the applicant is called upon to make a fresh application for permission to sue as a pauper simply because his first application was badly verified?

We want to lay emphasis on the feature that our decision has not been arrived at simply because we consider that these are hard cases but because we consider that the object for which the courts exist, namely, doing justice, has not been kept in view by the orders in question.

In the result, we allow the applications, set aside the orders complained of and remand the cases to the court below and direct it to give the applicant a sufficient opportunity to enable him to correct the verification of his petitions. After the petitions have been verified the court will proceed to decide the petitions on their merits.

APPELLATE CIVIL

Before Mr. Justice Iqbal Ahmad and Mr. Justice Kisch.

AMBA LAL (OBJECTOR) *v.* RAMGOPAL MADHOPRASAD (DECREE-HOLDER)*

1932
December, 5.

Civil Procedure Code, sections 144 *and* 151—*Restitution—Sale in execution of simple money decree—Decree-holder purchaser—Rateable distribution amongst several decree-holders —Judgment-debtor's title subsequently found invalid as the result of a separate suit—Application by decree-holder purchaser for restitution of amounts rateably distributed—Inherent power to order restitution*—Caveat emptor, *doctrine of—Duty of courts to prevent injury by act of court.*

In execution of a simple money decree the judgment-debtors' shares in certain joint family properties were sold by auction, the decree-holder being the purchaser. At that time a decree for partition among the judgment-debtors' family, which had allotted most of these properties as the separate shares of other members of the family, was in existence and on its basis objections under section 47 of the Civil Procedure Code were raised and a suit was filed by these other members, but the

* First Appeal No. 390 of 1929, from a decree of S. Nawab Hasan, Additional Subordinate Judge of Aligarh, dated the 8th of August, 1928.

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objections and the suit were dismissed on the finding that the partition was fraudulent and collusive. After the sale the decree-holder purchaser had to pay out a part of the sale price to other decree-holders who were entitled to a rateable distribution. Subsequently the objections and the suit aforementioned were allowed on appeal, on the finding that the partition was valid, with the result that most of the properties already sold were exempted from the operation of the sale. The decree-holder auction purchaser then applied for restitution of a corresponding portion of the money which had been paid out in rateable distribution to the other decree-holders.

Held that, without deciding the question whether section 144 of the Civil Procedure Code applies only to those cases in which a decree is reversed or varied on appeal or revision and not to cases in which a decree is varied or set aside as the result of separate proceedings initiated for the purpose, or the question whether relief cannot be granted under that section in the cases of variations and reversals of orders as distinguished from decrees, it is clear that the court had power to grant the restitution in exercise of its inherent powers under section 151.

Section 144 does not exhaustively deal with the powers of courts to grant restitution, and the jurisdiction of a court to grant restitution in appropriate cases is not confined only to cases coming within the purview of that section but is inherent in the general jurisdiction of the court to pass an order for restitution, independently of the provisions of that section, with a view to secure complete justice between the parties concerned.

In the present case justice dictated that the restitution should be granted. At the time of the sale it was honestly believed by everybody that the properties sold belonged to the judgment-debtors, but subsequently events showed that they had no saleable interest in some of the properties, with the result that the original fund, viz. the price fetched at the auction sale, that was rateably distributed between the several decree-holders was reduced in proportion to the value of these properties. This had the effect of reducing the amount to which each rival decree-holder was entitled on rateable distribution and the loss must, in the absence of any statutory provision to the contrary, be borne proportionately by all the decree-holders.

The doctrine of *caveat emptor* as applied to court sales discussed.

In the present case, having regard to the fact that the auction purchaser was the decree-holder himself, as well as to other circumstances, the doctrine of *caveat emptor* did not stand in the way of the restitution.

Further, the restitution was dictated by the duty cast upon courts to see that no act of the court does an injury to a suitor. Before the auction sale the question whether the judgment-debtors had any shares in the properties sought to be sold had actually been litigated and decided by the court and it was on the faith of that decision that the decree-holder made the auction purchase.

Messrs. *P. L. Banerji* and *S. B. L. Gaur*, for the appellant.

Mr. *Panna Lal*, for the respondent.

IQBAL AHMAD and KISCH, JJ. :—This appeal and the connected appeal No. 410 of 1929 are directed against an order for restitution passed by the court below under section 144 of the Code of Civil Procedure under the following circumstances. Firm Ram Gopal Madho Prasad, hereinafter referred to as the respondent, obtained a simple money decree from the High Court of Bombay against three brothers named Mani Shankar, Mohan Shankar and Suraj Shankar, who are hereinafter referred to as the judgment-debtors. The respondent had also impleaded three younger brothers of the judgment-debtors named Harendra Shankar, Mahendra Shankar and Gajendra Shankar as defendants to the suit in which the decree was passed, but the suit against them was dismissed. Before the said decree was passed Harendra Shankar, Mahendra Shankar and Gajendra Shankar had brought a suit for partition against the judgment-debtors and their mother Mst. Mani Kunwar and on the 28th of March, 1919, a decree for partition was passed. Mst. Mani Kunwar, the mother, and the six brothers were held entitled to a one-seventh share each and by the decree separate properties were allotted to the three brothers who were plaintiffs in the partition

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suit and to the judgment-debtors and to their mother, Mst. Mani Kunwar.

The respondent got his decree transferred to the Subordinate Judge's court, Aligarh, and on the 30th of April, 1923, applied for execution of the same by attachment and sale of the alleged three-seventh share of the judgment-debtors in various items of properties. Some of the properties so attached had been wholly allotted to Harendra Shankar and others, the plaintiffs in the partition suit, by the decree in that suit and some had been allotted to Mani Kunwar. To this application for execution Harendra Shankar, Mahendra Shankar and Gajendra Shankar preferred objections under section 47 of the Code of Civil Procedure and they contended that the judgment-debtors had no share in the properties that were allotted to them by the decree in the partition suit and that those properties were not liable to attachment and sale in execution of the decree held by the respondent. Mst. Mani Kunwar filed a regular suit on the same allegations against the decree-holder. On the 16th of April, 1925, both the objections and the suit were dismissed on the finding that the partition was collusive and fraudulent, and that the decree-holder was entitled to sell three-seventh share of the judgment-debtors in all the properties. Harendra Shankar and others, the objectors, and Mst. Mani Kunwar preferred appeals in the High Court and those appeals were allowed on the 30th of January, 1928, and the partition was held valid and binding.

In the meantime the alleged three-seventh share of the judgment-debtors in all the properties attached by the respondent was sold by auction and purchased by the respondent for Rs.31,290.

The appellant in the present appeal and the appellant in the connected appeal and certain other persons also held decrees against the judgment-debtors, and they applied for rateable distribution and, after confirmation of the

sale mentioned above, obtained an order for rateable distribution of Rs.4,279-12-9 amongst them. The decree-holder deposited the above amount in court which was rateably distributed between the appellants in the two appeals and the other decree-holders.

In consequence of the appeals mentioned above being allowed by the High Court the properties allotted to the objectors and to Mst. Mani Kunwar were exempted from the operation of the sale, with the result that the alleged three-seventh share of the judgment-debtors in those properties purchased by the decree-holder at the auction sale was exempted from the operation of sale. The decree-holder then filed an application under sections 144 and 151 of the Code of Civil Procedure alleging that as most of the properties had been released from the sale in consequence of the decrees of the High Court, the amount that could be rateably distributed between the other decree-holders was much less than the sum of Rs.4,279-12-9, and as the appellant in the present appeal and the appellant in the connected appeal and the other decree-holders had received, on rateable distribution, a sum in excess of the amount to which they were entitled, they were bound to refund the same to him.

This application was opposed by the appellant and other decree-holders mainly on the ground that sections 144 and 151 of the Code of Civil Procedure had no application to the case and that the respondent was not entitled to call upon those decree-holders to refund any portion of the amount that they had received on rateable distribution. This contention was overruled by the court below and an order for restitution was passed. That order is challenged in the present appeal.

It would appear from the facts stated above that the sale of three-seventh share in the properties that were allotted by the partition decree to the plaintiffs of that suit and to Mst. Mani Kunwar fell through, not in

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consequence of the reversal or variation in any respect of the simple money decree held by the respondent in execution of which the sale was held, but as a result of the decrees of the High Court that were passed in totally separate proceedings initiated for the purpose of having it declared that the judgment-debtors had no share in those properties. It has been held in a number of cases that section 144 is confined in its operation to cases in which a decree is varied or reversed on appeal or revision and does not apply to cases in which a decree is held to be wholly or partially null and void as the result of a decree in a suit other than the one in which the decree declared to be null and void was passed; vide *Tara Chand* v. *Champi* (1), and *Ashutosh Nandi* v. *Kundal Kamini Dasi* (2). In the Full Bench decision of this Court in *Bindeshri Prasad Tiwari* v. *Badal Singh* (3) it was observed that "The words 'varied or reversed' used in section 144 seem 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", but the question was not decided by the Full Bench. On the authority of these cases it is argued on behalf of the appellant that the court below was wrong in granting restitution under section 144 of the Code of Civil Procedure.

It is further pointed out that as the order confirming the sale was partially nullified by the decrees passed by the High Court and as that order was not a decree, no redress could be given to the decree-holder by ordering restitution under section 144 as that section has reference only to cases in which a decree, as distinguished from an order, is varied or reversed and not to cases in which an order which is not a decree is varied or set aside. In support of this contention reliance is placed on *Jagdip Narain Singh* v. *F. H. Holloway* (4) and *Sukhdeo Dass* v. *Rito Singh* (5).

(1) (1924) I.L.R., 46 All., 767.
(2) A.I.R., 1929 Cal., 814.
(3) (1923) I.L.R., 45 All., 369.
(4) (1917) 39 Indian Cases, 653.
(5) (1917) 39 Indian Cases, 763.

The questions, whether section 144 applies only to those cases in which a decree is reversed or varied on appeal and not to cases in which a decree is varied or set aside as the result of separate proceedings initiated for the purpose, and whether relief cannot be granted under that section in the cases of variations or reversals of orders as distinguished from decrees, are beset with difficulties of varying intensity, and as we have arrived at the conclusion, for reasons to be presently stated, that it was open to the court below to grant restitution in exercise of its inherent power under section 151 of the Code, we refrain from expressing any opinion on those questions.

We find that in cases almost similar to the case before us courts have granted relief to an aggrieved party under section 151 of the Code of Civil Procedure. In the Full Bench decision in *Bindeshri Prasad Tiwari* v. *Badal Singh* (1) it was observed that "Even if we were not so satisfied, we should have been prepared to grant the relief asked for, on the analogy of section 144, in exercise of our inherent power under section 151 of the Code." We are aware of the fact that in the case decided by the Full Bench the decree in execution of which the sale was held was itself vacated as the result of a separate suit, and we have quoted the observation made above simply to show that it is open to courts to grant restitution in cases not coming within the purview of section 144 on the analogy of the provisions of that section by exercising the inherent powers of courts defined by section 151 of the Code. In *Tara Chand* v. *Champi* (2) this Court while holding that section 144 did not apply observed that "It is clear that this Court has jurisdiction, under the provisions of section 151, to exercise its discretion and make such order as may be necessary for the ends of justice." In *Jai Barham* v. *Kedar Nath Marwari* (3) it was observed by their Lordships of the Privy Council

(1) (1923) I.L.R., 45 All., 369. (2) (1924) I.L.R., 46 All., 767.
(3) (1922) 21 A.L.J., 490.

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that "It is the duty of the court under section 144 of the Code of Civil Procedure 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." Similarly in the case of *Rai Charan Bhuiya* v. *Debi Prosad Bhakat* (1) it was held that, though the remedy afforded by section 144 may not be available to an aggrieved party, the court has wide powers under section 151 of the Code of Civil Procedure to pass an order for restitution with a view to do complete justice between the parties and to restore them to the *status quo ante*.

It is manifest from these cases that the jurisdiction of a court to grant restitution in appropriate cases is not confined only to cases coming within the purview of section 144 of the Code and that it is inherent in the general jurisdiction of the court to pass an order for restitution independently of the provisions of section 144, with a view to secure complete justice between the parties concerned. Section 144 only defines the power of a court to make an order for restitution in a particular class of cases and we can discover no justification for holding that that section exhaustively deals with the powers of courts to grant restitution and that an aggrieved party is not entitled to a relief by way of restitution independently of the provisions of that section. We hold, therefore, that it is not only permissible, but is imperative, to grant restitution by exercising the inherent powers vested in courts as defined by section 151 of the Code, provided the exercise of those powers is necessary for the purpose of preventing injustice and does not contravene any statutory provision.

In the case before us we are satisfied that justice dictates that the order for restitution passed by the court

(1) A.I.R., 1922 Cal., 28.

below be upheld. Both the appellant and the respondent held decrees against the judgment-debtors. The appellant as a rival decree-holder shared with the respondent in the proceeds of the sale of the properties that were, at the time of the sale, honestly believed by everybody to belong to the judgment-debtors. But it became clear from the events that subsequently happened that the judgment-debtors had no saleable interest in some of the properties sold, with the result that the original fund, viz., the price fetched at the auction sale, that was rateably distributed between the appellant and the respondent was reduced in proportion to the value of the properties that were held not to belong to the judgment-debtors. This obviously had the effect of reducing the amount to which each rival decree-holder was entitled on rateable distribution and the loss must, in the absence of any statutory provision to the contrary, be borne proportionately by all the decree-holders. All the decree-holders had to look to a common fund for the satisfaction of their decrees and that common fund having been reduced, the proportionate amount payable to each must undergo a proportionate reduction, and if any decree-holder has realised more than his legitimate share he must pay back the same to the other decree-holder who has received less. All the decree-holders were in the same position and were sailing in the same boat. They must sink or swim together and it is not open to one of the decree-holders to say to the other that he is entitled to ignore the effect of the decrees of the High Court and that the loss consequent on those decrees must be borne by the other decree-holder.

But it is argued by the learned counsel for the appellant that by ordering restitution in the present case we shall be wholly ignoring the well settled rule that the doctrine of *caveat emptor* applies to court sales and that there is no warranty of title at such sales. It is pointed out in this connection that if the properties that were

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exempted from the operation of sale in consequence of the decrees passed by the High Court had been purchased by a stranger and not by the decree-holder, that stranger auction purchaser would not have been entitled to a refund of any portion of the purchase money paid by him, and it is maintained that the mere fact that in the present case the decree-holder himself was the auction purchaser is no justification to put him on a preferential basis and to pass an order that would indirectly have the effect of giving a go-by to the rule of law mentioned above. In support of these contentions our attention is drawn to *Deputy Shankar* v. *Mangal Sen* (1) and to *Anand Krishna* v. *Kishan Devi* (2). In *Deputy Shankar's* case it was held by this Court that if the property purchased at an auction sale is lost by the purchaser in consequence of a decree passed in a suit brought by a third party for a declaration that he and not the judgment-debtor was the owner of the same, the purchaser is not entitled to bring a suit for recovery of purchase money as against the decree-holder. In that case the purchaser was a person other than the decree-holder and it was held that the only remedy of such a purchaser for the return of the purchase money is that provided for by order XXI, rule 91, and order XXI, rule 93 of the Code of Civil Procedure. The decision proceeded on the principle that there is no warranty of title at court sales.

We are not unaware of the fact that the rule that the doctrine of *caveat emptor* applies to court sales has been laid down in a series of cases, but we may point out that the application of that doctrine has undoubtedly the effect of negation of justice in many cases. It is true that there is no warranty of title at court sales and that what is sold is merely the right and interest of the judgment-debtor, but if it is found that the judgment-debtor had no saleable interest in the property sold we can discover no equitable principle to justify the retention by

(1) (1932) I.L.R., 54 All., 948. (2) (1930) I.L.R., 53 All., 496.

the decree-holder of the price paid by the auction purchaser in the event of the property purchased by him being lost to him. It is no doubt too late in the day to question the rule, but, for the reasons given above, we are inclined to the view that the rule must be confined within the strictest possible limits and should not be extended a step further than the limits imposed by decisions that are binding upon us.

In the present case the auction purchaser was not a third person but the decree-holder himself. On the one hand the argument is available to the appellant that on principle there is no distinction between a case where a third person is the auction purchaser and a case where the decree-holder himself makes the purchase, so far as the right to a refund of the purchase money in consequence of the sale being vacated is concerned. But, on the other hand, it has to be borne in mind that in the event of an auction purchase made by the decree-holder himself being set aside, the decree-holder is entitled, as against the judgment-debtor, to say that notwithstanding the auction purchase made by him his decree for the full amount stands intact, as the purchase made by him has been vacated. A question of this description, when raised by the decree-holder, would obviously come within the purview of section 47 of the Code of Civil Procedure, and in order to judge of the validity or otherwise of such a contention of the decree-holder the court will have to consider the question whether or not the decree has been wholly or partially satisfied. In considering this question the court cannot, in our judgment, ignore the fact that by the infructuous auction purchase the decree-holder got nothing, and that his decree has not been satisfied to any extent. The position that simply because of the doctrine that there is no warranty of title at court sales the court is bound to hold that the decree of the decree-holder has been satisfied to the extent of the amount for which he purchased the property which was

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afterwards held not to belong to the judgment-debtor, seems wholly illogical to us. The simple question in such a case would be, "Has the decree been satisfied to any extent?" and we are unable to appreciate how a court can ignore the fact that in consequence of the sale made by the decree-holder being set aside the decree-holder got nothing. For these reasons we are unable to extend the rule mentioned above to cases in which the decree-holder is the auction purchaser himself and the sale is found to be a nullity consequence of the decree in another suit declaring that the property sold did not belong to the judgment-debtor.

The view that we take is not in consonance with the decision of this Court in *Anand Krishna's* case (1). In that case the auction purchase was made by the decree-holder herself and the sale was in due course confirmed. The decree-holder, however, lost half of the property purchased by her as the result of a decree in a suit brought by a third person declaring that half of the property belonged to that third person and not to the judgment-debtor. This Court held that in such a case there was no "equity in favour of the decree-holder by which it may be said that she is entitled to recover one-half of the price paid by her because she lost one-half of the property attached and sold." It was pointed out by the learned Judges that when the attachment was made by the decree-holder the judgment-debtors never asserted that they had title to the whole of the property attached, nor did they demand any particular price for the same, and that it was quite possible that the property was worth much more than the sum for which it was purchased by the decree-holder and, therefore, it may very well be that even one-half of the property that remained with the decree-holder auction purchaser was worth more than the price paid by him.

We confess with respect that the reasons mentioned above do not appear to us to justify the conclusion that

(1) (1930) I.L.R., 53 All., 496.

there was no equity in favour of the decree-holder auction purchaser in the case. In the first place, in the absence of proof to the contrary the presumption must be that the price fetched at a court sale, where any and every person is entitled to bid, is adequate, and no proof to the contrary appears to have been adduced in that case. In the absence of such proof, we are unable to discover why the decree-holder should not be permitted to say that in the consideration of the question as to what extent his decree has been satisfied the court must look to the substance of the matter and must, in so doing, take note of the fact that the sale of half of the property purchased by him has been set aside. If, in any particular case, the property that remained with the decree-holder is worth approximately as much as the price paid by him, we agree that there would be no equity in favour of the decree-holder. But in the absence of evidence as to the value of the property remaining with the decree-holder, we are unable to accept as a general proposition that there is no equity in favour of a decree-holder auction purchaser in such a case.

In the case before us it was not the case of either party that the auction purchase was made by the decree-holder at an inadequate price and therefore his decree remained unsatisfied to the extent of value of the properties, the sale of which fell through in consequence of the decrees passed by the High Court. It follows, therefore, that the purchase price of the properties that were exempted from the operation of the sale was not available for rateable distribution between the decree-holder and the appellants of this and the connected appeal and other decree-holders. The property had originally been purchased by the decree-holder for a sum of Rs.21,290, and the result of the decrees of the High Court was that properties worth Rs.2,540-1-2 remained with the decree-holder, and, therefore, it would obviously be inequitable to distribute rateably the sum of Rs.21,290 instead of Rs.2,540-1-2 between the various decree-holders.

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For the reasons given above, the arguments advanced by the learned counsel for the appellant, in bar of the exercise of the inherent powers vested in courts to prevent injustice, do not commend themselves to us and we are unable to accept the same.

We may further point out that there is another consideration that weighs with us in upholding the order for restitution passed by the court below. Before the auction sale the question, whether the judgment-debtors had any shares in the properties allotted by the decree in the partition suit to Harendra Shankar and others and to Mani Kunwar, had actually been litigated and decided by the court below and it was on the faith of that decision that the decree-holder made the auction purchase. It is true that that decision had been appealed against in this Court, but nevertheless the decree-holder was entitled to assume, at the time of the sale, that a court of competent jurisdiction had held that the judgment-debtors had three-sevenths share in all the properties put to sale. Now, to deny to the decree-holder the relief that has been granted to him by the court below would in effect be to disregard the duties cast upon courts to see that no act of the court does an injury to a suitor. As was pointed out by their Lordships of the Privy Council in *Jai Barham* v. *Kedar Nath Marwari* (1), "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 of 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."

It was also argued by the learned counsel for the appellant that the order for restitution would result in great injustice to the appellant as the decree held by him has

(1) (1922) 21 A.L.J., 490.

become time barred. The suggestion that the decrees held by the appellants either in the present appeal or in the connected appeal have become time barred has not been substantiated and we have not, therefore, allowed that suggestion to influence our decision.

It is not disputed that the figures worked out by the court below are correct. The result, therefore, is that we affirm the decision of the court below and dismiss this appeal with costs.

Before Mr. Justice Niamat-ullah and Mr. Justice Kisch

RAM CHARAN (DECREE-HOLDER) *v.* PARMESHWARI DIN (JUDGMENT-DEBTOR) *

1932
December, 8.

Civil Procedure Code, section 47; *order XXI, rule* 97—*Transfer of Property Act (IV of* 1882), *section* 52—Pendente lite *transfer by mortgagor—Final decree for foreclosure—Decree executed against mortgagor for possession—Decree can be executed again against the transferee* pendente lite.

During the pendency of a suit for foreclosure the mortgagor defendant made a usufructuary mortgage to a stranger and then sold to him the equity of redemption. Subsequent to this the plaintiff applied for a final decree, impleading the transferee but later on discharging him. In execution of the final decree the plaintiff obtained delivery of possession against the mortgagor. Failing, however, in the mutation proceedings to get his name entered in place of that of the transferee, the plaintiff applied to execute his decree again, praying for delivery of possession as against the transferee.

Held that the rights of the decree-holder, namely to extinguish the right of redemption and to obtain possession of the mortgaged property, could not be affected by the transfers *pendente lite* and he was entitled to execute the final decree not only against the mortgagor but equally as against the transferee *pendente lite*. The execution taken out against the mortgagor turned out to be infructuous and was not a complete execution of the decree; so the decree-holder was entitled to maintain a second application for execution against

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* First Appeal No. 462 of 1931, from a decree of Priya Charan Agarwal, Subordinate Judge of Cawnpore, dated the 30th of June, 1931.