income which is the profit made during the working of the company, and the shareholder pays tax on his income which is the dividend. But in order that relief should be given to the shareholder and in order that the same income should not be taxed twice, a machinery is introduced into the Income Tax Act by s. 16 (2) and s. 18 (5) by which the shareholder is allowed to gross up the dividend received by him and then to deduct the tax paid by the company which by legal fiction is deemed to have been paid on his behalf. But in the case which we are dealing with there is no legal fiction with regard to the income of the annuitant. The annuity that he receives stands on the same footing as the dividend received by a shareholder, and we are not permitting the income-tax authorities to tax Sir Joseph Kay with the help of some legal fiction introduced into our Income Tax Act for the purpose of dealing with shareholders who have received dividends from Companies here. We are upholding the action of the income-tax authorities in taxing Sir Joseph Kay on the simple finding that in substance and in fact the income of Sir Joseph Kay is £500, that it accrued to him outside the taxable territories and that as he is a resident he is liable to pay tax on that amount.

The question therefore referred to us must be answered as follows :

"The sum of £ 500 fell to be included in the assessee's total income for the year ending March 31, 1952, for the purpose of assessment for the year 1952-53."

The assessee to pay the costs.

Attorneys for Applicant: *Daphtary Farreira & Diwan.*

Attorneys for Respondent: *N. K. Petigara.*

Answer accordingly.

P. M. P.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar.

MANGILAL KAJODIMAL, PETITIONER (ORIGINAL OPPONENT No. 1) *v.* SHANKAR SHRAVAN NIKAM, OPPONENT (ORIGINAL APPLICANT).*

1955 *Sept.* 27

Civil Procedure Code (Act V of 1908), ss. 2 (2), 96, 144 and 151—Restitution—Whether appeal lies against an order of restitution passed under s. 151.

No appeal lies from an order of restitution passed under s. 151 of the Code of Civil Procedure and not falling within the purview of s. 144 inasmuch as such an order is not a 'decree' as defined under s. 2 (2).

*Civil Revision Application No. 86 of 1954.

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Jai Berham v. *Kedarnath Marwari*,[1] referred to.

Mst. Champabai alias *Krishnabai* v. *Shree Daulatram Sharma and others*,[2] *Gnanda Sundari* v. *Chandra Kumar*,[3] dissented from.

Usman Saheb v. *Shivaramaraju*,[4] *Allahabad Theaters Ltd.* v. *Pandit Ram Sajiwan Misra*,[5] *Ganesh Datta* v. *Model Town Society*,[6] *Rameshwar Lal* v. *Ram Charan*,[7] *Brij Mohan Singh* v. *Rameshwar Singh*,[8] agreed with.

Civil Revision Application against the decision of R. M. Mehta, Esquire, Assistant Judge, Jalgaon dismissing the appeal against an order of restitution passed by V. P. Gadgil, Joint Civil Judge, Junior Division of Jalgaon.

The facts are fully set out in the Judgment.

K. R. Bengeri, with *Mrs. C. K. Bengeri* for the Petitioner.

V. S. Desai for the Opponent.

Gajendragadkar J.—This revisional application raises a short and interesting question of law. An order for restitution had been passed against the petitioner by the learned Civil Judge, Junior Division, Jalgaon. The petitioner preferred an appeal against this order in the Court of the learned District Judge at Jalgaon. The appellate Court has dismissed his appeal on the ground that the appeal is not competent inasmuch as the order of restitution challenged by the petitioner had been passed, not under s. 144, but under s. 151 of the Code of Civil Procedure. That is how the question which has been raised by Mr. Bengeri in the present revisional application before me is whether an appeal lies against an order of restitution passed under s. 151 of the Code. On this question a sharp difference of opinion has been expressed in judicial decisions and Mr. Bengeri has contended that the view taken in support of the competence of the appeal is more in consonance with justice and equity and he has pressed me to adopt that view.

It would be convenient to mention a few material facts leading to the order of restitution under revision. A partnership firm named Nandurdikar and Co. of Jalgaon sued Shankar Nikam for possession of a motor truck and for an account of hire due from him. It was alleged by the plaintiff firm that the truck belonged to the partnership and had been given to Nikam under a hire-purchase agreement, Nikam had failed to comply with the terms of the agreement and had committed defaults in the payment of hire due from him. That was the basis for the claim for the recovery of the truck and for accounts. Pending this suit, an application was made by the plaintiff firm requesting the learned Judge to direct that the truck should be delivered over to the firm on the firm's undertaking to produce the truck if called upon to do so by the

1. (1922) L. R. 49 I. A. 351.
2. [1939] Nag. 350.
3. [1927] A. I. R. Cal. 285.
4. [1950] A. I. R. Mad. 463 F. B.
5. [1949] All. 313.
6. [1939] A. I. R. Lah. 508.
7. [1939] A. I. R. Pat. 447.
8. [1939] A. I. R. Oudh. 273.

learned Judge and on the firm's further undertaking to keep an account of the earnings made by the firm on this truck. On April 13, 1942, the learned Judge granted the application made by the plaintiff firm and the truck was delivered into the possession of the plaintiff firm. Ultimately the suit was dismissed on July 27, 1944. I should have stated that, after the defendant appeared in the suit, he had made a counter-claim against the firm. This counter-claim also was dismissed by the trial Court. The decision of the trial Court gave rise to two appeals by the plaintiff and the defendant (Appeals Nos. 241 and 251 of 1944 respectively). Both these appeals were, however, dismissed. On April 26, 1951, the defendant applied for restitution of the truck and asked for accounts to be made in respect of the profits earned by the plaintiff on the strength of this truck. Unfortunately, when the suit was dismissed and even at the time when the appeals were ultimately disposed of by the District Court, no order was passed in respect of the truck which had been delivered over to the plaintiff pending the suit. That is why the defendant had to make a separate application for restitution as late as April 26, 1951. The learned Judge found that the claim for restitution would not be justified within the terms of s. 144 of the Code. He, however, held that this was a claim which should, and could, be entertained under the inherent jurisdiction of the Court under s. 151. On this view, the learned Judge allowed the defendant's claim for restitution and directed that the plaintiff firm should pay the defendant Rs. 15,583-8-4. This amount includes the value of the truck and the amount of profit earned by the plaintiff by means of this truck during the period the truck was in the plaintiff's possession as a result of the order passed by the trial Court on April 13, 1942. It is against this order that the plaintiff preferred an appeal to the District Court and the learned District Judge dismissed the appeal on the ground that an appeal against an order of restitution passed under s. 151 is incompetent.

It is not disputed before me that the order of restitution under revision has been passed, not under s. 144, but under s. 151 of the Code. It is well established that the power of the Court to grant relief by way of restitution is not confined to the provisions of s. 144 of the Code. A Civil Court has inherent jurisdiction to grant restitution even in cases that do not fall within the letter of the provisions of s. 144. In *Jai Berham* v. *Kedar Nath Marwari*,[9] their Lordships of the Privy Council have emphasized the fact that it is the duty of the Court under s. 144 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, and they have added that it is not as if this duty or jurisdiction arises merely under the provisions of s. 144.

9. (1922) L. R. 49 I. A. 351.

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"It is inherent in the general jurisdiction of the Court", said their Lordships, "to act rightly and fairly according to the circumstances towards all parties involved." Thus the trial Court was justified in entertaining the present application for restitution under s. 151 of the Code.

Now, an order passed under s. 144 of the Code is appealable. It is appealable because it is artificially included in the definition of the word "decree" contained in s. 2, sub-s. (2) of the Code. The question which falls for decision in the present revisional application is: Can it be said that an order of restitution which has been passed under s. 151, and which in substance resembles an order that can be passed under s. 144, can be regarded as a decree within the meaning of s. 2, sub-s. (2) of the Code? Section 2, sub-s. (2), which defines a decree, provides that "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and it goes on to add that the decree may be either preliminary or final. Then the definition adds that the word "decree" shall be deemed to include the rejection of a plaint and the determination of any question within s. 47 or s. 144. Since an order passed under s. 144 is a decree within the meaning of s. 2, sub-s. (2), an appeal lies against every such order by virtue of the provisions contained in s. 96 of the Code. The argument is that the effect of the order of restitution passed under s. 151 is indistinguishable from the effect of the order of restitution passed under s. 144, the basis for making both kinds of orders of restitution is the same and the object intended to be achieved by passing the said orders is also the same, and so, like the order for restitution passed under s. 144, the order for restitution passed under s. 151 should be held to amount to a decree within the meaning of s. 2, sub-s. (2) and an appeal against such an order should be held to be competent under s. 96 of the Code.

In dealing with the question as to whether an appeal lies against any order of adjudication, it is necessary to remember that there is no inherent right of appeal. The right to appeal is the creature of a statute, and unless the right to prefer an appeal against any specific order of adjudication is expressly provided by the statute it would not be possible to recognise or carve out any such right on grounds of justice, equity or fairness. As the definition of the word "decree" indicates, but for the inclusion of restitution orders passed under s. 144 within the definition of the word "decree", no appeal would have been competent even against the said orders of restitution. It is clear that an order for restitution even under s. 144 is not passed in regard to any of the matters in controversy in the suit. It is after the suit is finally determined that the provisions

of s. 144 can be, and are, invoked, so that within the definition of the word "decree" an order of restitution passed under s. 144 would not have been included. That is why in defining the word "decree" Legislature has included specifically orders made under s. 144. It seems to me that it would be difficult to accede to the argument that an appeal should be regarded as competent against orders of restitution passed under s. 151 on the ground that orders of restitution of this kind are in substance similar to the orders of resitution passed under s. 144. The argument based on the similarity of the orders may be logical. It may also be true that, if the Court exercises its inherent jurisdiction in favour of a party claiming restitution even though the claim does not fall within the four corners of s. 144, it would be just and fair that a party aggrieved by an order of restitution passed under s. 151 should have an opportunity to challenge that order by preferring an appeal against that order. But considerations of logic and of equity and justice cannot, in my opinion, have an effective voice in deciding the question as to whether an appeal lies against any particular order, once it is remembered that the right to prefer an appeal is the creation of a statute. All arguments of logic and fairplay may, at best, indicate that Legislature may provide for an appeal even against all restitution orders passed under s. 151. But what legislature may do cannot be attempted to be done by Courts on the ground that the claims of equity and fairness would be met by allowing an appeal against such orders of restitution. An order for restitution passed under s. 151 has not been included within the definition of the word "decree" under s. 2, sub-s. (2) and so it must be held that such an order is not a decree within the meaning of the said section and as such no appeal can lie against such an order under s. 96 of the Code. The Court allows appeals against orders. But even in respect of these appeals there are two provisions that determine the question as to whether a given order is appealable or not. Section 104 of the Code deals with orders from which appeals lie and the rules under O. XLIII supplement the provisions contained in s. 104. It is clear that the rules under O. XLIII as well as the provisions of s. 104 do not justify the argument that an order for restitution passed under s. 151 is appealable as an order. Incidentally it may be pointed out that *prima facie* the exercise of inherent jurisdiction by the trial Court is not intended to be subject to supervision by the appellate Court, as the provisions contained in ss. 151, 152 and 153 suggest, powers which can be generally described as inherent powers, are expected to be exercised by Courts sparingly and with due circumspection, and normally orders made by trial Courts in the exercise of these inherent powers are not subject to appeal. But apart from this consideration, unless an order for restitution

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passed under s. 151 amounts either to a decree or appears to be one of the orders against which an appeal has been provided, it would not be possible to hold, on considerations of equity, justice or fairness, that an appeal can be entertained against such an order.

It is necessary to mention one point in considering this question apart from authorities. If an order for restitution has been passed between persons who were parties to a suit and it is possible to take the view that the said order for restitution falls within the purview of s. 47 of the Code, the position may be different. In such a case, the order of restitution may have been passed under s. 151 and yet it may theoretically be possible to take the view that the order has relation to execution, discharge or satisfaction of the decree between the decree-holder and the judgment-debtor; and if that is so, the said order may perhaps be appealable under s. 47 itself. The present order cannot attract the provisions of s. 47 because the suit instituted by the plaintiff firm has been dismissed and the order of restitution has relation to the possession of the truck obtained by the plaintiff pending the suit by reason of the interim order passed by the trial Court in that behalf. Therefore, it is unnecessary for me to consider and decide whether an order for restitution which may be able to attract the provisions of s. 47 of the Code would be appealable or not.

In my opinion, therefore, the order of restitution passed by the trial Court in the present proceedings has been passed under s. 151 of the Code and an appeal to the District Court against this order was clearly incompetent.

I may now refer to the judicial decisions to which Mr. Bengeri for the petitioner has invited my attention. The decisions of the Nagpur and the Calcutta High Courts are in favour of the view for which Mr. Bengeri contends. In *Mst. Champabai alias Krishnabai* v. *Shree Daulatram Sharma*,[10] it has been held by Sir Gilbert Stone, C. J., and Digby J. that an appeal lies from an order of restitution made by an executing Court under its inherent powers. In his judgment, Digby J. readily conceded that because an order is passed under the inherent powers it does not necessarily become appealable. But he felt impressed by the view that the exercise of inherent powers is intended "to expand a remedy in order to do justice to cover a case not within the exact words of, but within the purpose of a procedural section" and so he thought that the Court, while using its inherent powers, was in effect acting as if the order was made under s. 144. "In such a case", observed the learned Judge, "even as justice demanded that one side should be given a remedy, restitution, as if s. 144 applied; so the other side should, as a matter of justice, be allowed the right to appeal that would

10. [1938] Nag. 350.

have existed had s. 144 really applied instead of its being applied by means of a fiction." With respect, I would like to point out that the considerations of justice which weighed with the learned Judges can be more appropriately invoked in a legislative chamber for the purpose of suggesting that Legislature should provide for an appeal against an order of restitution passed under the inherent jurisdiction of the Court. I apprehend that Courts would not be justified in creating a right of appeal by fiction because they feel impressed by the argument that the exercise of inherent jurisdiction under s. 151 really has the effect of applying the principles of s. 144 by means of a fiction. If it is remembered that the right to prefer an appeal is the creation of a statute, it would not be legitimate to carve out such a right or to recognise it on considerations of justice, equity or fairness.

In *Gnanda Sundari* v. *Chandra Kumar,*[11] Greaves and Mukherji JJ. have held that, where an order is made under the provisions of s. 151, but in fact in exercise, by analogy, of the jurisdiction under s. 144, an appeal does lie from the order. Greaves J., in coming to this conclusion, observed that

"it certainly seems a curious position that if the court deals with the matter under s. 144, C. P. C., an appeal lies whereas if the court under s. 151 exercises the same jurisdiction which s. 144 gives him, but exercises that jurisdiction under s. 151 because s. 144 is not strictly applicable, no appeal lies".

And he thought that it would be a reasonable view to take that the order of restitution passed under s. 151 should be taken to be an order made under s. 144. With respect, I am unable to agree with the view thus expressed by Greaves J. On the other hand, in *Usman Saheb* v. *Sivaramaraju,*[12] a Full Bench of the Madras High Court has held that no appeal lies against an order of restitution passed under s. 151 of the Code. There appears to have been a conflict in the reported decisions of the Madras High Court on this point, but the said conflict has been resolved by the Full Bench in favour of the view that an appeal does not lie against an order of restitution under s. 151. The Allahabad, Lahore, Patna and Oudh Courts have also taken the same view, *vide Allahabad Theatres Ltd., Allahabad* v. *Pandit Ram Sajiwan Misra*[13], *Ganesh Datta* v. *Model Town Society,*[14] *Rameshwar Lal,* v. *Ram Charan*[15] and *Brij Mohan Singh* v. *Rameshwar Singh.*[16] In regard to the decision of the Allahabad High Court, I may point out that on the facts it was held that the order for restitution in question had been made under s. 144 and so an appeal was treated as competent against the said order. But in dealing with the question of law as regards the competence of appeals against orders of restitution passed

11. [1926] A. I. R. Cal. 285.
12. [1950] A. I. R. 37 Mad. 463.
13. [1949] All. 313.
14. [1939] A. I. R. Lah. 508.
15. [1938] A. I. R. Pat. 447.
16. [1939] A. I. R. Oudh. 278.

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under s. 144 as well as under s. 151, Harishchandra J. has dissented from the view taken by the Calcutta and the Nagpur High Courts and has observed that an order for restitution passed under s. 151 was not appealable.

In the result, the revisional application fails and the rule is discharged with costs.

Rule discharged.

G. N. V.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

1955 Sept. 28

PANNALAL NANDLAL BHANDARI OF INDORE, APPLICANT *v.* THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY, BOMBAY.*

I

Indian Income-tax Act (XI of 1922), ss. 22 and 34—Assessee non-resident during years of account relevant for years of assessment—Public notice under s. 22 (1) given but no individual notice under s. 22 (2) served on assessee—Notice under s. 34 read with s. 22 (2) served on assessee—Whether such notices within period of limitation?

The word 'omission' in s. 34 (*1*) (*a*) of the Indian Income-tax Act, 1922, unlike the word 'failure' merely refers to the not doing of a thing, whether the law casts upon the assessee an obligation to do it or not. Where an assessee does not in fact make a return under s. 22 of the Act, his case falls under s. 34 (*1*) (*a*) which provides a period of eight years for service of notice under s. 34 read with s. 22 (*2*) of the Act

The constructive notice under s. 22 (*1*) operates whether the notice was in fact read by the person sought to be affected by the notice, or whether such person had in fact the opportunity of reading it. If the prescribed notice is given, in law the notice is deemed to have been actually served upon the person affected by it. Whether he is a resident or non-resident, such notice is sufficient notice and casts an obligation upon the assessee to make a return.

Whitney v. *Commissioner of Inland Revenue*,[1] referred to.

It being well settled that the Indian Legislature has the competence to tax non-residents, legislation cannot be challenged on the ground of extra-territoriality.

Pannalal Nandlal Bhandari of Indore, assessee, is a Hindu undivided family and was non-resident in the years of account relevant for the assessment years 1943-44, 1944-45, 1946-47 and 1947-48. The assessee had not made return for these years though public notices for the respective years were duly given under s. 22 (*1*) of the Indian Income-Tax Act, 1922. No individual notices under s. 22 (*2*) of the Act were served on the assessee

*Income-tax Reference No. 5 of 1955.

1. (1925-26) 10 T. C. 88.