

ALLAHABAD HIGH COURT

Badruddin Khan

Vs

Munshi Mahyar Khan

Misra, J.

28.09.1938

JUDGMENT

Misra, J.

1. This appeal, though termed by the office as an execution first appeal, is an appeal arising out of proceedings under Section 144, Civil P.C. Such proceedings, as has been held by a Full Bench of this Court in *Parmeshwar Singh v. Sital Din Dube*¹ are not proceedings in; execution of decree. The facts which have given rise to this appeal are as follows : The applicant in this appeal filed a suit in the year 1927 for specific performance of a contract of sale against Munshi Mahyar Khan, defendant-respondent 1, and Kunwar Nand Lal deceased, predecessor-in-interest of defendants-respondents 2 to 4. The suit was dismissed, by the trial Court of the Civil Judge with costs. By executing their decree for costs defendant-respondent 1 realized from the plaintiffs a sum of Rs. 683 on 22nd June 1928 and Nand Lal deceased realized Rs. 662-2-6 his costs on 24th January 1929. The plaintiffs filed an appeal against the decree of the trial Court and on 24th July 1930 this Court allowed the appeal, set aside the decree of the trial Court and passed a decree for specific performance of the contract in the following terms: The result therefore is that we allow this appeal and setting aside the decree of the Court below decree the plaintiffs' claim for the specific performance of the contract in terms entered in the unregistered sale deed dated 22nd November 1926 (Ex. 18). We fix 25th August 1930 as the last date for the deposit of Rs. 13,850 (half of the sale consideration) plus Rs. 275 (costs of stamp) to the credit of Mahayar Khan, defendant 1, in the Court Mow. If the amount is not deposited within the time fixed, the suit will stand dismissed with costs. In case the amount is deposited within the time allowed, the plaintiffs shall be entitled to costs in both Courts which shall also include the sum of Rs. 275 (costs of stamp), the defendant Kunwar Nand Lal must execute a fresh deed of sale in terms of Ex. 18 and present it for registration within the time allowed by law : if he neglects or refuses to do so the plaintiffs will be at liberty to proceed in the manner allowed by Order 21, Rule 34, Civil P.C. The balance of the sale consideration, viz. Rs. 13,550, should be deposited in the Court below within one week of the date of the registration and will be to the credit of His Highness the Maharaja of Benares, unless defendant 1 satisfies the Court that the mortgage deed of 15th May 1913 has

been fully satisfied, in which case defendant 1 would be entitled to the whole amount. In case the second instalment is not deposited by the plaintiffs, defendant 1 will be at liberty to execute the decree against them.... Execution.

2. The plaintiffs applied for an urgent copy of the judgment on 25th July 1930, but as the judgment was not ready and the High Court closed for the long vacation on 31st July 1930, the judgment was not actually signed by the Judges till shortly before the reopening of the Court in October 1930. The copy of the judgment was ready on 7th October 1930 and was actually delivered to plaintiff's counsel on 16th October 1930. In the meantime the date fixed for the deposit had expired. On 22nd August 1930 the plaintiffs by means of a tender which was signed by the Civil Judge deposited in the Government Treasury the sum of Rs. 13,550 and they deposited in the Court of the Civil Judge stamp papers of the value of Rs. 275. Without waiting for the registration of the document, they deposited the balance of Rs. 13,550 in Court within a week of their previous application in; was directed in the decree of this Court.

3. On 23rd August the plaintiffs applied for execution of their decree on the ground that they had complied with the terms of the decree of this Court and were entitled to execute it. As a copy of this Court's judgment was not available to the office of the Civil Judge, no report was made on the application for execution and copies of the judgment and decree of this Court were awaited. In the meantime the defendants rushed to the Court and on 16th October 1930 filed objections to the effect that the decree of this Court had not been complied with inasmuch as the sum of Rs. 13,550 had been deposited not to the credit of defendant 1, Mahyar Khan, as ordered in the decree of this Court, but to the credit of defendant 2, Kunwar Nand Lal deceased and further that instead of depositing Rs. 275 in cash to the credit of defendant 1 the plaintiffs had deposited stamp papers of that value.

4. This objection found favour with the Civil Judge and on 14th February 1931 he dismissed the plaintiffs' application for execution. The plaintiffs thereupon came up in appeal to this Court and their appeal was allowed on 6th February 1935. The order of the lower Court was set aside and the case was sent back to that Court with the direction that the plaintiffs having deposited the amount within the prescribed time their application for execution should be proceeded with. Thereafter on 9th December 1935, the plaintiffs made an application under Section 144, Civil P.C., asking for (1) the refund of their costs (together with interest at 6 per cent, per annum) which had been recovered from them by defendants 1 and 2, and (2) for compensation amounting to Rs. 9000 (together with interest, Rupees 1402.8-0) on the ground that by reason of the improper objection taken by the defendants, the completion of the sale in favour of the plaintiffs was delayed and they were not put in possession of the property from 16th October 1930 until 6th February 1935. The executing Court of the Civil Judge dismissed the plaintiffs' application under Section 144, holding that as regards the refund of costs the relief was barred by time and as regards the compensation and damages the plaintiffs cannot recover them by way of restitution under Section 144, Civil P.C. Hence this appeal.

5. In regard to the claim for compensation we agree with the trial Court that it is not maintainable by means of an application under Section 144, Civil P.C.; what this Section requires is that on a decree being reversed or varied the party entitled to any benefit by way of restitution shall, so far as may be, be placed in the same position which he would have occupied but for the decree which has been reversed or varied, and for this purpose the Court may make orders including orders for payment of damages and compensation which are properly consequential on such variation or reversal. The doctrine of restitution contemplates a case where property has been recovered by the decree-holder under his decree and the decree is subsequently reversed wholly or partly in other proceedings. In such cases the law raises an obligation on the party who has received the benefit of the erroneous judgment to make restitution to the other party for what he has lost. The use of the words damages, compensation and mesne profits in the Section indicates that the possession obtained under an erroneous decree subsequently reversed is wrongful possession and, on the reversal of the decree the judgment-debtor would be entitled not only to possession of the property taken from him but also to mesne profits during the period he was kept out of possession.

6. In this case, possession of the property was already with the defendants when the suit was brought. The suit was for specific performance of an agreement to sell, not for possession. An agreement to sell does not create any interest in the property, much less a right to obtain a decree for possession of the property. The decree for specific performance passed by the High Court in favour of the plaintiffs only entitled them to execution of the sale deed in their favour; it did not award them possession of the property. Section 144, Civil P.C., has therefore no application to the present case. It may be observed that the defendants in this case did not derive any benefit from the money that was deposited by the plaintiffs in Court. It lay to the credit of the plaintiffs. The only thing that can be said is that by reason of the erroneous decision of the first Court consequent on the improper objections made by the defendants, execution of the sale deed was delayed. The case as put by the plaintiffs is this : If objections had not been taken by the defendants the sale deed would have been completed by 16th October 1930 on the completion of the sale deed the plaintiffs would have been put in possession of the property sold; on being put in possession they would have been able to collect the profits of the property.

7. This involves many assumptions. One cannot say what circumstances might have intervened to prevent the execution of the sale deed, to delay the plaintiffs being put in possession of the property to be sold, and to prevent their realizing the profits of the property for a considerable time. The loss which the plaintiffs might have suffered by reason of the execution of the sale deed having been delayed owing to objections by the defendants cannot be said to have been "properly consequential" on the reversal of the decree; it would be a remote and indirect loss which is entirely outside the scope of Section 144, Civil P.C. In cases like the present (e. g. in a case where the decree reversed is a declaratory decree), the remedy if any is by suit, not by an application under Section 144, Civil P.C. For the above reasons we consider that the relief for compensation cannot be granted to the applicants by means of an application under Section 144,

Civil P.C. Neither can it be granted under Section 151, Civil P.C. It is true that the jurisdiction to make restitution is inherent in every Court and will be exercised where the justice of the case demands it, e.g. where an application is not strictly within the terms of Section 144, Civil P.C., but where, as here, the relief claimed is not really restitution and can appropriately be claimed in a suit, recourse cannot be had to the inherent powers of the Court under Section 151, Civil P.C.

8. As to the refund of costs, we do not agree with the lower Court that the claim is time-barred. According to the view of this Court, an application for restitution under Section 144, Civil P.C., is governed by Article 181, Limitation Act : vide *Parmeshwar Singh v. Sital Din Dube*² The period of limitation is three years from the date the right to apply arises. In this case the right to apply for restitution arose when the applicants made a deposit in accordance with the terms of the decree of this Court, that is on 22nd August 1930. They had three years from this date within which to apply. But before the expiry of the period of three years, the decree in respect of which they could seek restitution ceased to exist by reason of the lower Court's decision that the deposit was not made by the applicants in strict accordance with the terms of the High Court decree and their suit therefore stood dismissed and there was no decree in favour of the applicants which they could execute. This decision was made on 14th February 1931. After this decision the applicants could neither have sought execution nor restitution in respect of their costs and it would have been a senseless proceeding on their part to have made an application for execution or restitution. It was only when in appeal this Court decided on 6th February 1935 that the deposit made by the applicants on 22nd August 1930 was a proper deposit and entitled them to a decree, that they became entitled to apply for execution and restitution. The period from 14th February 1931 to 6th February 1935 should therefore be excluded. The limitation remained suspended for this period. There is no provision in the Limitation Act which prevents the exclusion of this period. Section 9 of the Act which provides that when once time has begun to run, no subsequent inability or disability to sue stops it, has no application to a case of this kind. It is true that there no specific Section of the Limitation Act which provides for the exclusion of this period. Section 14 has obviously no application, inasmuch as the application for execution of decree was not an application for restitution under Section 144, Civil P.C., neither was the executing Court unable to entertain that application on account of defect of jurisdiction or other cause of a like nature. Section 15 also does not help the applicants. That Section is confined in its operation to suite and applications for execution of decree. The cases in *Lakshminarayana v. Lakshmipati*³ *Satya Deo Narayan v. Radhey Kuar*⁴ and *Satish Mohini Debya v. Pabna Banki Ltd*⁵. relied upon by learned Counsel for the appellant, were cases relating to suits or applications for execution. The present application is not an application for execution of decree. Further, the order referred to did not stay the making of an application for restitution. The only thing that may be said is that its effect was that if an application for restitution had been made, it would have been a superfluous application and would undoubtedly have been dismissed. Even so, we are disposed to think that if the making of the application helped only to save time the appellants would have been bound to make it : see *Beti Maharani v. Collector of Etawah*⁶ and *Nagendra Nath Dey. v. Suresh Chandra Dey*⁷ It is on the general principles of suspension of limitation

which are applied in cases where a party is prevented under certain circumstances from taking action in pursuance of his rights, that the applicants in this case are entitled to exclude the time from 14th February 1931 to 6th February 1935. Courts do recognize and act upon these principles : see *Akshoy Kumar v. Abdul Kader Khan*⁸ The principal case as regards suspension of limitation arising after certain proceedings had terminated is that in *Swarno Mayi v. Shashi Mukhi Barmani* (1867-69) 12 M.I.A. 244. In that case an auction sale under a certain Bengal regulation of the rights of patnidars in a patni taluq by the zamindar for arrears of rent was set aside by the Zila Court for informality in the notices under that regulation and the patnidars who had been dispossessed were restored to possession and mesne profits were to be paid by the purchaser during the time they were out of possession. The zamindar then brought a suit against the patnidars to recover the arrears of rent which had accrued before and during the time they were out of possession. The High Court decided that the suit not having been brought within three years from the time the rent first became due was barred by limitation. The finding was reversed on appeal, the Judicial Committee holding that the cause of action accrued at the date of the decree reversing the auction sale and the suit having been brought within three years from the date of that decree the time had not run out. The view of their Lordships of the Privy Council was that upon the setting aside of the sale and the restoration of the patnidars to possession the latter took back the estate subject to the obligation to pay the rent and that the particular arrears of rent claimed in that suit must be taken to have become due in the year in which that restoration to possession took place.

9. Another case in which the right to bring an action to recover property was suspended during certain period is that in *Lakhan Chandra Sen v. Madhusudan Sen*⁹ In that case a Hindu died intestate in 1872, leaving three sons B.M., M.M. and C.L. G.L. died in 1881. On 18th January 1892, M.M. and the sons of C.L. were dispossessed of their share in certain property. In 1896 the sons of C.L. instituted a suit against B.M. and M.M. for possession and account, and in 1897 on the death of B.M. and M.M. their sons were brought on the record. The sons of M.M. supported the sons of C.L. and an issue was raised as between the co-defendants as to whether the sons of M.M. were entitled to a certain share. A decree, dated 20th April 1903, was passed in favour of the plaintiff and it was further declared that the defendants, the sons of M.M., were entitled to the share they claimed. The sons of B.M. appealed. On 22nd February 1904, the Appeal Court confirmed the decree in favour of the plaintiffs and set aside the decree so far as it related to the sons of M.M.. Thereupon, on 14th November 1904, the sons of M.M. instituted the suit against the sons of C.L. and of B.M. for possession, partition and accounts. It was held that the right of the plaintiffs to bring an action to recover the property was suspended between 20th April 1903 and 22nd February 1904 and the case fell within the principle laid down by the Judicial Committee of the Privy Council in the cases in *Swarno Mayi v. Shashi Mukhi Barmani*¹⁰ and *Prannath Roy Chowdry v. Rookea Begum*¹¹ In connexion with that case the learned Judges of the Calcutta High Court referred to the observations of Lord Eldon in *Pulteney v. Warren* (1801) 6 Ves. 73 to the following effect: If there be a principle, upon which Courts of Justice ought to act without scruple, it is this to relieve parties against that injustice occasioned by its own acts or

oversights at the instance of the party against whom the relief is sought. That proposition is broadly laid down in some of the cases.

10. This decision of the Calcutta High Court was approved of and confirmed by their Lordships of the Privy Council : see *Nritya Moni Dasi v. Lakhan Chandra Sen*¹² As was pointed out by Dawson Miller C.J. in *Ramgulam Singh v. Raj Kumar Rai* (1928) 15 A.I.R. Pat. 86: The Limitation Act is always subject to this, in so far as it applies to execution, that there must be some decree in existence which you can in fact execute. In the present case for the period which I have mentioned, between August 1922 and April 1925, there was no decree which could be executed at all and the only period during which execution could take place was the short period between....

11. This principle applies with equal force to the present case in which the application was not for execution of decree but for restitution. In this case, as has already been pointed out, by reason of the decision of the executing Court on 14th February 1931 the decree under which the applicants became entitled to execution and to restitution ceased to exist and until that decision was set aside by this Court on 6th February 1935 there was no decree which could be executed or in respect of which restitution could be sought by the applicants. For the reasons given above, we are of opinion that the right of the applicants to execute their decree and to seek restitution in respect of it was suspended from 14th February 1931 to 6th February 1935, and consequently their application for restitution made on 9th December 1935 was in time. The applicants are therefore entitled to refund of the costs which were realized from them by the opposite parties. They are also entitled to interest by way of damages on the amount of the costs recovered from them, inasmuch as they were wrongfully deprived of the use of their money : vide *Gokul Prasad v. Ram Devi* (1921) 8 A.I.R. All. 241(Supra). Interest is claimed at 6 per cent, per annum which we consider to be a reasonable rate. The amount due from opposite party 1, Mahyar Khali, is Rs. 683, amount of costs plus Rs. 303-15-0, interest up to 9th December 1935, and from opposite parties 2 to 4 Rs. 662-2-6, amount of costs plus Rupees 271-6-6, interest up to 9th December 1935, total Rs. 933-9-0.

12. In the result we accept the appeal in part, set aside the decision, of the lower Court in so far as the claim for refund of costs is concerned and give the appellants a decree for Rs. 986-15-0 against opposite party 1 with future interest at 6 per cent, per annum on the sum of Rs. 683 from 9th December 1935 up to the date of realization; and as against opposite parties 2 to 4 we give a decree for Rs. 933-9-0 with interest at 6 per cent, per annum on Rs. 662-2-6 from 9th December 1935 until the date of realization. Opposite parties 2 to 4 will be liable only to the extent of the assets of the deceased Kunwar Nand Lal that might have come into their hands and not been duly disposed of. As to costs both in this Court and in the Court below we order that the parties shall receive and pay them in proportion to their success and failure.

Cases Referred.

1(1934) 21 A.I.R. All. 626
2(1934) 21 A.I.R. All. 626
3(1927) 14 A.I.R. Mad. 997
4(1920) 7 A.I.R. Pat. 354
5(1918) 5 A.I.R. Cal. 143
6(1895) 17 All. 198
7(1932) 19 A.I.R. P.C. 165 at p. 167
8(1930) 17 A.I.R. P.C. 165 at p. 866
9(1908) 35 Cal. 209
10(1867-69) 12 M.I.A. 244
11(1863-66) 7 M.I.A. 323
12(1916) 3 A.I.R. P.C. 96