

1932

*Present : Drieberg and Akbar JJ.*ASIRIWATHAN *v.* MUDALIHAMY *et al.*

12—D. C. (Inty.) Ratnapura, 4,664.

*Execution of decree—Money paid in satisfaction—Decree reversed in appeal—  
Restitution of benefits—Civil Procedure Code, s. 777.*

Where a decree is reversed in appeal, the successful party is entitled to restitution of money paid in process of execution of the erroneous decree of the Court of first instance.

An application for the purpose may be made under section 777 of the Civil Procedure Code.

**A** PPEAL from an order of the District Judge of Ratnapura.

*Croos da Brera*, for plaintiff, appellant.

July 20, 1932. DRIEBERG J.—

The appellant brought this action against the defendants to recover a sum of Rs. 4,827.93 which he said was due to him as his share of gems obtained from a certain land and for an accounting. On May 7, 1928,

<sup>1</sup> (1879) 41 L. T. 376.

<sup>2</sup> (1919) 17 N. L. R. 216.

an agreement not very clearly worded, was entered into between the appellant and the defendants, the second and third of whom are respondents to this appeal, that the action was to be withdrawn and that the first to the fourth defendants were to pay the appellant Rs. 12,603.60.

On the day of trial, June 11, 1928, the defendants were absent. The trial Judge proceeded *ex parte*, and, after examining the appellant, entered judgment for the appellant on June 11, 1928, in terms of the agreement for Rs. 12,603.60.

On July 19, 1928, the appellant applied for execution which was allowed; at that time there was no appeal from the judgment. Before the returnable date for the writ the first respondent moved that the judgment be vacated and that execution be stayed pending the inquiry. This was allowed but later the Court refused to vacate the judgment and writ was re-issued on January 25, 1929. On January 28, 1929, the first respondent appealed against the order refusing to vacate judgment.

In the interval the appellant proceeded with execution. On March 11, 1929, the first respondent moved that writ should not re-issue without the appellant giving security as provided by section 763 of the Civil Procedure Code; on March 14, 1929, security was given in one surety for Rs. 500 and writ re-issued. Property was seized and a payment of Rs. 3,000 was made to the appellant which was certified on June 5, 1929. On July 17, 1929, the Supreme Court set aside the decree and sent the case back in order that the present appellant might move that judgment be entered in terms of the agreement. Apparently the Court thought the trial Judge had adopted a wrong procedure in entering judgment according to the agreement on the day the trial was fixed merely for *ex parte* hearing. Other steps were taken in the action since that date and the case has been fixed for trial. On September 12, 1931, the respondents moved that the appellant be ordered to bring into Court the sum of Rs. 3,000 paid to him by them on the ground that the decree under which it was paid had been thereafter set aside. The learned District Judge made order directing the appellant to bring into Court the sum of Rs. 3,000 but that the money could not be drawn until the trial was concluded. He held that he had power under section 839 of the Civil Procedure Code to make such an order. The appellant in the Court below took the objection that the application to the Court should have been by way of petition and affidavit under Chapter 24 of the Code and not by motion, but he also contended that the respondents should have claimed this amount in a separate action.

It was not necessary to resort to section 839 of the Civil Procedure Code, for there is provision made in the Code for such a situation as this in section 777 which provides that "when a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in an action." This section is based on section 583 of the old Indian Code. The inadequacy of this section to meet all cases where restitution was indicated was realized, and in the new Indian Code section 144 was substituted for section 583.

It has been held by the Courts in India that the procedure provided by section 583 is not confined to cases where the restitution desired is provided for by the decree but that a decree of reversal by an appellate court contains, by necessary implication, a direction to the Court below to cause restitution to be made of all the benefits of which the successful party in the appeal was deprived by the enforcement of the erroneous decree of the Court of first instance (*Parbhu Dayal v. Ali Ahman*<sup>1</sup>). The appellant's motion to have judgment entered in terms of the agreement was dismissed on November 18, 1929, and his appeal from this order was dismissed on February 20, 1930. The case has now been fixed for trial.

The decree in favour of the appellant having been set aside, can the appellant show any good reason why he should not restore what he obtained by the enforcement of that decree? The appellant does not say that he is not liable to do so but he contends that he should not be compelled to pay before the final decision of the action for that might terminate in his favour. The appellant complains that the long delay in claiming this money has made his position very difficult as his financial position has altered since. This complaint is not without reason. The payment was made some time before June 5, 1929. On July 17, 1929, the Supreme Court set aside the decree of June 11, 1928, in the enforcement of which this payment was made and it was then open to the respondents to move to recover the money paid, yet they took no action until September 12, 1931, but a decree-holder who executes a decree against which an appeal is pending should be prepared for the inevitable consequences following on the reversal of the decree.

It appears to me that the only one entitled to this relief is the first respondent; the appeal on which the decree was set aside was by him alone and, though the reversal of it benefited the other defendants as well, I do not think they are entitled in the circumstances of the case to this relief at this stage; payments are alleged to have been made by others and I find that one payment of Rs. 4,500 was certified on June 12, 1928. The application for repayment of the Rs. 3,000 is made by the first respondent and the second respondent; they do not say how much each of them paid, but the appellant in his petition of appeal says that each paid him Rs. 1,500.

The first respondent alone is entitled to relief under section 777 and to the extent only of so much of the Rs. 3,000 as was paid by him. I set aside the order appealed from and direct that the first respondent be allowed to proceed under section 777 to the extent of so much of the said sum as he paid; if the parties are not in agreement on this point the Court will determine the amount after inquiry.

The procedure adopted is not in order. The correct course is to apply for execution; it is in fact the decree of the Appeal Court which it is sought to enforce, and all further proceedings will continue as in the execution of a decree to pay money, but any sum paid or realized will remain in Court until the final determination of the action.

I make no order as regards the costs of this appeal.

AKBAR J.—I agree.