

(84) The royalty, along with receipts from minor minerals, as observed by Gurdev Singh J., is credited under the head: "XXXIX—Industries—Miscellaneous" and is levied only on those who are using brick earth where its property vests in the Government. The element of compulsion is thus limited and a user of brick earth whose property does not vest in the Government does not have to pay royalty. I do not think that the levy of royalty in such a situation is a tax and in agreement with my learned brother, I consider that it is appropriately in the nature of a rent.

(85) The various cases, to which our attention has been invited by Mr. Bhagirath Dass, Mr. Tuli, Mr. Sachar and other learned counsel, do not deal exactly with the situation with which we are confronted in this case, and in agreement with my learned brother, I would dismiss these petitions, leaving the parties to bear their own costs.

K. S. K.

APPELLATE CIVIL

Before H. R. Sodhi, J.

GURDIAL SINGH,—*Appellant*

versus

SOWARAN SINGH AND ANOTHER,—*Respondents*

Execution Second Appeal No. 546 of 1968

July 15, 1968.

Code of Civil Procedure (Act V of 1908)—S. 144—Claim of restitution under—Bona fide purchaser for value—Whether to be allowed to suffer—Decree or order varied or reversed by a Court of concurrent and competent jurisdiction—Restitution—Whether can be claimed under the section—Such restitution—Whether can be granted under section 151.

Held, that the rule of equity embodied in section 144 of the Code of Civil Procedure enabling the Court to direct that the parties be placed in the same position which they would have occupied but for the decree is subject to the

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condition that a *bona fide* purchaser for value should not be allowed to suffer because of the irregularities or mistake in procedure made by the Courts.

(Para 14)

Held, that section 144 permits restitution only when the decree or an order is varied or reversed. It is nowhere said in this provision of law as to by whom the decree or order should have been reversed, but the use of the words "the Court of first instant" is very significant and suggests that the decree is varied by some superior Court and not in a separate suit or by the same Court as for instance when the *ex parte* decree is set aside. In other words, this section applies only where a decree has been varied or reversed by a Court of appeal or revision exercising appellate or revisional powers and not where it had been vacated or held to be invalid by a Court of concurrent and competent jurisdiction in certain circumstances in a separate suit. The decision of setting aside decree by a separate suit cannot be said to have finally disposed of the suit and nor does it vary or reverse the decree passed in that suit by substituting a different decree instead. The decree when set aside in a separate suit re-opens the first suit for a fresh decision. (Paras 15 and 16)

Held, that a person who has suffered as a result of the passing of the decree which has been subsequently varied or reversed by a separate suit or by the setting aside of the decree of the same *ex parte* decree is not without a remedy in the matter of seeking restitution. The Court whose decree has been set aside has inherent jurisdiction to grant necessary restitution under section 151 of the Code of Civil Procedure in order to see that no body suffers as a result of the proceedings in a Court of law which have been set aside. (Para 17)

Execution Second Appeal from the order of Shri Jagwant Singh, Additional District Judge, Jullundur, dated 25th January, 1968, affirming that of Shrimati Bakhshish Kaur, Sub-Judge, 1st Class, Jullundur, dated the 26th July, 1967 dismissing the application of the judgment-debtor.

Application under sections 144/151 C.P.C.

H. S. WASU, ADVOCATE, for the Appellant.

RESPONDENT No. 1 through NEMO.

JANAK RAJ, Respondent No. 2 in person.

JUDGMENT

SODHI, J.—This Execution Second Appeal is directed against the judgment, dated 25th of January, 1968, passed by the Additional District Judge, Jullundur, who confirmed the judgment of the trial

Court dismissing the application of the judgment-debtor Gurdial Singh appellant under sections 144/151 of the Code of Civil Procedure for restitution of a house purchased by Janak Raj, auction purchaser Respondent on 16th December, 1961 at a public auction on 16th March, 1962, for Rs. 5,100 in execution of a decree obtained by Sowaran Singh against the said Gurdial Singh.

(2) The facts of this case have a chequered history and have to be stated a little in detail. Sowaran Singh respondent filed a suit against Gurdial Singh, judgment-debtor for recovery of Rs. 509.00 paise and obtained an *ex parte* decree on 27th February, 1961, for a sum of Rs. 519.66 paise. In execution of this decree the house in dispute was sold at a public auction and it was purchased by Janak Raj respondent for Rs. 5,100. The judgment-debtor Gurdial Singh made an application for setting aside the *ex parte* decree which was actually set aside on 26th October, 1962, but in the meantime the house had already been sold on 16th December, 1961. It may be mentioned that the suit was also ultimately dismissed on 17th December, 1962. The sale was, however, not confirmed by the executing court as the judgment-debtor got the proceedings stayed. It is not understood why the judgment-debtor did not get the sale of the house in execution of the *ex parte* decree stayed when he had moved for setting aside the same. The judgment-debtor also filed objections under Order 21 Rule 90 of the Code of Civil Procedure challenging the sale on the ground of material irregularity and fraud in publishing or conducting the same. He never applied to get the sale set aside under Order 21 Rule 89 on depositing in court 5 per cent of the purchase money for payment to the purchaser. The objections of the judgment-debtor appellant were ultimately dismissed and Janak Raj auction purchaser applied for the revival of the execution proceedings which had been stayed and for confirmation of the sale. The judgment-debtor resisted the application for confirmation of the sale contending that the application for revival was not maintainable since the *ex parte* decree in execution of which the sale had taken place had been set aside and also because the auction-purchaser was in conspiracy and collusion with the decree-holder. It was, therefore, pleaded that in view of his conduct which lacked *bona fides*, the auction-purchaser was not entitled to have the sale confirmed in his favour. The sale was however confirmed on 31st August, 1963 by a Sub-Judge at Jullundur who over-ruled the objections of the Judgment-debtor. Judgment-debtor preferred an appeal in the Court of Senior Sub-Judge there and that too was dismissed. A second appeal filed by him in the

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High Court was accepted by a learned Single Judge on 26th November, 1964 and the order of the executing Court confirming the sale in question in favour of the auction-purchaser was set aside. The auction-purchaser took the matter before the Letters Patent Bench which by its judgment, dated 24th December, 1965 dismissed his appeal.

(3) The sole question for determination before the learned Single Judge and the Letters Patent Bench was as to whether the sale in favour of Janak Raj auction-purchaser be confirmed under Order 21 Rule 92 of the Code of Civil Procedure or not. The Letters Patent Bench certified the case to be fit for appeal to the Supreme Court and the auction-purchaser's appeal there was decided on 8th November, 1966. The judgment of the Letters Patent Bench of this High Court was reversed and the order of the executing Court confirming the sale in favour of Janak Raj auction-purchaser was upheld. The Supreme Court judgment is reported as *Janak Raj v. Gurdial Singh* (1). It was observed by their Lordships of the Supreme Court that the collusion as alleged by the judgment-debtor in resisting the application of revival of the execution proceedings and confirmation of sale was not substantiated. A few of the other observations in the Supreme Court judgment which are necessary for the decision of this case are quoted below in extenso—

“There is no provision in the Code of Civil Procedure of 1908 either under Order XXI or elsewhere which provides that the sale is not to be confirmed if it be found that the decree under which the sale was ordered has been reversed before the confirmation of sale. It does not seem ever to have been doubted that once the sale is confirmed the judgment-debtor is not entitled to get back the property even if he succeeds thereafter in having the decree against him reversed. The question is, whether the same result ought to follow when the reversal of the decree takes place before the confirmation of sale.”

(4) In the opinion of their Lordships, it makes no difference whether the decree in execution of which sale had taken place is reversed before or after the confirmation of sale. It was also contended before their Lordships that because of the amendment of

(1) A.I.R. 1967 S.C. 608.

section 47 of the Code of Civil Procedure, which added an explanation to sub-section (3) of the said section making a purchaser at a sale in execution of a decree a party to the suit for determining all questions relating to the execution, discharge or satisfaction of the decree, the auction-purchaser was no longer a stranger and that restitution could be asked against him under section 144 of the Code. Their Lordships in most unequivocal terms observed that no opinion was being expressed on this issue and nor was such a decision called for in the circumstances of this case at that time when the sole question before the Supreme Court was whether the sale should be confirmed or not. After the Supreme Court judgment confirming the sale in favour of Janak Raj auction-purchaser, the judgment-debtor Gurdial Singh made an application on 1st March, 1967, under sections 144/151 of the Code of Civil Procedure to the executing court praying for restitution of the house on the ground that the *ex parte* decree in the execution of which the sale was effected had been set aside and such a sale was, therefore, void and nullity entitling him to restitution. In this application a prayer was also made that his previous application under section 144 of the Code of Civil Procedure may be proceeded with further. It may be noted that the judgment-debtor had made an application earlier as well on 4th September, 1963, for a similar relief, but this application remained undisposed of. The final order on this application is dated 23rd January, 1965, and is in the following terms:—

“Security has been filed. Proceedings to be consigned to record room *sine die*. The parties will be at liberty to get them restored after the decision of the High Court.”

(5) It appears that no final order was passed by the executing Court on the request of the judgment-debtor for restitution as the matter of confirmation of sale was then pending before the High Court and the Court thought that the question of restitution was linked up with that of confirmation of sale. The parties also did not seem to have had any objection to such a course since this order consigning the proceedings to the record room was not objected to either at that time or subsequently by either of the parties.

(6) It is necessary at this stage to refer also to the grounds on which restitution was sought by the judgment-debtor in both the applications. The only reason for claiming restitution was that the

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sale in execution of an *ex parte* decree which was later set aside was a nullity and the judgment-debtor was on that score entitled to restitution. There is no allegation in either of these applications about want of *bona fides* on the part of Janak Raj auction-purchaser nor any reference to circumstances from which such an inference could be drawn that Janak Raj auction-purchaser had not acted *bona fide* in purchasing the house in auction sale. The auction-purchaser resisted the restitution and the executing Court framed the following issues:—

- (1) Whether any application under section 144 C.P.C. was already filed by petitioner, if so, its effect?
- (2) Whether any application is barred by the *res judicata*?
- (3) What is the effect of the judgment of Hon'ble Supreme Court?
- (4) Relief.

(7) All the issues were decided against the judgment-debtor and the application was consequently dismissed on 26th July, 1967. He then filed an appeal before the Additional District Judge and this also met with no success. Hence the present Execution Section Appeal.

(8) I have heard Mr. Harnam Singh Wasu, learned counsel for the appellant, at great length and he contends that the application for restitution has been dismissed by the Courts below on an erroneous approach including misreading of the record. The submission is that the previous application under section 144 of the Code of Civil Procedure had never been decided but was consigned to the record-room *sine die* as per final order, dated 23rd January, 1965, and there was, therefore, no question of the present application being barred by the rule of *res judicata*. It was contended that the second application was under section 144 read with section 151 of the Code of Civil Procedure, whereas the first application was only under section 144 of the Code.

(9) The other contention raised by the learned counsel is that the Supreme Court judgment has not been correctly understood by the Courts below inasmuch as the application, as now made by the judgment-debtor appellant, was not before their Lordships of the

Supreme Court who were dealing only with the matter of confirmation of sale in favour of the auction-purchaser. The question as to whether the restitution could be granted or not was, according to the counsel, left open by the Supreme Court and that the application for restitution has now to be decided on its own merits. It is submitted that the test for deciding whether restitution can be claimed against a stranger auction-purchaser on the reversal of the decree in execution of which the sale has taken place, is whether the purchaser acted *bona fide*, but the Courts below have not given any finding on this important issue arising in this case, which must be remanded for a fresh decision after framing necessary issue.

(10) The respondent auction-purchaser, who appeared in person, submits that the Supreme Court has held beyond doubt that the sale in his favour having been confirmed he cannot be asked to restore the property. Reliance is placed on the passage in the judgment of the Supreme Court which has been quoted above.

(11) I have given my careful consideration to the contentions of both the parties and am of the view that this appeal must fail and the judgment-debtor appellant is not entitled to restitution though for reasons somewhat different from those recorded by the lower appellate Court. The Courts below have erred in giving a finding that the present application is barred by *res judicata* on the ground that an earlier application made by the judgment-debtor appellant to the same effect on 4th September, 1964, was decided on 26th November, 1964, when the sale was confirmed. The only previous application which purports to be under section 144 is the one made on 4th September, 1963, on which no final order on merits was passed and the last order is of 23rd January, 1965, whereby the proceedings were consigned to the record-room *sine die*. I do not understand how can it be said, in these circumstances, that there was a decision on an earlier application relating to the same matter now in issue, that is, the question of restitution had been decided and that the present application made on 1st March, 1967 after the judgment of the Supreme Court was barred by any rule of *res judicata*. It appears that in the dispute between the auction-purchaser and the judgment-debtor relating to the confirmation of sale when the auction-purchaser sought to get the proceedings revived and the sale confirmed, an issue was raised whether the auction-purchaser acted *bona fide* or acted fraudulently in collusion with the decree-holder. The contention of collusion

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and want of *bona fides* raised by the judgment-debtor was rejected by the executing Court and a finding in favour of the auction-purchaser to this effect was not reversed by any higher Court, though the matter went up to the Supreme Court. Since an auction-purchaser cannot be expected to go behind the judgment in order to find the irregularities in the suit, he will not be deprived of the property purchased by him at a public sale in execution of a decree so long as he has acted *bona fide*. There may be circumstances which show collusiveness between the decree-holder and the auction-purchaser who might have had full knowledge of the proceedings involving irregularities and was only waiting for an opportunity to purchase the property immediately it is sold in execution of the decree. The plea of the judgment-debtor attributing such a conduct and lack of *bona fides* had already been repelled by the executing Court in proceedings relating to confirmation of sale and the decision being between the same parties it may be said that a fresh decision on the same issue, namely, want of *bona fides* on the part of auction-purchaser is barred by the general rule of *res judicata*. The Courts below had probably this aspect in view when deciding issues Nos. 1 and 2 and holding that the present application was barred by *res judicata*.

(12) The Courts below have again interpreted the judgment of the Supreme Court to mean that the judgment-debtor appellant is not entitled to get back the property, no matter that the decree was reversed. I am of the view that the Supreme Court never intended to dispose of the application of the appellant for restitution. It was only in the context of deciding whether the sale should be confirmed or not under Order 21 rule 92 of the Code that their Lordships of the Supreme Court made a reference to rules 89, 90 and 91 of the Code and held that unless an application is made under those rules or if so made had been rejected or there are some other well known circumstances justifying a refusal to confirm, the sale must be confirmed. The effect of confirmation of sale was examined by the Supreme Court and it was held that the property could not be given back to the judgment-debtor, simply because the decree had been reversed. The lower appellate Court and the executing Court went wrong in dismissing the application for restitution on the basis of the Supreme Court judgment alone, though the same result will follow but from another stand-point.

(13) Mr. Wasu who is a senior advocate of this Court very fairly conceded that no restitution could be claimed from the executing Court in the exercise of its discretion under section 144 or section 151

of the Code of Civil Procedure if the stranger auction-purchaser acted *bona fide*. He also admitted that no plea of want of *bona fides* had been specifically raised in either of the applications under sections 144/151 of the Code of Civil Procedure. He only submitted that the case should be remanded for determination of this question of *bona fides* of the auction-purchaser because such a plea had been raised earlier as well as is apparent from the records. I find that such a plea was actually raised but I do not think that Mr. Wasu can legally take advantage of the pleas of collusiveness conspiracy of judgment-debtor with decree-holder and want of *bona fides* raised by his client in connected proceedings when no specific plea to that effect has been taken in the present application. In the absence of any such plea, no question of any rejoinder by the auction-purchaser respondent arose nor could any issue be raised. It is not for this Court now in second appeal to fill up the gaps in the pleadings of the judgment-debtor appellant and make out a new case by remanding the case and enabling him to make a proper application with necessary pleas. The plea of want of *bona fides* could not be substantiated in the proceedings relating to confirmation of sale and it was probably on this score that the appellant did not raise any such plea, in either of the applications for restitution, which was being sought only on the short ground that because of the setting aside of the *ex parte* decree he was entitled to the relief of restitution. A ground was taken in the Memorandum of appeal filed in this Court presumably because such allegations by the judgment-debtor being already on the record, but Mr. Wasu did not press the same and asked only for the remand of the case as mentioned above. He conceded that he could not legally press into service a similar plea in the connected proceedings relating to confirmation of sale. The law is well settled that *bona fide* purchasers for value at auction sales in execution of decrees must be protected, as otherwise if their titles are thrown open to doubts because of some pre-decree matters, no one will be coming forward to purchase properties. It may work hardship in an individual case, but in the general application of law, individual cases have to be ignored. In the matter of restitution the observations of their Lordships in this very case are also a guide in regard to the exercise of discretion in ordering restitution under section 144 or 151 of the Code of Civil Procedure. It has been observed that—

“The policy of the Legislature seems to be that unless a stranger auction-purchaser is protected against the vicissitudes

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of the fortunes of the suit, sales in execution would not attract customers and it would be to the detriment of the interest of the borrower and the creditor alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified."

(14) The rule of equity embodied in section 144 of the Code of Civil Procedure enabling the Court to direct that the parties be placed in the same position which they would have occupied but for the decree is, therefore, subject to the condition that a *bona fide* purchaser for value should not be allowed to suffer because of the irregularities or mistakes in procedure made by the Courts. In the instant case, there being no plea of want of *bona fides* of the auction-purchaser in the proceedings for restitution and rather the same having been specifically negated earlier between the same parties, no question of restitution arises.

(15) There is another aspect of the case as well. The respondent who appeared in person made no such submission but I am of the view that an application under section 144 of the Code of Civil Procedure was not at all competent. No objection as to the applicability of section 144 was taken in either of the Courts below though it is a pure question of law. This section permits restitution to be ordered by a Court of *first instance* only when the decree or an order is varied or reversed. It is nowhere said in this provision of law as to by whom the decree or order should have been reversed, but the use of the words "the Court of first instant" is very significant and seems to suggest that the decree is varied by some superior Court and not in a separate suit or by the same Court as for instance when the *ex-parte* decree is set aside. There is a conflict of judicial opinion as to whether this section applies where the variation of the decree or its reversal is as a result of a decree in a separate suit.

(16) It was held by Abdul Rahman, J., in a case reported as *Alfred Zahir v. Siraj-ud-din* (2), that section 144 of the Code of Civil Procedure could apply only where a decree has been varied or reversed by a Court of appeal or revision exercising appellate or revisional powers and not where it had been vacated or held to be invalid by a Court of concurrent and competent jurisdiction in certain circumstances in a separate suit. It was observed by the learned Judge that the decision of setting aside a decree by a separate suit cannot be said to have finally disposed of the suit and nor does it

vary or reverse the decree passed in that suit by substituting a different decree instead. The decree when set aside in a separate suit reopens the first suit for a fresh decision. I am in respectful agreement with the observations of the learned Judge in this case and am of the view that the same reasoning will apply *mutatis mutandis* if not with greater vigour when an *ex-parte* decree has been set aside by the same Court on an application having been made to it under Order 9, rule 13, Code of Civil Procedure.

(17) The applicability of section 144 to obtain restitution when an *ex-parte* decree had been set aside was doubted by Subha Rao, C.J., in *Pullata Lakshminarayan v. Bakkida Ramanna and others* (3), though it was observed that if section 144 was not to be applicable restitution could be granted on a proper case being made out under the inherent powers of the Court under section 151 of the Code. The same view was taken in *Kandaswami Mudali v. Annamalai Raddi and others* (4), where an *ex-parte* decree was first passed for a certain amount and later the decree being set aside and the suit tried afresh, the amount of the decree was reduced by the new decree. It was held that the new decree was not a decree varying or reversing the decree which had been set aside and that section 144 of the Code was, strictly speaking, not applicable, though restitution might be allowed on equitable principles which underlie section 144 and in pursuance of the inherent powers of the Court to prevent an abuse of its process. A different view was, however, taken by a Division Bench of the Allahabad High Court in *The Allahabad Theatres Limited v. Ram Sajiwan Misra* (5), but I am of the opinion, with due respect to the learned Judges, that there is no ground for drawing distinction between a decree being set aside by a separate suit and an *ex-parte* decree being set aside by the same Court on an application under Order 9 rule 13 of the Code. A person who has suffered as a result of the passing of the decree which has been subsequently varied or reversed by a separate suit or by the setting aside of the decree if the same was *ex parte* is not, however, without a remedy in the matter of seeking restitution. The Court whose decree has been set aside has inherent jurisdiction to grant necessary restitution under section 151 of the Code of Civil Procedure in order to see that no body suffers as a result of the proceedings in a Court of law which

(3) A.I.R. 1954 And. 5.

(4) A.I.R. 1937 Mad. 150.

(5) A.I.R. 1949 All. 730.

have been set aside. In that event, there will be no remedy available to the parties by way of appeal. In the instant case restitution is claimed because of the setting aside of the *ex parte* decree and an application for such a purpose is maintainable only under section 151 C.P.C., and not under section 144 of the same Code. In this view of the matter, the order of the executing Court refusing restitution to Janak Raj respondent was not appealable and the District Judge had no jurisdiction to hear the appeal. The order of the executing Court must be deemed to be one passed in the exercise of its inherent powers under section 151 of the Code, though restitution was refused. No such objection was raised regarding the maintainability of the appeal or as to whether the application for restitution could be entertained under section 144 of the Code by Janak Raj respondent before the executing Court or before the District Judge or even in this Court. Mr. Wasu, when confronted with this situation, requested that the Execution Second Appeal filed by him in this Court be treated as a revision petition against the order of the executing Court.

(18) In a matter of discretion regarding restitution as in the present case, no question of jurisdiction was involved and remedy by way of a revision will be misconceived. He has, as a matter of fact, conceded that section 151 of the Code was added with section 144 because of the doubt whether an application under section 144 could be maintainable. The executing Court refused restitution in the exercise of its discretion and I do not find any justification to interfere in its discretion in the circumstances of this case even if I were to treat this appeal as a revision.

(19) There is still another aspect of the case viz., as to what is the effect of amendment made to section 47 of the Code of Civil Procedure referred to above, by virtue of which the auction-purchaser is treated as a party to the suit for the purpose of that section. Can it be said that in an application for restitution also he will be treated as a party because of the amendment of section 47 thereby giving jurisdiction to the executing Court to grant restitution even against a stranger auction-purchaser. In view of my decision on other issues of the case as a result whereof the appeal stands dismissed and the restitution cannot be allowed to the judgment-debtor, no decision on this matter is called for.

(20) The appeal is accordingly dismissed, but there will be no order as to costs.