

(1930) 02 CAL CK 0028**Calcutta High Court****Case No:** None

Ramanath Karmakar

APPELLANT

Vs

Sheikh Asanulla

RESPONDENT

Date of Decision: Feb. 11, 1930**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 144, 151

Citation: AIR 1931 Cal 42**Hon'ble Judges:** Mukerji, J; Guha, J**Bench:** Full Bench**Judgement**

Mukerji, J.

The appellant as plaintiff sued the respondent as defendant on a mortgage and having obtained a decree ex parte, purchased the mortgaged property in execution thereof, and upon confirmation of the sale, obtained delivery of possession on 20th October 1918. The respondent then instituted a suit for declaration of title to the property so purchased, assailing the ex parte mortgage decree as vitiated by fraud. He obtained an ex parte decree and recovered possession of the property in May 1926. The ex parte mortgage decree which the appellant had obtained having thus been set aside, the original mortgage suit was restored and retried and was again decreed, this time on contest, on 1st March 1928. In the course of this retrial the respondent prayed for an account being taken of the profits enjoyed by the appellant during his possession of the property from 20th October 1918 to the date in May 1926 when the respondent had regained possession. The Court left the question of the profits aforesaid open with the re-mark that the question might be determined on an application u/s 144, Civil P.C. On that and before the final decree was passed in the suit on 31st March 1929, the respondent, on 30th March 1928, made the present application u/s 144, Civil P.C., for being awarded the said profits. Thereafter in execution of the decree which the appellant had obtained, the appellant purchased the mortgaged property.

2. The application u/s 144, Civil P.C., was dismissed by the Munsif as not maintainable, but the Additional Subordinate Judge holding otherwise has remanded the case to the Court of first instance to be dealt with on the merits. Hence this appeal.

3. The contention of the appellant is that (the application of the respondent does not come within the purview of Section 144, Civil P. C, and that his only remedy, if any, is by a suit. What the appellant gains if this contention succeeds is obvious, because a suit for recovery of profits is now barred and a part of the claim would be barred even if his application u/s 144, Civil P.C., be treated as a plaint for the purpose. I am prepared to overrule this contention upon the short ground that the appellant having taken the decree in the mortgage suit with the reservation that the question of profits for the period of his possession would be determined on an application u/s 144, Civil P.C., and having reaped the benefit of that decree by execution, cannot be permitted to turn round now and challenge the maintainability of that very application when it has been made.

4. On the question as to whether Section 144, Civil P.C., is wide enough to cover the present application a good deal of argument has been addressed to us. In the view that I take of the maintainability of the appellant's contention and which I have already expressed, it is hardly necessary for me to pronounce any opinion on this argument. It is well known that on this question there is a divergence of judicial opinion. According to one view the section does not apply unless the decree is varied or reversed by a Court superior to the one that passed it : Chintaman Singh v. Chuni Sahu [1916] 1 P.L.J. 43 [Ashutosh Nandi and Another Vs. Kundal Kamini Dasi and Others,](#). According to the other, the section-applies in all cases where the decree is varied, reversed or superseded however and by whatever Court, and even though by a separate suit : Subbarayudu v. Seshani [1917] 40 Mad. 299 Shivbai v. Yesoo [1919] 43 Bom. 235. Cases may be cited in which doubts have been expressed as to which of the two views is correct i.e., [Bindeshri Prasad Tiwari Vs. Badal Singh and Others](#) ; Sivami Rao v. Valentine [1920] 44 Bom. 702.

5. At the same time it cannot be and has never been disputed that on a variation, reversal or supersession of a decree, even if Section 144, Civil P.C., is not in its terms applicable, restitution must be ordered and that to the fullest extent, and that it is the duty of the Court to see that it is so effected. That Section 144 of the Code does not define the full measure of the power of the Court to make an order for restitution, but may be taken as a, guide for doing complete justice between the parties concerned under similar circumstances has been over and over again laid down in a long series of cases many of which are referred to in the judgments of Mookerjee, J., in the case of [Rai Charan Bhuiya and Others Vs. Debi Prosad Bhakut,](#) and their Lordships of the Judicial Committee in the case of Jai Berham v. Kedar Nath Marwari AIR 1922 P.C. 269 have pointed out that the duty or jurisdiction of the Court in this respect does not arise merely under the said section but is inherent in the

general jurisdiction of the Court. As at present advised I am inclined to take the view that the words "Court of first instance" in Section 144, sufficiently point to the intention on the part of the legislature to confine the applicability of the section to cases where the variation or reversal has been made, or is a consequence of an order passed, by a superior Court. I am however unable to assent to the view if that was meant to be expressed in the case of [Ashutosh Nandi and Another Vs. Kundal Kamini Dasi and Others](#), that the applicability of the section may depend upon the character of the question simple or complicated that may arise for consideration. If the case comes within the purview of the section, no matter whether; the question is simple or complicated, it will have to be determined on an application made under it, and a separate suit would be barred. But the appellant can gain nothing even on the limited view that I am inclined to take of the scope of Section 144, Civil P.C., because it was clearly the duty of the Court to proceed u/s 151, Civil P. C, and give the respondent the most complete relief in the shape of restitution. Whether under, the one section or under the other, the right order has now been passed by the Court of appeal below, and there is no reason why. it should be interfered with.

6. The only point on which I am not satisfied with the order appealed from is the finding on the question whether the appellant was or was not awarded interest on account of the fact that he was in possession. On this point the two Courts below have expressed different views. This is a matter that will have to be further investigated when the respondent's application will be, as it must be, dealt with on the merits, and the decision of this question will affect the merits of the application.

7. In my judgment the appeal should be dismissed but I would make no order as to costs.

Guha, J.

8. I agree with my learned brother in holding that the appeal should be dismissed. The substantial question of law raised in this appeal is that Section 144, Civil P.C., is not applicable to the case out of which it had arisen inasmuch as the decree in favour of the appellant passed on 27th March 1916 was not set aside in appeal. There is a further question raised as to whether, regard being had to the complicated nature of the claim and counter-claim involved in the present case, an application for restitution was the proper form by which the rights of parties could be settled. The questions thus raised are of general importance, and reliance has been placed by the learned advocate for the appellant on the recent decision of this Court in [Ashutosh Nandi and Another Vs. Kundal Kamini Dasi and Others](#), in which it has been held that Section 144 referred only to a case where a decree of the Court of first instance was reversed on appeal or revision and further that Section 144 did not apply to a case where the Court had to decide questions of "conflicting rights under different decrees. I am inclined to think that Section 144, which embodies the rule to be followed in cases where restitution is sought after reversal or variation of decrees contemplates all cases of reversal or variation and is not confined to

reversal or variation on appeal or revision only. The reversal or variation as mentioned in Section 144, may be on appeal or revision; it may also be by decision of a Court of competent jurisdiction in another suit, in which the decree is impeached and sought to be set aside, the test being whether the decree previously made remained in force or not; was the decree annulled, be it by a decree passed on appeal or revision in the same suit or by a decree passed in another suit brought for the purpose of setting aside the decree previously made ? The reference to the Court of first instance in Section 144 with the object of determining the forum by which restitution is to be granted, does not to my mind militate against this interpretation being given to the section; and I am unable to find sufficient justification for reading some words into the section which are not there. The observations of Sir Richard Garth, C. J., in *Jogesh Chunder Datt v. Kali Churn Datt* [1877] 3 Cal. 30 approved by their Lordships of the Judicial Committee of the Privy Council in *Bommadevara Naganna Naidu v. Ravi Venkatappaya* AIR 1923 P.C. 167 upon which the decision of the learned Judges in [Ashutosh Nandi and Another Vs. Kundal Kamini Dasi and Others](#), is based, were made in a case in which the decree previously passed was not directly superseded by a subsequent decree but was superseded by the operation of a decree passed in another suit, a case in which the subsequent decree had not "the legal effect of annulling or altering ipso facto" the previous decree and pointed reference was therefore made to the English rule as laid down in *Marriot v. Hampton* 7 Term. Rep. 269 applicable to cases where decrees and judgments remained in force. In one part of his judgment Garth, C. J., remarked that in the case before him, a review of judgment would not only have been the most complete and the most appropriate and unobjectionable remedy, thus indicating the proper procedure in a case where the previous decree had not been annulled but remained in force. The observations of Garth, C. J., referred to above, do not in my opinion stand in the way of the interpretation I am inclined to give to Section 144. If Section 144 applied to the case before us, as in my opinion it did, the necessity for determination of question of claim and counterclaim, complicated or simple, should not stand in the way of the application of the respondent before us being investigated on its merits. As the learned Additional Subordinate Judge who heard the appeal in the lower Court has said, the inquiry on the application could not be avoided on that ground.

8. Apart however from the question of applicability of Section 144 which has been discussed above, the present case on appeal before us may very well be disposed of as one coming u/s 151, Civil P.C. There can be no doubt it is open to a Court, in the exercise of its inherent power, to make an order for restitution for the purpose of doing justice between the parties concerned, even in a case which may not come within the terms of Section 144. As has been observed by Mookerjee, J., in [Rai Charan Bhuiya and Others Vs. Debi Prosad Bhakut](#), the difficulty in the exercise of the inherent power of the Court, when there is an express provision to the contrary in the Code itself, cannot possibly arise, inasmuch as Section 144 does not purport

to define the power of the Court so far as restitution is concerned. There is nothing contained in Section 144 which puts any restriction on the power of the Court to do justice between parties on the facts and in the circumstances of the case before it.

9. In the above view of the matter, and seeing that a separate suit might mean the relinquishment of a part of the claim covered by the application for restitution now before the Court, the application of Sheikh Asanulla for restitution should be held to be maintainable, and investigation should therefore be made of the claim made by the aforesaid applicant on the one hand, and the counter claim by Ramanath Karmakar on the other. One very question on which the Courts below have differed from each other as to the real state of facts, namely, whether Ramanath has or has not been awarded any interest on account of his possession of the property to which the present dispute between the parties relates, requires further and fuller consideration, in the light of materials before the Court; and the finding arrived at on this question would materially affect the claim for restitution.