(1930) 07 CAL CK 0030

Calcutta High Court

Case No: None

Maharaja Sasikanta Acharjee		APPELLANT
	Vs	
Jalil Baksha Munshi and Others		RESPONDENT

Date of Decision: July 10, 1930

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 92, 144, 151

Citation: AIR 1931 Cal 779

Judgement

1. The appellant obtained a decree for rent against the respondents in respect of a jote held by the latter and in execution thereof purchased the jote at an execution sale on 19th February 1923. He took delivery of possession from the Court on 14th June 1923. The respondents applied for setting the sale aside on the ground of material irregularity and the sale was set aside on 31st July 1924. The respondents applied for restitution for possession of the jote with mesne profits for a period of 13 months from Sravan 1330 to Sravan 1331.

2. The Munsif held that the respondents were entitled to Rs. 675 as mesne profits. The appellant then preferred an appeal to the District Judge and the respondents a cross-appeal. The District Judge dismissed the appeal and allowing the cross-appeal enhanced the mesne profits to Us. 1,620. Hence the present appeal.

3. It has been urged in the first place that the learned District Judge had no jurisdiction to deal with the matter because the restitution that was ordered by the Munsif was not within the purview of Section 144, Civil P.C., but was ordered by him u/s 151 in the exercise of the inherent powers of the Court. Now, in this ease no "decree" having been varied or reversed but the sale having bean set aside under Order 21, Rule 92 by the Court, Section 144 has no application; but the Court of the Munsif granted restitution in the exercise of its inherent power u/s 151. On the question as to whether an appeal would lie from such an order passed by the Munsif however there must always be two opinions. One view is that an appeal

being always a creature of the statute, it is only when an order has been expressly made appeal-able by the Code that an appeal would lie. The other view is that when an order, though not strictly justified by the statutory provisions relating to such an order appealable under the Code, purports to have been made under such provisions, an appeal is competent. Acting on this view this Court has often treated orders of remand, not strictly justified by the Code, as being open to appeal. The appellant himself appears to have acted on this view in preferring an appeal to the District Judge, an appeal which opened the venue for the respondents'' cross-appeal to which exception is now taken. I may observe in passing that it may be a question to consider whether the appellant is entitled to approbate and reprobate in the way he desires to do, having regard to the decisions in such cases as Bindeswari v. Lakpat [1910] 8 I.C. 26 and Raghubar Dyal v. Jadunandan [1911] 13 I.C. 365; but I do not feel called upon to go into this question or express any opinion on it as it has not been argued at the Bar. I think the view enunciated above is the one which found favour with this Court in the case of Gnanada Sundari Mojumdar Vs. Chandra Kumar De, in which it was held that where a Court, acting u/s 151, Civil P.C., exercises the same jurisdiction which Section 144 of that Code gives it, the order of restitution made u/s 151 is appealable. It was observed in that case:
It certainly seems a curious position that if the Court deals with the matter u/s 144, Civil P.C., an appeal lies whereas if the Court u/s 151 exercises the same jurisdiction which Section 144 gives him, but exercises that jurisdiction u/s 151, because Section 144 is not strictly applicable, no appeal lies.

4. This decision is directly in point and no authority of this Court has been shown to us in which a different view has been taken. In my opinion, a matter of this description in which two views are always possible, should be left to be governed by practice.

5. An appeal from an order of restitution passed by a Court u/s 151 in the exercise of its inherent power may, in my opinion be hold to be competent from another point of view. According to the decisions of this Court an application for restitution is not an application for execution to be governed by Article 182, Schedule 1, Lim. Act, but is an independent application governed by the residuary Article 181: see Hari Mohan Dalal and Another Vs. Parameshwar Shau and Others, . But I hardly see any reason to hold that the question arises in such proceedings are not questions which come within the purview of Section 47. An appeal it is true lies from an order under Order 21, Rule 92 as an appeal from an order Order 43, Rule 1, Clause (i) and not as an appeal from a decree which is defined as including an order u/s 47 Section 2, Clause (2) so that an order confirming or setting aside a sale is not a decree within the definition and is not appealable as a decree. u/s 583 of the Code of 1882 proceedings for restitution had to be commenced by an application for execution of the appellate decree which in the words of that section had to be executed according to the rules for execution of decrees prescribed by the Code. Under the

Code of 1882, when on the reversal of a sale, application for restitution was made such an order of reversal falling within Section 244 and so amounting to a decree could be executed in the manner laid down by Section 583. In a case of this description under the old Code the Judicial Committee observed:

The claim to have the questions determined in the execution proceedings is justified by Sections 244 and 583, Civil P.C.: Parag Naran v. Kamakhia Singh [1909] 31 All. 551.

7. Section 144 of the present Code has omitted all reference to execution so that when an application is to be made under that section it has to be made to the Court of first instance and that Court has to pass an order such an order is covered by the definition of "decree" and it is this order that is to be executed as a decree. When however on the reversal of a sale by an appellate Court application for restitution has to be made to the Court of first instance, that Court must necessarily be an executing Court which held the sale, the proceedings of which will be required to be undone.

8. That executing Court will have to act in the exercise of its inherent power. It will act in connexion with the execution proceedings and the questions that it will determine will be questions arising u/s 47 in respect of execution of the decree which has been or is being executed by that Court and for which execution the sale was held. It is true that in the definition of decree as given in Section 2, Clause (2), Section 47 has been kept separate from Section 144 but the fact that in an artificial definition intended only for the purpose of laying down provisions for appeals those sections have been enumerated separately should not be taken to mean that questions which arise u/s 144 may not be questions falling within Section 47. The questions that arise are essentially questions of the character specified in Section 47 and the fact that the auction-purchaser is sometimes a stranger to the suit does not stand in the way of their being so regarded in view of the wide construction that their Lordships of the Judicial Committee were in favour of putting upon the language of Section 244 (now Section 47) in the cases of Prosunno Kumar v. Kali Das [1892] 19 Cal. 683 and Ganapathy v. Krishnama Chariar AIR 1917 P.C. 121. Applications for restitution which are not by way of execution of the decree varying or reversing an original decree but are independent applications in connexion with execution proceedings taken under the original decree have been regarded as giving rise to matters u/s 47 of the "Code in such cases as Bindeshri Prasad Tiwari Vs. Badal Singh and Others a case of an auction-purchaser against whom the judgment-debtor had obtained a declaration that the auction sale was not binding on him and who thereupon applied for refund of the purchase money which he had paid Shivbai v. Yesu [1910] 43 Bom. 235 a case of judgment-debtor who having succeeded in getting an ex-parte decree passed against him set aside applied to set aside the sale which had in the meantime taken place under the ex parte decree and Swamirao v. Valentine [1920] 44 Bom. 702 a case on somewhat similar facts as the last mentioned case. These cases are no doubt cases of reversal of decrees but the

point is that in all of them the learned Judges thought that if the applications did not come u/s 144 there was no objection to their being regarded as coming u/s 47 in connexion with the execution of the original decree that was subsequently set aside.

9. Turning now to the merits of the case it seems to me that the learned District Judge was not right in accepting the highest figures given by a witness for the appellant without coming to a finding as to whether in respect of the lands concerned such figures were in fact attained. The Munsif had proceeded upon no rational basis and had taken a figure at random and the learned Judge therefore was right in varying it. But I think the figures on which the learned Judge proceeded are themselves too high. It would in my judgment be fair to take the average of the figures given by the appellant''s witness. Taking the said average figures, the calculations would be as follows:

Jute	5 x 12 x 10 x 2	Rs. 1,200
Paddy	10 x 13 x 3-1/2	Rs. 455
		Rs. 1,655

10. Deducting 25 per cent for the costs of cultivation as the learned Judge has done the amount comes up to Rs. 1,241 1/4 which I would allow as mesne profits, instead of Rs. 1,620 awarded by the learned Judge. The appeal is allowed as indicated above. There will be no order as to costs in this appeal but the order as to costs passed by the Court below will stand.