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under section 7 of the Limitation Act the right of the three plaintiffs to recover possession of 28/32th share in the property would be within time, as the claim of one of them, who was under a disability, is within time. The purchaser in possession would be equitably entitled to have his rights under the simple mortgage satisfied before he can be called upon to part with his possession. The result is substantially the same as if he were a mortgagee in possession with this difference that he may not be liable to account as a mortgagee in possession.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah on difference between Mr. Justice Beaman and Mr. Justice Heaton.

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BHUTA WALAD JAYATSING (ORIGINAL PLAINTIFF-APPLICANT), APPELLANT
v. LAKADU DHANSING AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 144—Decree for plaintiff—Reversal of the decree in appeal—Restoration of the trial Court's decree in second appeal—Claim for restitution—Plaintiff's right to claim restitution.

A question being referred whether a plaintiff who obtained a decree in his favour in the trial Court and went into possession under it, and was put out of possession under the decree of the first Court of appeal reversing the trial Court's decree, and who succeeded in the Court of second appeal, which restored the judgment of the trial Court, can claim any benefit under section 144, Civil Procedure Code, 1908, in respect of time he was dispossessed between the decrees of the first and second appeal Courts,

Held, that the plaintiff could claim such benefit under section 144 of the Civil Procedure Code, 1908.

SECOND Appeal against the decision of C. C. Dutt, Assistant Judge of Khandesh, confirming the decree passed by J. H. Betigiri.

* Second Appeal No. 22 of 1917.

Application under section 144 of the Civil Procedure Code, 1908.

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In 1908, a suit was brought by the plaintiff for joint enjoyment of the water of a well. The Subordinate Judge decreed the suit in plaintiff's favour. The defendants appealed to the District Court, but while the appeal was pending the plaintiff took out execution of the decree and was put in joint possession of the water of the well with the defendants on the 6th September, 1909. The District Court reversed the decree of the Subordinate Judge's Court and dismissed the suit. As a result of this, the plaintiff lost possession of the well on the 8th November, 1911.

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The plaintiff, thereupon, appealed to the High Court. The High Court reversed the decree of the District Court and restored that of the Subordinate Judge's Court. After the High Court's decree, the plaintiff got possession again on the 7th November, 1913. He then presented an application under section 144 of the Civil Procedure Code, 1908, claiming Rs. 750 by way of compensation for the loss of joint enjoyment of the water from the 8th November, 1911 to 7th November, 1913.

Both the lower Courts were of opinion that the plaintiff's remedy was to obtain the relief sought by a regular suit and not by an application under section 144 of the Civil Procedure Code, 1908.

On appeal to the High Court, the case was argued before Beaman and Heaton JJ. Their Lordships delivered the following judgments on the 12th March 1918.

BEAMAN, J.:—The plaintiff has applied for restitution by way of compensation in the following circumstances. He brought a suit to be given joint enjoyment of the water of a well. The trial Court found in his favour. The defendants appealed, but while the appeal was

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pending the plaintiff took out execution of the decree, and was put in joint possession of the water of the well with the defendants. The Court of appeal reversed the decree of the Court below and dismissed the plaintiff's suit. He appealed to the High Court, but the defendants in turn took out execution and the plaintiff was deprived of joint enjoyment of the water of the well. Two years later the High Court confirmed the decree of the trial Court. The plaintiff asks for restitution by way of compensation for the loss of joint enjoyment of the water for those two years.

It is not very easy to find any good reason in the language of the section for refusing his prayer as the Courts below have done. The most, I think, that can be said is that the former section, of which section 144 of the present Code is an enlargement, found a place in the chapter on first appeals which lends some support to the principle which I would affirm. But I own that on that ground alone I should not feel very confident.

It appears to me, however, that such a prayer as this is opposed to the principle of restitution. As I understand that principle it is limited to cases in which the *status quo ante* suit has been disturbed by a decree which is afterwards reversed. The case before us has to deal with two appellate decrees. The original decree disturbed the *status quo ante*, and the decree of the first Court of appeal restored it. There can be no doubt but that had the litigation ended here the defendants would have been entitled to restitution for the intervening period, by way of compensation, had it been in all respects a proper case. That is to say they would have been entitled to a restoration of the *status quo ante* the trial Court's decree, under which the plaintiff had disturbed that state of affairs, and along with it

compensation for any loss which had been caused them by the premature execution of a wrong decree. In the end what was at that time a wrong decree was shown to be a right decree, and had the defendants not executed the intermediate decree no case would have arisen for compensation by way of restitution. Remembering that at the commencement of the period for which the plaintiff is asking for compensation the parties were relatively occupying the same positions as they had done before the litigation began, can it be said that the plaintiff is entitled to have what he asks? In my opinion it cannot. For if he can, it would only be upon a principle, which being extended to all cases would give a plaintiff who had been defeated in two Courts, but had finally succeeded in the High Court a right of this kind over all the intervening period. No such right has ever yet been claimed, nor, if claimed, would I am sure, have been entertained in any Court. Here, for example, had the decree of the trial Court been against the plaintiff, and that decree been confirmed by the Court of first appeal, the plaintiff would never have obtained joint enjoyment of the water of the well from the institution of the suit to its final decision in his favour some years later by the High Court. And most assuredly in that case he would have had nothing upon which to found a claim of this kind. I cannot see that the principle is really affected in any way by the fact that the plaintiff was successful in the trial Court, and lost no time in taking advantage of that Court's decree. If the principle upon which I would decide this appeal be correct it has this great advantage, that it is simple, uniform, and yields this result that in no case can a plaintiff ask for restitution or any of its concomitant modes, under section 144. I am fortified too, in my belief, that this is the true principle by the fact that the pleader for the appellant could not refer

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us to a single case among the many which have come up for judicial determination under section 144 and the corresponding section in the former Code, in which a plaintiff had asked for this relief.

In my view there can never be a true ground for affording relief to a plaintiff on the principle of restitution, for the very simple reason that until he is in under a good decree, he must be taken to have been out all the time, else he had not been a plaintiff. And when I say a good decree I mean a decree which is finally good and beyond the reach of further correction. There might be a difficult case where in facts such as those with which we are dealing, the defendants had asked for and obtained restitution in the form of compensation under the intermediate decree. It might then be a question whether when the final decree re-affirmed the first decree, the plaintiff would not at least be entitled to be re-imbursed anything he had been compelled to pay to the defendants under the head of restitution.

That, however, would be a genuine, though, I think, a very rare case of restitution, and we may wait till it occurs before we express any definite opinion upon it. I would dismiss this appeal and confirm the order appealed against with all costs upon the appellant.

HEATON, J.:—A litigant obtained a decree entitling him to the use jointly with another person of a well. I will call him the decree-holder and the other the judgment-debtor. The former applied to the trial Court to execute the decree and was placed in joint possession of the well with the judgment-debtor. Thereafter as the decree was reversed in first appeal, he was, on the application of the judgment-debtor, removed from joint possession on the 8th November 1911. In second appeal the decree-holder again succeeded and was restored to joint possession on the 7th November 1913. He now claims compensation for the period of two

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years from 8th November 1911 to 7th November 1913 for the loss he has been put to through being deprived of the use of the well-water. The claim is made under section 144 of the Civil Procedure Code. Its merits have not been investigated, for both the lower Courts have decided that this application is not one that can be dealt with under section 144. He has appealed and in my opinion his appeal must succeed.

The lower Courts have held that as the judgment-debtor did not gain anything material he cannot be called on to recompense the decree-holder for any loss. That, I think, involves an absolute misreading of section 144. The loss incurred by the decree-holder, if any, is due to the fact that the judgment-debtor executed against him an erroneous decree. If he has suffered a loss and if he is entitled to compensation that compensation must be obtained from the judgment-debtor.

For the purpose of the argument before us on the preliminary point we must assume that the decree-holder has incurred a loss. If so, I do not doubt that he is entitled to compensation or damages. He was entitled to execute the decree, he did so. He was then ousted and it turns out that the judgment-debtor ousted him in reliance on a right which is found not to exist. That being so, the decree-holder, in my opinion, is entitled to compensation or damages.

The question then arises whether he is to get the compensation or damages under section 144 or by separate suit. In my opinion it must be under section 144. That section lays down a law very different from the old law of section 583 of the old Code. To begin with, by clause (2), which did not form part of the old section, it is enacted that no suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

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This indicates, with unmistakable clearness, that the intention of the law is to bar separate suits and to compel litigants to have these matters cleared up in execution proceedings.

Secondly, old section 583 by its terms applied only to "benefit by way of restitution or otherwise" under a decree made in first appeal. There is no such restriction in section 144, so the benefit may arise under a decree in second appeal, as it does in this particular case.

Thirdly, the comprehensive nature of the section is emphasised by the words expressly empowering the Court to award interest, damages, compensation or mesne profits.

I read section 144 as a part of the scheme of the Code as to executing decrees under appeal. Execution of such decrees is not forbidden nor even discouraged as appears clearly from Rules 5 to 8 of Order XLI of the Code. But safeguards are provided. On the one hand the decree-holder may be required to give security if he executes the decree; on the other, the judgment-debtor may be required to give security in order to avoid having the decree executed. But this is not enough and section 144, I think, supplies what is wanting and enables the Court to settle in execution all questions as to the loss one party or the other is put to in executing any decree subsequently varied or reversed.

OWING to this difference in opinion the following point of law was referred for decision to Shah J. under section 98 of the Civil Procedure Code, 1908; "whether a plaintiff who has obtained a decree in his favour in the trial Court and gone into possession under it, and has been put out of possession under the decree of the first Court of appeal reversing the trial Court's decree (no claim for restitution having at this stage been

preferred against him by the defendant) and who has succeeded in the Court of second appeal which has restored the judgment of the trial Court, can claim any benefit under section 144 in respect of the time he was dispossessed between the decrees of the first and second appeal Courts?"

W. B. Pradhan, for the appellants.—The words of section 144 of the Civil Procedure Code, 1908, are very wide; the expression "any party" includes plaintiff as well as defendant. Whenever a question of restitution arises, the Court has first to see whether there has been execution of a wrong decree; if there is, then the Court has to see what party has come to any damage by the execution. The relief by way of restitution is based on the ground that the Court must see that its process is not abused.

Section 144 of the Code of 1908 has its counterpart in section 583 of the Code of 1882. The latter section occurs in the chapter relating to first appeals and that is why I cannot quote a case where a plaintiff has claimed and been awarded restitution.

[*SHAH J.* :—The section would apply to second appeals also by virtue of section 587.]

Section 144 differs from section 583 of the Code in two ways; first, it is made applicable to all appeals; and, secondly, the right of restitution is an independent right which the party aggrieved can exercise.

I rely on the wording of the section which is strongly in my favour: see *Rajkissen Singh v. Baroda Dabee*⁽¹⁾; *Hurro Chunder Roy Chowdhry v. Shoorodhonee Debia*⁽²⁾; *Rodger v. The Comptoir D'Escompte De Paris*⁽³⁾; *Raja Singh v. Kooldip Singh*⁽⁴⁾; *Dorasami*

⁽¹⁾ (1866) 6 W. R. Misc. 111
at p. 113.

⁽²⁾ (1868) 9 W. R. 402 at p. 407.

⁽³⁾ (1871) L. R. 3 P. C. 465 at p. 475.

⁽⁴⁾ (1894) 21 Cal. 989 at p. 994.

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Ayyar v. Annasami Ayyar⁽¹⁾; *Prag Narain v. Kamakhia Singh*⁽²⁾; *Parbhu Dayal v. Ali Ahmad*⁽³⁾; *Subharayudu v. Yerram Setti Seshasani*⁽⁴⁾.

S. Y. Abhyankar, for respondents Nos. 1 to 3 :—The scheme of the Civil Procedure Code is that it deals mainly with execution and provides for cases when there has been a wrong execution. It seems to suggest that a successful plaintiff can get all that he is entitled to get by a decree properly framed. He is protected at all three stages : (i) from the cause of action to the date of suit ; (ii) from the date of suit to decree ; (iii) from the decree to the date of realisation of the fruits by the decree-holder.

So far as the execution of decree is concerned, we have complete provision in section 47 ; and we must look only to section 47 for all questions relating to execution. When execution of decree is possible to a plaintiff, he must resort to section 47 alone ; he cannot proceed under section 144, which is a far wider section providing for a different contingency.

The words “ which are properly consequential on such variation or reversal ” in section 144 indicate the purpose of the section. If the damages are properly consequential on the reversal of the decree, then will the section apply. In this case the damages claimed by plaintiff during dispossession are not damages properly arising on the reversal but they are referable to the original right under which plaintiff was dispossessed in the first instance. For that damage provision is made by the decree.

Turning to the history of section 144, there was first of all section 362 in Civil Procedure Code of 1859 ; it

(1) (1899) 23 Mad. 306 at p. 310.

(2) (1909) 32 All. 79.

(3) (1909) 31 All. 551.

(4) (1916) 40 Mad. 299.

provided for the execution of appellate decrees. Between 1859 and 1877, cases of restitution arose now and again. Therefore, section 583 was inserted in the Code of 1877. The words "by way of restitution or otherwise" were introduced as a result of the case law. Section 583 of the Code of 1882 is the same in its wording.

On this section, the Madras High Court held that restitution can be given in execution. Differing from the above the Allahabad High Court held that restitution can be had only by a separate suit. The Calcutta High Court was of opinion that restitution could not be had in execution, but the Court had inherent powers to grant it. This difference of opinion has been swept off by clause 2 of section 144.

The last words of section 144 (1) are materially changed from the last words of section 583. The powers under section 144 are much wider than the powers given to executing Courts. So far as the plaintiff is concerned there would be no difference though there would be a good deal of difference when the defendant is concerned.

When a decree is capable of execution then section 144 does not apply at all, but when there is no direction in the decree itself for restitution, then section 144 would apply. If section 144 be literally construed, sections 47 and 144 are overlapping. We must, therefore, look into the reasons for their enactment. When a decree has to be executed, Part II should be resorted to. It is not permissible to seek the aid of section 144 which appears in a chapter dealing with "miscellaneous" subjects.

Pradhan, in reply :—The remarks in *Hurro Chunder Roy Chowdhry v. Shoorodhonee Debta*⁽¹⁾ furnish a reply to the contentions of the other side.

(1) (1868) 9 W. R. 402 at p. 406.

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When an appellate Court decides an appeal, it directs its attention solely to the merits of the case with a view to determine whether the decree appealed from should be confirmed or reversed. It does not address itself to the side question whether the decree appealed from has in fact been executed, and whether in case of reversal the rights of the parties are to be adjusted afresh. To provide for such a contingency section 144 has been enacted in its present form.

SHAH, J. :—In consequence of the difference of opinion between Mr. Justice Beaman and Mr. Justice Heaton, the following point of law has been referred to me for decision under section 98 of the Code of Civil Procedure.

“Whether a plaintiff who has obtained a decree in his favour in the trial Court and gone into possession under it, and has been put out of possession under the decree of the first Court of appeal reversing the trial Court’s decree (no claim for restitution having at this stage been preferred against him by the defendant), and who has succeeded in the Court of Second Appeal which has restored the judgment of the trial Court, can claim any benefit under section 144 in respect of the time he was dispossessed between the decrees of the first and second appeal Courts?”

I am of opinion that the plaintiff can claim such benefit under section 144 of the Code of Civil Procedure. The words of the section are plain and cover the case of the plaintiff claiming the benefit of the section under the circumstances stated in the point of reference.

I do not quite follow the significance of the paranthetical clause in the question, viz., “no claim for restitution having at this stage been preferred against the defendant”. It probably refers to such claim for restitution in the form of compensation under the

intermediate decree, as has been mentioned in the judgment of Mr. Justice Beaman. The defendant, however, in recovering back the possession under the intermediate decree did make a claim for restitution though not for restitution by way of compensation. In the view I take of the point it makes no difference whether the defendant did or did not make a claim for restitution in any sense under the intermediate decree.

The section provides that the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree as has been reversed; and for this purpose the Court may make any orders including orders for the payment of damages or compensation, which are properly consequential on such reversal.

The words "any party" include a plaintiff and cannot be interpreted as meaning a defendant only. The plaintiff claims to be entitled to a certain benefit in virtue of the decree in second appeal and is entitled to be placed in the position which he would have occupied but for the decree of the Court of first appeal which was reversed; and on his application the Court may make an order for damages or compensation properly consequential on such reversal suited to the circumstances of the case. I am unable to see how the plaintiff's application for damages or compensation can be properly held to be outside the scope of the section, having regard to the words of the section, which are plain, and which I am bound to read in their ordinary and natural sense. It may be that the section includes some cases, which may not be cases of restitution in the ordinary acceptance of the term; and it may be that if the words of the section were not clear, there may be

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some ground for refusing to treat them as cases of restitution. But where the Legislature has adopted a comprehensive phraseology, I do not think its scope could be properly curtailed by reference to any principle, which, though simple and uniform, yields the result that "in no case can a plaintiff ask for restitution or any of its concomitant modes under section 144", contrary to the word of section. If the Legislature intended that section 144 should not apply to a plaintiff in any case; the words "any party" could not have been appropriately used. It may be that the plaintiff, who has obtained a decree in his favour for the first time in second appeal or after having obtained it in either of the lower Courts has not proceeded to execute it, may not be able to take advantage of section 144. But that is no ground in my opinion for holding that the plaintiff, who has obtained possession in execution of the decree of the trial Court and is subsequently dispossessed under the decree of the District Court, cannot claim the benefit of section 144, if finally the decree of the District Court is reversed, and it is found that his dispossession under it was not justified.

It is contended by Mr. Abhyankar for the defendant, first, that when the plaintiff finally obtains a decree in his favour, he can execute it under section 47 and that to such a case section 144 has no direct and natural application; and, secondly, that when the plaintiff obtains the final decree it is open to him to ask the final Court of appeal to make proper provision in the decree for such relief as he may be entitled to by way of interest, damages or compensation in consequence of an erroneous decree of the lower Court, and that it is an additional ground for holding that section 144 is not intended to apply to the case of a plaintiff, who can get the necessary relief by the terms of the decree and by execution under section 47, Civil Procedure Code:

I do not think that these considerations can justify the conclusion that section 144 cannot apply to a plaintiff at all. It may be that to a large extent the plaintiff may be able to secure the relief given him by the final decree by an application under section 47. But the circumstance that within certain limits the ground covered by section 47 and 144 is common as regards a plaintiff under certain circumstances affords no basis for holding that there can be no ground open to the plaintiff under section 144, which is not covered by section 47 of the Code.

As regards the contention that as the relief may be given by the decree, it cannot be claimed under section 144, I think it must be disallowed. It may be possible in some cases for the Court in second appeal to make provision for such relief as the plaintiff claims in the present proceedings. But it is possible that in many cases, whether the provision is to be made for the benefit of the plaintiff or the defendant, the Court may not make any such provision for various reasons. At the time of passing the decree the Court is chiefly concerned with the adjustment of the rights of the parties without any reference to the rights arising in consequence of the change of possession during the pendency of the litigation under the decree under appeal; and it may not be possible always for the Court to determine matters which are properly determinable under section 144. Thus the absence of any such provision in the decree is not necessarily a ground for refusing the relief under section 144. It may be that where the Court, while passing the decree, has adverted to any particular point covered by section 144 and refused to grant relief on that point, any application under that section for the same relief will be refused. But such a refusal would be based on a different ground altogether; and the absence of any relief on the point, which it may be

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possible to provide for but which has not been in fact provided for in the decree, is not a ground for holding that section 144 cannot apply to the case of a plaintiff. The plaintiff in my opinion is entitled to apply, and when the application comes to be considered on its merits, it will be open to the defendant to establish, if he can, that the particular relief which the plaintiff claims is definitely refused by the Court passing the final decree.

On these grounds I hold that the application of the plaintiff for an order for the payment of damages or compensation from the date of dispossession under the decree of the District Court until the date of the restoration of that possession under the decree in second appeal reversing the decree of the District Court is clearly within the scope of section 144.

I have nothing to do at this stage with the merits of the claim, and express no opinion whatever thereon. It will be for the lower Court to determine whether under the circumstances the plaintiff has made out any case for an order for the payment of damages or compensation properly consequential on the reversal of the decree.

I agree with Mr. Justice Heaton that this appeal should be allowed. The result of allowing the appeal is that the orders of the lower Courts are set aside and the application is remanded for disposal by the Court of first instance according to law.

Costs to be costs in the application.

The consequential order, which I make, is not stated in terms in the judgment of Mr. Justice Heaton; and there is no rule as to the procedure to be followed when the decision of the point referred to a Judge under section 98 is not sufficient by itself to dispose of the appeal completely but some further order becomes necessary for the proper disposal of the appeal. The practice under the Code of 1882 cannot afford any assistance, as under the old section 575, the appeal, and not

only the point of law, was to be decided by the Judge or Judges to whom the reference was made. Under these circumstances as the order is consequential, I have consulted Mr. Justice Heaton about it, and he agrees that that is the order which he would have made if he had been able to dispose of the appeal.

This case illustrates the desirability of making definite rules regulating such references.

Appeal allowed.

J. G. R.

PRIVY COUNCIL.*

RACHAPPA SUBRAO (DEFENDANT) v. SHIDAPPA VENKATRAO (PLAINTIFF)

[On appeal from the High Court of Judicature at Bombay.]

Valuation of Suit—Suit for declaration of Title without consequential Relief—Court-Fees Act (VII of 1870) Schedule II, 17 (iii)—Suits Valuation Act (VII of 1887), section 8—Objection to jurisdiction not taken in First Court—Illegal and misconceived practice of valuing suit.

The plaintiff (respondent) brought a suit against the appellant for moveable and immoveable property left by one V of whom he claimed to be the adopted son. The property was stated in the plaint to exceed Rs. 60,000 and to be in the hands of the Collector (with the exception of a house worth Rs. 250) at the instance of the appellant, who claimed to be the nearest heir of the deceased. The plaint prayed for a declaration (valued at Rs. 130) of the respondent's title, and for an injunction (valued at Rs. 5) to prevent obstruction by the appellant to the property in the respondent's possession. The appellant denied the adoption, but he made no objection either in his written statement or in his memorandum of appeal to the District or the High Court to the jurisdiction of the First Class Subordinate Judge to try the suit. That Court decided the suit in favour of the respondent. From that decision the appellant appealed both to the District Judge and to the High Court, and the latter appeal stood over until the former had been decided by the District Judge who on the ground that the valuation of the suit was less than Rs. 5,000 reversed the decision of the First Court and made a decree in favour of the appellant, but

* Present : Lord Buckmaster, Lord Dunedin, Sir John Edge, and Sir Lawrence Jenkins.

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