money into Court. The first respondent filed a suit in the Court of the Subordinate Judge of Sivaganga for a declaration that he was entitled to the amount of that decree, the appellants being only his representatives, and obtained a decree to that effect and further that he was entitled to continue the execution proceedings of the said decree. An appeal was preferred to the High Court against the decree of the Subordinate Judge's Court of Sivaganga and pending that appeal an application was made for an injunction restraining the first respondent from executing the decree of the Subordinate Judge's Court of Ramnad and drawing the money in deposit, and an order was made that he might draw it on furnishing security to the satisfaction of the Ramnad Sub-Court. The security was furnished and the money was drawn. In the appeal against the decree of the Sivaganga Sub-Court, that decree was modified, the first respondent being declared entitled only to a 5/17ths share in the decree of the Ramnad Sub-Court and the appellants to the

* Appeal against Order No. 206 of 1932 and Civil Revision Petition No. 734 of 1932.

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remaining 12/17ths share. In an application filed by the appellants in the Ramnad Sub-Court for restitution, held: (1) that the application was properly made to that Court; and

(2) that that Court had inherent power, and was under a duty, to accord restitution.

Rajjabali Khan Tulukdar v. Faku Bibi, (1930) I.L.R. 58 Calc. 1070, and *Shiam Sundar Lal v. Kaisar Zamoni Begam*, (1906) I.L.R. 29 All. 143, followed.

Subbarayudu v. Yerram Setti Seshasani, (1916) I.L.R. 40 Mad. 299, distinguished.

Semble: section 144 of the Code of Civil Procedure was inapplicable to the case and the Court below had no power to order restitution under that section. The words "where and in so far as a decree is varied or reversed, the Court of first instance shall . . ." are directed to the ordinary case where the decree of the executing Court has been varied or reversed.

Mrs. Burn Murdoch v. Ma Saw Kyi, A.I.R. 1931 Rang. 21, dissented from.

APPEAL against and petition under sections 115 of Act V of 1908 and 107 of the Government of India Act to revise the order of the Court of the Subordinate Judge of Ramnad at Madura, dated 1st February 1932 and made in Execution Petition No. 77 of 1931 in Original Suit No. 6 of 1911.

K. Rajah Ayyar and *V. Ramaswami Ayyar* for appellants.

A. Swaminatha Ayyar and *K. S. Rajagopalachari* for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CURGENVEN J. CURGENVEN J.—The appellants in the miscellaneous appeal, who are also the petitioners in the revision petition, applied to the Subordinate Judge of Ramnad for restitution in the following circumstances. In Original Suit No. 6 of 1911 on the file of the same Court they obtained a decree

upon a promissory note for a sum of Rs. 28,575 and as a result of adjustment between the parties the judgment-debtors paid into Court a sum of Rs. 17,618. The first respondent filed the suit, Original Suit No. 14 of 1921 in the Subordinate Judge's Court of Sivaganga, for a declaration that he was entitled to the amount of this decree, the appellants being only his representatives, and obtained a declaration to this effect and further that he was entitled to continue the execution proceedings of the said decree. An appeal (Appeal Suit No. 135 of 1924) was preferred to this Court and this judgment was modified, the respondent being declared entitled only to a 5/17ths share in the promissory note and therefore in the decree. In connection with this appeal an application was made for an injunction restraining the respondent from executing the decree in Original Suit No. 6 and drawing the money in deposit and an order was made that he might draw it on furnishing security to the satisfaction of the Ramnad Sub-Court. The security was furnished and the money was drawn. The result of Appeal Suit No. 135 of 1924 was that the present appellants were entitled to recover 12/17ths of this amount. They accordingly filed this petition before the Subordinate Judge of Ramnad for restitution. Six issues were framed, the first of which enquired whether the Court had jurisdiction to entertain the application. The learned Subordinate Judge has found upon this in the negative. The judgment is not very clear, but he appears to hold that section 144, Civil Procedure Code, will not apply and that apart from that provision the Court has no inherent powers to order restitution. The appeal

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before us relates to the finding under section 144 and the revision petition has been filed in case the facts should not come within that section but should justify the Court in exercising its inherent powers.

We propose first to consider the position apart from the circumstance that the respondent has bound himself by the execution of a security bond to obey any orders that may be passed for the refund of the money. It will be observed that the decree in Original Suit No. 14 of 1921 declared that the plaintiff in that suit was entitled to continue the execution in Original Suit No. 6 of 1911. In such circumstances it has been held in *Sethurayar v. Shanmugam Pillai*(1) that he occupies the position of a transferee-decree-holder under Order XXI, rule 16, Civil Procedure Code, i.e., he possesses an interest which has been transferred to him by operation of law. He may thus be regarded as a party to Original Suit No. 6 of 1911 and the general question which arises is whether when execution has been wrongly taken by a transferee-decree-holder, the Court can upon discovering the error accord restitution to the rightful decree-holder. Some attempt has been made to argue that if such a power exists it should be exercised not by the Court which passed the decree in Original Suit No. 6 of 1911 but by the Sivaganga Court, which made the declaration of the respondent's title. This is a wholly untenable position. The latter Court was only concerned with making the declaration and had no power to allow the decree-holder to draw the money lying to the credit of the other suit.

(1) (1897) I.L.R. 21 Mad. 353.

This was the function of the executing Court and, if execution was taken by the wrong person, it is that Court, if any, that should rectify the mistake.

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It is first for consideration whether the case can be brought within the terms of section 144, Civil Procedure Code. The section has replaced section 583 of the Code of 1882 and is drafted in noticeably wider terms. But we hesitate to say whether a case of this nature was in contemplation when it was so drafted. The words "where and in so far as a decree is varied or reversed, the Court of first instance shall . . ." seem to us to be directed to the ordinary case where the decree of the executing Court has been varied or reversed, the use of the phrase "the Court of first instance" supporting this construction. In more than one case, see for instance *Ashutosh Nandi v. Kundal Kamini Dasi*(1) and *Sohnun v. Mast Ram*(2), it has been held that while a wide interpretation should be given to the section, it only applies where restitution is sought owing to a change in the decree under which execution has been taken. There is indeed a case, *Mrs. Burn Murdoch v. Ma Saw Kyi*(3), which has taken the contrary view. That too related to a declaratory decree out of the modification of which in appeal the necessity for making restitution arose. With due respect to the reasoning employed in that case, we find it quite unnecessary to strain the language of the section, and would prefer to base our decision upon the alternative ground that a matter of this sort lies within the inherent

(1) A.I.R. 1929 Cal. 814.

(2) A.I.R. 1929 Lah. 657.

(3) A.I.R. 1931 Rang. 21.

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jurisdiction of the Court. It is a general principle, recognized in a number of decisions, that when a Court has wrongly paid out money it has not only the power but also a duty to recover it from the person so paid. In *Jai Berhma v. Kedar Nath Marwari*(1) their Lordships of the Privy Council make the following observations :—

“ 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 ’. 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.”

And quotation is made from 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 lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.”

This statement of the law would appear general enough to cover a case where the executing Court has been made to take a wrong step by an erroneous decision passed by another Court. The same principles underlie the judgment of the Calcutta High Court in *Rai Charan Bhuiya v. Debi Prasad Bhakat*(3), where it was found necessary to make adjustment of certain sums overpaid to a mortgagee-decree-holder by his judgment-debtor. It was recognized that the case would not fall under

(1) (1922) I.L.R. 2 Pat. 10 (P.C.).

(2) (1869) L.R. 2 P.C. 393.

(3) (1921) 26 C.W.N. 408.

the express terms of section 144 and the question then arose whether it was "competent to the execution Court, in the exercise of its inherent power, to make an order for restitution with a view to secure complete justice between the parties concerned". Reference was made to *Prag Narain v. Kamakhia Singh*(1), in which Lord MACNAGHTEN, delivering the judgment of the Judicial Committee, summarily dismissed an argument based upon the terms of the Civil Procedure Code in a case where mesne profits were claimed from a mortgagee-decree-holder who had purchased the property. It was further held that section 144 is not exhaustive of the powers of the Court but may be taken as a guide to determine in what class of cases an order of restitution may be made. *Rajjabali Khan Talukdar v. Faku Bibi*(2) was another case not of the normal kind, in which restitution in respect of benefits acquired by certain third parties was disallowed. The judgment fully recognizes the inherent jurisdiction of the Court but holds that it cannot deal with persons other than the parties on the record. We have already given our reason for treating the respondent as a party to Original Suit No. 6 of 1911. A case which bears some resemblance to the present one inasmuch as it relates to the effect of a declaratory decree is *Shiam Sundar Lal v. Kaisar Zamani Begam*(3). Certain property was attached under a decree as the property of the judgment-debtor and a claim petition filed and allowed. The decree-holder thereupon sued for a declaration that the property was liable to sale

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(1) (1909) I.L.R. 31 All. 551 (P.C.).

(2) (1930) I.L.R. 58 Calc. 1070. (3) (1906) I.L.R. 29 All. 143.

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in execution of the decree and obtained a decree in the first Court. The claimant however succeeded in appeal and sought and obtained restoration of the property. The learned Judges held that, whether an order could be made under the provisions of section 583 (the present section 144) or by virtue of the Court's inherent jurisdiction, the order was a right and proper one to make. The correctness of this decision has been questioned in *Subbarayudu v. Yerram Setti Seshasani*(1), but perhaps if the declaration had declared the decreeholder's competence to execute the decree in the other suit the doubt would not have arisen.

These decisions are, we think, enough to show that quite apart from section 144 it is a power inherent in the Court, and a duty laid upon it, to accord restitution in any case, such as the present, where money has been improperly drawn out under a decree. That would be so even where execution has been taken in the ordinary course. Where, as here, permission to draw the money was subject to the execution of a bond embodying an undertaking to repay it if so ordered, it need scarcely be said that the right to claim restitution is at any rate not weakened. We find it unnecessary therefore to decide whether or not repayment could be enforced in execution under the bond, apart from the general powers of restitution which the Court possesses.

Since we are basing our decision upon the inherent powers of the Court rather than upon the terms of section 144 we may agree with the lower Court in its finding as to the inapplicability of that section and dismiss the appeal. But we allow

(1) (1916) I.L.R. 40 Mad, 299.

the civil revision petition and we answer the first issue in the affirmative and remand the case for further disposal according to law. The first respondent will pay the appellants' costs of the proceedings in this Court including the printing charges incurred in the appeal. (One pleader's fee.)

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*Before Sir Owen Beasley, Kt., Chief Justice, and
Mr. Justice Bardswell.*

R. T. RANGACHARI (PLAINTIFF), APPELLANT,

1933,
December 19.

v.

THE SECRETARY OF STATE FOR INDIA IN
COUNCIL (DEFENDANT), RESPONDENT.*

Government of India Act (1919), sec. 96-B (1) and (2)—Civil servant under the Crown—Tenure of office of—Statutory Rules framed under sec. 96-B (2), viz., rules XIII, XIV, XV and XVI—Non-observance of—Dismissal of civil servant by the Crown—Effect of—Suit for damages for wrongful dismissal—Secretary of State—Non-maintainability—Rule delegating power of dismissal to an authority subordinate to the appointing authority—Intra vires—Suit for declaration of wrongful dismissal against the Crown—Pensions Act (XXIII of 1871), sec. 4—Effect of—Public Servants (Inquiries) Act (XXVII of 1850), sec. 25.

R, a Sub-Inspector of Police, was first discharged on an invalid pension but was afterwards dismissed with the consequence of his pension being withdrawn for misconduct prior to his discharge. V, a Reader in the Government Press, Madras, was dismissed from service without any proper enquiry in that

* Original Side Appeals Nos. 1 and 18 of 1931.