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ROSS, J.

property is actually taken; and, until such possession is taken, the Court of Wards is not in charge of the property and the ward may be free to deal with it as he likes: but this is a matter on which I express no opinion. In the present case possession was admittedly taken in November, 1919; and, if that possession was lawfully taken, then section 60A is clearly a bar to the levying of execution against it. I can see no ground for holding that possession was not lawfully taken because no fresh order under section 35 of the Act was made. In my opinion such an order is made once for all; and, after the order has once been made, all that is required to complete the charge of the Court of Wards is the taking of possession.

This appeal must be dismissed with costs and the application in revision is also dismissed.

SEN, J.—I agree.

Appeal and application dismissed.

REVISIONAL CIVIL.

Before Jwala Prasad and Kulwant Sahay, J.J.

1924.

Nov., 4.

ADIT PRASAD SINGH

v.

RAMHARAKH AHIR.*

Civil Procedure Code, 1908 (*Act V of* 1908), *sections* 148, 149 *and* 151, *Order XLVII*, *rule* 1 *and section* 114 *Pleader's clerk misappropriation of court-fee by—Plaintiff's remedy.*

Where a litigant handed over to his pleader the balance of the court-fee due on a plaint, and the pleader's clerk, to whom the money was entrusted to be paid into Court, misappropriated the same and filed bogus applications for time

* Civil Revision no. 173 of 1924, from an order of Babu R. K. Ghosh, Subordinate Judge, Shahabad, dated the 30th January, 1924.

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to pay the deficit court-fee with the result that the court ultimately rejected the plaint, *held*, that after having paid the money to the pleader who was a duly constituted agent and officer of the court under the Legal Practitioners Act and the rules of the High Court, and whose duty it was to deposit it in court, the responsibility of the plaintiff ceased until he was informed of the default.

The plaintiff having applied to the court for revocation of an order rejecting a plaint in such circumstances, and for restoration, and the court having rejected the application, *held*, on the facts of the case, that the plaintiff was entitled to ask the trial court to set aside its decree and to restore the case whether the application be deemed to be one under section 151, 149, 148 and 147 or Order XLVII, rule 1.

Rameshwar Mahton v. *Lala Dwarka Prasad*(1), referred to.

Where some other provision of the Code of Civil Procedure prohibits a thing from being done section 151 does not empower the court to direct such thing to be done; but where there is doubt and difficulty in applying the other provisions of the code to the facts of a particular case there is no bar to section 151 being invoked.

Application by the plaintiff.

The facts of the case material to this report are stated in the judgment of Jwala Prasad, J.

S. P. Varma (with him *Sambhu Saran*), for the petitioner.

Dhanindra Nath Varma, for the opposite party.

JWALA PRASAD, J.—We have heard both parties. The case appears to be a very serious one involving a serious misdemeanour and misbehaviour on the part of a clerk of a pleader in the Subordinate Court of Shahabad.

The pleader's evidence clearly establishes the plaintiff's case that the deficit court-fee demanded by the Court was paid by the plaintiff to the pleader who handed it to his clerk to put in Court. The clerk misappropriated the money and filed bogus applications for time to pay the deficit court-fee with the result

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that the Court, being tired of such applications, ultimately rejected the plaint; the plaintiff coming to know of the result of the suit and the deceitful conduct of the clerk filed an application in Court for revocation of the order rejecting the plaint and for restoration of the suit to its original file.

JWALA PRASAD, J.

The Court below seems to have treated this case as a very simple case of default on the part of the plaintiff, holding that the laches on the part of the pleader's clerk amount to his own laches and that so far as this case is concerned, he is out of Court. I fail to appreciate the contention of the Court below. I am also surprised at the simplicity exhibited by the Court in dealing with such a serious case as an ordinary case of review leaving the aggrieved party to seek his remedy by a suit for compensation against the pleader's clerk, who, perhaps, is a pauper or has absconded. The result of the order of the Court below is to leave the plaintiff practically without any remedy. The Court below has tried to discuss the several provisions in the Code of Civil Procedure bearing on the subject and one by one he has disposed of them by holding that the plaintiff's application does not come under any of them.

It seems to me that the case is of such a flagrant nature that it is impossible to conceive that the Code would leave the case without providing any remedy. If the Court below has failed to find out the pertinent provision in the Code, it must have struck him that the Code is defective; but I cannot impute that lack of knowledge or experience on the part of the legislature and I am fully convinced that the case comes under the purview of the Code. The sections relevant to the point are 148, 149, 151, Order XLVII, rule 1, read with section 114, and the chapter relating to appeals from decrees.

The aforesaid provisions of the Code often overlap each other and therefore present sometimes difficulty in applying them to the facts of a particular case.

The order rejecting a plaint amounts to a decree under the definition of the term in section 2 of the Code of Civil Procedure. If the order in question is a decree, it is appealable, and one is apt to ask the question why the plaintiff did not appeal treating the order as a decree. If the question is asked one would find it difficult to answer. Admittedly the plaint was insufficiently stamped and the deficiency had to be made up. Admittedly the deficit court-fee was not paid within the time fixed by the Court, and in such circumstances the imperative provision in Order VII, rule 11, must apply and the plaint must be rejected. Present this case before a Court of appeal, and the only order which the party could expect is an order of dismissal. Knowing this why would the plaintiff go to the appellate Court? His case is that the Court acted fully within the powers vested in it but that the pleader's clerk, who is an officer of the Court, behind the back of the Court and that of the party, acted in a deceitful and dishonest manner and he withheld the payment of the money handed over to him in time to be deposited in Court. The only thing that will strike the plaintiff in such a position is to represent the matter to the Court itself which passed the decree. Therefore, although the order may be technically appealable, it is not practically appealable. Now, how to approach the Court? Ask the Court to review its order under Order XLVII, rule 1, or under the inherent powers of the Court, contained in sections 148 to 151 referred to above. Then the difficulty arises in finding out proper and sufficient grounds for a petition under Order XLVII, rule 1, and, therefore, the legal advisers of the party described the application under the provisions which are supposed to vest the Court with large and unlimited powers. This is the reason for putting the application under section 151. It is not the party which has put it but the legal adviser of the party. Therefore we have to look to the substance of the petition and the petition discloses the circumstances under which the order rejecting the plaint was passed and the reason for asking the Court

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to exercise its powers to grant a relief to the plaintiff. It has been pointed out in several cases that the powers vested in section 151 are indefinite, undetermined, unlimited and large, and it is difficult to define and describe such powers. The circumstances of each case will show whether section 151 should or should not apply. There are also authorities which, in some way, limit the scope of section 151 when there is some other provision in the Code which would give relief to the deserving party. Upon this ground it is often urged that when there is a provision for review and when the case can come under Order XLVII, rule 1, or can be taken in appeal, section 151 should not apply. I myself would be loath to exercise the power under section 151 when a party can come under any other provision of the Code. If the statute says that a thing should not be done, section 151 cannot vest the Court with the power to direct that it should be done; but when and where there is doubt and difficulty in applying the other provisions of the Code to the facts of a particular case I do not know why section 151 should not apply. It is in these circumstances that, where there is a doubt or dispute as regards there being any other provision in the Code, section 151 should be invoked. Personally I would apply section 151 to the facts of the present case although, technically speaking, the order rejecting the plaint is a decree. It is possible that Order XLVII, rule 1, also applies to the case. The section clearly gives an option to the party to elect to appeal or apply for review. In this case the party did not appeal but applied for review of judgment.

The plaintiff asks for permission to deposit the deficit court-fee. Virtually, therefore, the plaintiff asked for extending the time to pay the court-fee. The Court has power to extend the time to deposit the court-fee, even though the time originally fixed has expired, under sections 148 and 149.

The only difficulty created is by the final order rejecting the plaint. If that order had not been passed, there certainly would have been no difficulty.

In the circumstances I would not let that formal order stand in the way of giving relief to the plaintiff. The Court below held that Order XLVII, rule 1, does not apply and upon that view did not demand that the plaintiff should pay the deficit court-fee for review. The Subordinate Judge treated this case as one not coming under the review section of the Code. Therefore there was no fault of the plaintiff if the court-fee for review was not paid.

In the case of *Rameshwar Mahton* v. *Lala Dwarka Prasad* (1) where a Court wrongly treated an application under Order XLVII, rule 1, as one under section 151 and set aside an order of dismissal of a suit under its inherent powers, Das and Ross, J.J., held that the order of the Court below was not vitiated by the aforesaid irregularity. The observation in that case to some extent applies in the present case. Therefore I would hold that the plaintiff was not out of Court and he was fully entitled to ask the Court below to set aside its decree and to restore the case to its original file whether the application be deemed as one under sections 151, 149, 148 and 147 or under Order XLVII, rule 1.

The question is whether the plaintiff was entitled on merits to have the decree set aside. The circumstances stated will clearly show that this point need not be laboured hard for the plaintiff did pay the court-fee to the properly constituted agent who also is an officer of the Court and upon that payment the plaintiff was entitled to be saved from any further harassment due to non-payment of the court-fee.

I would, therefore, allow this application, vacate the order rejecting the plaint and restore the case to its original file.

The opposite party is represented by a learned vakil of this Court whom I have heard on all the points concerned, and I do not think that the case should be delayed in any way by formally asking the opposite

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party to show cause why the order of the Court below should not be vacated The case rests entirely upon the unimpeachable evidence of the pleader, Babu Harnandan Prasad, whose clerk, Babu Badri Prasad, withheld the money paid by the plaintiff to be deposited in Court and misappropriated the same. The said pleader proves that the money was actually paid by the plaintiff and that the clerk was entrusted with the work of depositing it in Court, but that he misappropriated it and on false pretext took adjournment after adjournment, and the case was ultimately dismissed for non-payment of the court-fee. The plaintiff all along believed that the money was actually deposited in Court. After having paid the money to the duly constituted agent and an officer of the Court under the Legal Practitioners Act and the rules of the High Court, whose duty it was to deposit in the Court, the responsibility of the plaintiff ceased until he was informed of the default made by the pleader or his clerk. It is no solace to the plaintiff that he can proceed against the pleader's clerk in the civil or criminal Court. The case was dismissed on account of certain circumstances over which he had no control and for no fault of his. The order of dismissal is set aside and the suit will be restored to its original number on the plaintiff paying the deficit court-fee within three weeks of the notice of this order given to him by the Court below.

The case, however, should not rest here. An investigation into the conduct of Babu Badri Prasad is necessary.

Let notice issue upon Badri Prasad, clerk of Babu Harnandan Prasad, Pleader, Arrah, to show cause why he should not be properly dealt with for having committed the offences of cheating and misappropriation and for misconduct as a pleader's clerk in connection with the deposit of the deficit court-fee in Rent Suit no. 2 of 1923.

KULWANT SAHAY, J.—I agree.

Application allowed.