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supported in this view by the decision of Pandit KANHAIYA LAL, A. J. C. in *Durga Prasad v. Ram Charan* (1). It was held in that case that a grove-holder could not be considered a tenant until there was a contract between him and the landlord to pay rent and that he was entitled to hold possession so long as the land retained the character of a grove and the mere fact that the land was liable to resumption or assessment of rent if brought under cultivation did not make the grove-holder a tenant liable to ejection. It is, therefore, clear that if a grove-holder, has been ejected illegally by the landlord a suit for possession by him lies in the civil court and not in the revenue court. I, therefore, decide the plea of jurisdiction also against the appellants.

Having decided all the pleas against the appellants, I dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Wazir Hasan and Mr. Justice Muhammad Raza.

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SANT SAHAI (APPLICANT-APPELLANT) v. CHHUTAI
 KURMI AND ANOTHER (OPPOSITE PARTY).*

Civil Procedure Code, section 144—Execution application—Application for restitution under section 144 of the Code of Civil Procedure is an application for execution.

The respondents obtained a decree for redemption of a usufructuary mortgage against the appellant on payment of a certain sum of money, deposited the amount within the time fixed and obtained possession. On appeal the decree was varied in so far that the amount of the redemption money was raised. The respondents paid the additional amount also

* First Execution of Decree Appeal No. 74 of 1924, against the order of Mahmud Hasan Khan, Subordinate Judge of Fyzabad, dated the 22nd of September, 1924, dismissing the application for restitution under section 144 of the Code of Civil Procedure.

as required. The present application was filed by the appellant under section 144 of the Code of Civil Procedure for recovering a certain sum of money from the respondents as mesne profits by way of restitution, for the period between the dates of the two deposits.

Held, that an application for restitution under section 144 of the Code of Civil Procedure is the same thing as an application for execution of the decree passed in appeal when that decree varies or reverses the decree of the court of first instance. [31 A. 551 and 45 Bom., 1137, followed. 44 A. 407; 3 Pat., L. J., 367 and 67 P. R., 1918, dissented from.]

Mr. *H. K. Ghosh*, for the appellant.

Messrs. *H. Husain* and *Niamatullah*, for the respondents.

HASAN and RAZA, JJ.:—This is an appeal from the decree of the Subordinate Judge of Fyzabad, dated the 22nd of September, 1924. The facts are few and simple. On the 12th of August, 1911 the respondents brought a suit for redemption of a usufructuary mortgage, dated the 22nd of August, 1903 against the appellant. In defence the appellant claimed money due under two deeds of further charge also as the price of redemption. The trial court rejected the respondent's claim and decreed redemption on payment of Rs. 11,329-7. This amount was paid within the time fixed by the redemption decree together with a certain amount of costs and the respondents entered into the possession of the mortgaged property on the 25th of August, 1912. On an appeal to the late Court of the Judicial Commissioner of Oudh the decree of the trial court in the matter of the amount of redemption money was varied in favour of the appellant and respondents were ordered to pay the

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sum of Rs. 12,119-15-3 to the appellant for the purpose of redeeming the mortgaged property. On the 12th of November, 1913 the respondents paid the difference between the two sums of money payable under the decree of the trial court and the decree of the Judicial Commissioner's Court.

The application, out of which this appeal arises, was made on the 28th of May, 1923 by the appellant, for the purpose of recovering Rs. 2,665 from the respondents as mesne profits, by way of restitution, for the period between the dates of the two deposits already mentioned. The application was made under section 144 of the Code of Civil Procedure. To save limitation the appellant claimed the benefit of section 6 of the Indian Limitation Act, 1908, for the reason that at the time from which the period of limitation was to be reckoned he was a minor. One of the pleas in defence to the appellant's claim was that the provisions of section 6 of the Indian Limitation Act were inapplicable because the appellant's application was not "an application for execution of a decree," to which those provisions apply. The court below has accepted this plea and dismissed the application.

We are of opinion that the appeal succeeds. We are unable to discover any reason in principle for entertaining the view that an application made for restitution under section 144 of the Code of Civil Procedure is not an application for the execution of a decree. This is particularly true in a suit founded on a mortgage to which the provisions of order XXXIV of the Code of Civil Procedure apply. The decree in a suit for redemption, as the present suit, was, enures to the benefit of the mortgagor and the mortgagee alike. Such a decree

imposes an obligation on the mortgagor in favour of the mortgagee for payment of the mortgage money and in the event of payment the mortgagor enters into possession when the mortgage is usufructuary and in default the mortgagee is given the right to bring the property to sale in satisfaction of the mortgage money. The final decree, therefore, which the Court of the Judicial Commissioner passed imposed the liability of payment of a further sum of money on the mortgagor before he was entitled to take possession. This obligation on the part of the mortgagor created a corresponding right in favour of the mortgagee to remain in possession until full payment as directed by the final decree was made. We, therefore, have no hesitation in holding that the present application is in substance an application made for seeking the aid of the court in working out the final decree.

The right of restitution arises under a decree of the court of appeal which decree has varied or reversed the decree of the court of first instance. Restitution is thus a benefit which would only accrue by executing the decree of the court of appeal. Under the old Code of Civil Procedure an application made under section 583 of that Code was treated by their Lordships of the Privy Council as an application for execution in *Prag Narain v. Kamakhia Singh* (1). A Divisional Bench of the High Court at Allahabad in the case of *Jiva Ram v. Nand Ram* (2) has expressed the opinion that the law as enacted in section 144 of the new Code is different from what it was in section 583 of the old Code. With great respect we are unable to agree with that opinion. It is true that the words "execution" and "to execute" were used in section 583 of the old Code

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(1) I.L.R., 31 All., 551.

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and are not used in section 144 of the new Code, but this change in our opinion makes no difference in substance. Those words, it appears to us, were superfluous and the law remains the same in spite of their disappearance. As we have said before, an application for restitution is the same thing as an application for execution of a decree passed in appeal when that decree varies or reverses the decree of the court of first instance. The view taken in the Allahabad case seems to be shared by some of the Judges of the High Court at Patna—see *Balmakun v. Basanto Kumari Das* (1), and *Krupasindhu Roy v. Mahant Balbhadra Das* (2), and also by the Chief Court of the Punjab in *Ram Singh v. Sham Prashad* (3). With regard to these cases we content ourselves with quoting a passage from the judgement of MACLEOD, C. J., in the case of *Hamid Ali v. Ahmed Ali* (4), and say respectfully that we entirely agree with the opinion expressed in that quotation, which is as follows:—

“ No doubt, as mentioned by Mr. Mulla in his Code of Civil Procedure, last edition, page 315, a different view has been taken by the High Court of Patna and the Chief Court of the Punjab. With all due respect to the learned Judges of those courts, it appears to me that the decision I have referred to is correct, and that an application for restitution cannot be treated as anything else than an application for execution of the decree of the appellate court. It is the decree of the appellate court which entitles the successful appellant to get

(1) I.L.R., 3 Pat., 371.
(2) P.R. No. 67 of 1918.

(2) 3 Pat., L. J., 367.
(4) I.L.R., 45 Bom., 1137.

back something which he had been deprived of by the decree of the lower court under which the then successful party had actually received possession. In order, therefore, to get back what he has lost, the successful appellant must apply for execution of the order which entitles him to get back that possession."

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In *Kurgodigonda v. Ningangonda* (1) it was held that the provisions of section 6 of the Indian Limitation Act applied to an application made under section 144 of the Code of Civil Procedure inasmuch as that was an application for execution of a decree. Another case decided by the Bombay High Court on the same lines is *Shivbai v. Yesoo* (2). We wish to emphasize that the view which we are taking is supported by the authority of the opinion of Sir DAWSON MILLER, C. J., of the Patna High Court in the case of *Basanta Kumari Das v. Balmukund* (3). Our opinion is further fortified by the decision of a Bench of the Madras High Court in the case of *Somassundaram Pillai v. Chokkalingam Pillai* (4). The same view seems to have been taken by the Calcutta High Court in *Madan Mohan Dey v. Nagendra Nand Dey* (5), and *Gangadhar Marwari v. Lachman Singh* (6).

On the grounds stated above, we allow this appeal, set aside the decree of the lower court and, as the decision of that court had proceeded on a preliminary point, we remand the case under order XLI, rule 23, of the Code of Civil Procedure with directions that the case be re-entered in the

(1) I.L.R., 41 Bom., 625.

(2) I.L.R., 48 Bom., 235.

(3) I.L.R., 2 Pat., 277 at page 283.

(4) I.L.R., 40 Mad., 780.

(5) (1917) 21 C.W.N., 544.

(6) 11 C.L.J., 541.

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proper register to its original number and disposed of according to law. The appellant will be entitled to his costs in this Court in all events.

The costs in the lower court will abide the result.

Appeal dismissed.

Before Mr. Justice Wazir Hasan and Mr. Justice Gokaran Nath Misra.

KUNWAR LAL BAHADUR (OBJECTOR-APPELLANT) v.
LALA BENI MADHO AND ANOTHER (DECREE-HOLDERS
RESPONDENTS.)*

1925,
November,
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Civil Procedure Code, sections 39 and 42 and order XXI, rule 48(1)—Attachment of salary—Court to which decree is transferred, powers of.

Where the court to which a decree had been transferred issued an order for the attachment of the salary of the judgement-debtor who was living beyond his jurisdiction in another district, *held*, that in view of the provisions of section 42 of the Code of Civil Procedure it cannot be contended that the power of attachment given by order XXI, rule 48(1) of the Code of Civil Procedure can only be exercised by the court which passed the decree and not by the court to which the decree was transferred under section 39 of the Code of Civil Procedure.

Mr. *Hardhian Chandra*, for the appellant.

Mr. *P. D. Rastogi*, for the respondents.

HASAN and MISRA, JJ.:—The respondents obtained a simple money-decree from the Court of the Subordinate Judge of Lucknow on the 17th of April, 1920 against four persons, one of whom was the appellant, Kunwar Lal Bahadur. On the 6th of April, 1921 the Court of the Subordinate Judge of Lucknow on an application being made to that

* Execution of Decree Appeal No. 67 of 1925, against the decree of Khurshed Husain, Subordinate Judge of Hardoi, dated the 12th of September, 1925.