

of a *ghardamad* has been acquired;—one is that there must be the definite intention on the part of the parties that that status should be acquired and another is that the person adopted as a *ghardamad* should, in the same way as a Hindu who is adopted as a son, definitely forego his title to succeed to any property of his natural father. The learned lower appellate court has not found either of these points in favour of the appellant. He has definitely held that there was no adoption of Mahadeva as *ghardamad* and it appears from the facts as stated in the judgments that Mahadeva did retain the raiyati land which came to him from his natural father.

In the result the appeal fails and is dismissed with costs.

DAS, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Fazl Ali and Dhable, JJ.

RAM RATAN PRASAD

v.

BANARSI LAL.*

Code of Civil Procedure, 1908 (Act V of 1908), sections 144, 151 and Order XXI, rule 90—execution—sale set aside under Order XXI, rule 90—judgment-debtor, application by, for restitution—section 144, whether applies—restitution, inherent power of the Court to order—section 151—order whether appealable as a decree—District Judge entertaining incompetent appeal—second appeal, whether lies to the High Court.

*Appeal from Appellate Order no. 28 of 1929, from an order of Mr. Jyotirmay Chatterji, District Judge of Saran, dated the 21st November, 1928, reversing an order of Brahmdeo Narayan Singh, Munsif of Chapra, dated the 8th August, 1928.

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The provision of section 144, Code of Civil Procedure, 1908, does not apply to a case where a sale in execution of a decree is set aside under Order XXI, rule 90, and the judgment-debtor applies for restitution and mesne profits. The Court can, however, in the exercise of its inherent power under section 151 of the Code, order restitution and direct the auction-purchaser to make over to the judgment-debtor the profits realised from the property, having got hold of the property by an abuse of the court's process.

Sukhdeo Das v. Rito Singh(1), *Meda Chinna Subbanma v. Papireddigeri Chennayya*(2), *S. M. Amiramnessa Chowdhurani v. S. M. Kurimannessa Chowdhurani*(3), followed.

Kamlanath Jha v. Mobit Jha(4) and *Jai Berhna v. Kedar Nath Marwari*(5), distinguished.

An application for restitution following a sale which has been set aside is not a matter relating to the execution, discharge or satisfaction of a decree and, therefore, an order made under section 151, Code of Civil Procedure, 1908, in that proceeding is not appealable as a decree under section 47 of the Code.

If a District Judge entertains an appeal which does not lie to his court, a second appeal lies against his decision.

Sagar Mull v. Hira Mahraj(6), followed.

Appeal by the decree-holders.

The appellant got a decree in a rent suit against the respondents and in execution of the decree 3 bighas 8 cattahs and 1 dhur of land in village Mahesia belonging to the respondents was sold and on the 11th February, 1927, the appellant who had purchased the land at the auction-sale obtained delivery of possession. Meanwhile on the 7th February, 1927, the respondents had filed an application under

(1) (1917) 2 Pat. L. J. 361.

(2) (1917) I. L. R. 41 Mad. 467.

(3) (1914) 18 Cal. W. N. 1299.

(4) (1923) 5 Pat. L. T. 553.

(5) (1922) I. L. R. 2 Pat. 10.

(6) (1925) 7 Pat. L. T. 264.

Order XXI, rule 90 of the Civil Procedure Code for setting aside the sale. On the 29th June, 1927, the sale was ordered to be set aside and on the 8th March, 1928, the respondents applied to the Court for being restored to possession and also for being awarded mesne profits up to the date when they were restored to possession. The learned Munsif before whom the application was made deputed a commissioner for a local investigation and the commissioner submitted a report on the 23rd June, 1928, in which he stated that he found the judgment-debtors to be in possession at the time, but, as regards whether the appellants had at all obtained possession of the trees and fields, the commissioner stated that he was unable to give any definite opinion because the parties were at variance with each other and there were witnesses to support both the parties. The Munsif dismissed the application of the judgment-debtors asking for mesne profits because in the first place he was of opinion that it was highly improbable that the decree-holders had actually got possession during the interval that the case under Order XXI, rule 90 lasted and in the second place he held that, properly speaking, no application under section 144 of the Civil Procedure Code lay in the case because the decree of the Court of first instance had neither been reversed nor varied. The judgment-debtors then appealed to the District Judge who vacated the order of the Munsif and remanded the case to him in order to decide, on taking such evidence as might be adduced by the parties, whether the decree-holders had or had not actually obtained possession. The decree-holders preferred the present appeal from this order of the District Judge and it was contended on behalf of the appellants that the order of the District Judge was entirely without jurisdiction, because the order passed by the Munsif was not appealable at all.

Hareshwar Prasad Sinha, for the appellants.

Ganesh Sharma and *B. P. Verma*, for the respondents.

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FAZL ALI, J. (after stating the facts set out above proceeded as follows :) Now, the question which arises for consideration is whether the provision of section 144 of the Civil Procedure Code will apply where a sale in execution of a decree is set aside under Order XXI, rule 90, and the judgment-debtor applies for restitution and for mesne profits. Now, looking to the language of section 144 it is clear that a duty is cast upon the Court to order restitution only where and in so far as a decree is varied or reversed. In this particular case it is clear that although the sale was set aside the decree remained intact and it was neither varied nor reversed. This being so, the case in my opinion does not come within the purview of section 144. I do not, however, mean to suggest for a moment that where the decree is not reversed or varied, the Court will be entirely powerless to order restitution even though the ends of justice may require it, because, as has been held in a number of cases, the Court has inherent jurisdiction to make such orders as are necessary in furtherance of the ends of justice. This view was clearly enunciated in the case of *Sukhdeo Das v. Rito Singh*⁽¹⁾. In that case a sale in execution of a decree was set aside at the instance of the auction-purchaser on the ground that the judgment-debtor had no saleable interest in the property as his interest had been previously sold in execution of another decree. The sale was confirmed in appeal but in the meantime the auction-purchaser had withdrawn the purchase-money from the Court. The executing Court ordered him to refund the money and on his objecting to do so attached his moveable property. This order was set aside by the lower appellate Court upon which a second appeal was preferred and it was held by this Court that the order did not fall within section 144 of the Code of Civil Procedure, 1908, but that the order of the executing Court must have been made under section 151 of the

(1) (1917) 2 P. L. J. 361.

Code. Similarly it was held in *Meda Chinna Subbamma v. Papireddigari Chennayya*⁽¹⁾ that where an order passed under Order XXI, rule 90 of the Civil Procedure Code refusing to set aside a sale held in execution of a decree was reversed on appeal, section 144 of the Civil Procedure Code did not in terms apply as no decree was varied or reversed but only an order under Order XXI, rule 90 was reversed on appeal. It was, however, suggested in that case also that it may be a case to which the provisions of section 151 might apply. Again in *S. M. Amirannessa Chowdhurani v. S. M. Kurimannessa Chowdhurani*⁽²⁾ it was held that where a sale in execution of a decree is set aside on the ground of fraud on the part of the decree-holder as well as auction-purchaser, the Court in setting aside the sale can, in the exercise of its powers under section 151 of the Civil Procedure Code, direct the auction-purchaser to make over to the judgment-debtor the profits realised from the property, having got hold of the property by an abuse of the Court's process. It appears from the judgment of the High Court in that case that the question as to whether section 144 would apply to a case like that was actually raised, but their Lordships, although they did not choose to decide the point, expressed themselves as follows—"It is contended that having regard to the definition of the word "decree" in section 2(2) of the Code an order for sale is a decree. We are not satisfied that the case falls within the terms of section 144. What was set aside was the sale itself—the transfer of the property. It is difficult to say that a transfer is a decree". In my opinion, therefore, the decree not being reversed or varied, the provisions of section 144 did not apply to the case and the Munsif could only act under section 151 of the Civil Procedure Code in the exercise of the inherent jurisdiction of the Court.

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The learned Advocate for the respondent, however, contends that even though a case may not come within the letter of section 144, a Court may order restitution and the order of restitution thus passed would be deemed to be an order under section 144 of the Civil Procedure Code and the learned Advocate relies upon two well-known cases. It appears, however, that all that was said in one of these cases—*Kamlanath Jha v. Mohit Jha*⁽¹⁾—was that the power of a Court to order restitution was by no means confined to the terms of section 144 of the Civil Procedure Code and that it was the inherent right of a Court to do what was right and proper under the circumstances which have happened. In the other case again *Jai Berhma v. Kedar Nath Marwari*⁽²⁾ their Lordships of the Judicial Committee expressed themselves as follows—“ 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 ”. Now, I do not find anything in either of these two decisions to warrant the proposition of law that even though an order for restitution may be passed by a Court in cases where there has been no reversal or variation of the decree, it must necessarily be deemed to be an order passed under section 144. On the other hand, in both these decisions the inherent powers of the Court have been referred to side by side with section 144 of the Civil Procedure Code. If then it is held, as I am inclined to hold, that this was not a case to which the provisions of section 144 would apply and that, if any restitution was to be ordered or mesne profits were to be awarded, it should have been done

(1) (1923) 5 Pat. L. T. 553.

(2) (1922) I. L. B. 2 Pat. 10.

under section 151 of the Civil Procedure Code, it is clear that no appeal would lie from the order passed by the learned Munsif. This result will follow from an examination of section 104 of the Civil Procedure Code and Order XLIII, rule 1 of the Civil Procedure Code and if any authority is needed for that proposition it is to be found in the case which I have already referred to, *Sukhdeo Das v. Rito Singh*(1), where it was clearly held that the order of the executing Court was not a decree and, therefore, no second appeal lay.

It is, however, argued—and this is what seems to have been suggested by the learned District Judge also—that this is a case to which section 47 of the Civil Procedure Code will apply. This section says that all questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. The question, therefore, is whether an application for restitution following a sale being set aside would be a matter relating to the execution of the decree. Now, in my opinion, it cannot be treated as a matter relating to the execution of the decree without somewhat stretching the expression and some of the decisions to which I have referred also seem to support me indirectly in this view. As I have already said, it has been held in these cases that an order for restitution, where no decree has been varied or reversed, would fall under section 151 of the Code of Civil Procedure. The jurisdiction of the Court, however, under section 151 is a discretionary jurisdiction, while section 47 of the Code of Civil Procedure says that all questions which relate to the execution, etc., shall be determined by the Court, implying thereby that if those questions are raised, it will be obligatory upon the Court to decide them.

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In my opinion the point raised by the learned Advocate for the appellant that the learned District Judge acted entirely without jurisdiction in entertaining an appeal against an order of the Munsif must prevail and the order of the learned District Judge must be set aside.

It is also contended by the learned Advocate for the respondents that no second appeal will lie to this Court for two reasons: In the first place, because no appeal originally lay to the District Judge and secondly, because the order of the District Judge being an order of remand, no appeal will lie from such an order. It has, however, been held in a series of cases that if the District Judge entertains an appeal which does not lie to his Court a second appeal lies against his decision—see, for example, *Sagar Mull v. Hira Maharaj*(¹). It is clear that if it is held that the order of the District Judge was entirely without jurisdiction, then, whatever the nature of that order may be, it will be competent for this Court to vacate that order. The appeal is, therefore, allowed and the order of the District Judge vacated, but in the circumstances of the case there will be no order as to costs.

In view of the order passed by me in this case the application for the stay of proceedings becomes infructuous and is withdrawn by the appellant.

DHAVLE, J.—I agree.

Appeal allowed.

(1) (1925) 7 Pat. L. T. 264.