

ALLAHABAD HIGH COURT

Ujagar Singh

Vs.

Likha Singh

(Braund, J.)

24.09.1940

JUDGMENT

Braund, J.

1. This is a second appeal. It arises in this way. One Dhyan Singh, the father of the present plaintiff appellant, had occasion to bring a suit for preemption. On 18th January 1930 a decree was passed in favor 'of Dhyan Singh for pre-emption upon payment of a sum of L 1500. This sum was payable as to L 469 to the vendor, Gaya Singh, and as to L 1031 to Likha Singh who was the original purchaser. The reason why those payments were to be made in that way was, apparently, that out of the original purchase price of L 1500 a sum of L 469 still remained due to the original vendor. There then follows the sequence of events which have given rise to this appeal. This appeal turns entirely on a point of limitation and it is, therefore, necessary to observe the dates with some care. The original decree was passed, as I have said, on 18th January 1930. The payments into Court were made immediately afterwards. In due course Likha Singh filed a first appeal against the pre-emption decree and on 9th January 1931, that appeal was allowed and a decree was passed dismissing the original suit. Now, at that point the position was that there was no pre-emption and, accordingly, subject to anything that might have intervened, Dhyan Singh would have been entitled to get back the monies he paid into Court.

2. Several things, however, had happened in the meantime. On 30th January 1930 and again in December 1930 Likha Singh had 'withdrawn an aggregate sum of L 384-3-0 out of Court. It will be noticed that both "those dates are prior to the decision of the first appeal. The way in which Likha Singh withdrew those monies was this. It will be (remembered that out of the total sum of L 150. originally paid into Court L 469 stood in Court to the credit of Gaya Singh, while L 1031 stood in Court to the credit of Likha Singh. Likha Singh happened to have a money decree against Gaya Singh on another account altogether. In execution of that money decree, Likha Singh attached and ultimately obtained payment out of Court of this sum of L 384-3-0 out of L 469 standing to the credit of his judgment debtor, Gaya Singh.

3. On 24th of February 1931, which was after the decision of the first appeal, another person named Daya Mahesh, who is defendant-respondent 2 to the present appeal, withdrew L 163-8-0 out of L 1031 standing in Court to the credit of Likha Singh. Daya Mahesh had a decree against Likha Singh and he executed it by attaching Likha Singh's money in Court to the extent of L 163-8-0. Meanwhile Dhyan Singh had filed a second appeal in the suit. This was dismissed by the High Court on 23rd November 1933. On 23rd November 1936, exactly three years after the date of the dismissal of the second appeal Dhyan Singh's son, the present plaintiff appellant, made the present application under Section 144, Civil Procedure Code for the recovery from Likha Singh of the sum of L 547-11-0 made up, as to L 384-3-0 of the sum withdrawn in the year 1930 by Likha Singh and, as to L 163-8-0, of the sum withdrawn by Daya Mahesh in February 1931 which sum had gone to discharge a judgment debt for which Likha Singh was liable. To this application under Section 144, Civil Procedure Code both Likha Singh and Daya Mahesh were made respondents. As regards Daya Mahesh he can be disposed of in a very few words. He was never a party to the suit and, accordingly, it is conceded that as against him the proceedings under Section 144, Civil Procedure Code are misconceived. The suit as against him must be dismissed with costs. As regards Likha Singh, however, the matter is not so easy. The defence raised by Likha Singh was one of limitation. The point can be put very shortly. He says that the proper article of limitation is Article 181 which allows a period of three years from the time " when the right to apply accrues." He says that the right to apply for restitution under Section 144, Civil Procedure Code, first accrued, as regards Rupees 384-3-0 when the first appeal was allowed on 9th January 1931 and, as regards the sum of Rupees 163-8-0, on 24th February 1931 when it was withdrawn by Daya Mahesh. He says, accordingly, that this application was well out of time and must be dismissed. That view of the matter has commended itself to both the lower Courts and it is from their orders dismissing the application that this second appeal has come to me.

4. It has been very ably argued by Mr. Baleshwari Prasad who concedes that the proper article of limitation is Article 181. Indeed, he is compelled to concede that because he cannot withstand the volume of authority which exists in this Court to that effect. It is true that among the High Courts in India there is an unfortunate conflict of opinion on this matter, the High Courts of Madras, Bombay and Lucknow taking one view and the High Courts of Calcutta, Patna and Allahabad taking the opposite view. It is sufficient for me to say that it is well settled in this Court at any rate that the proper article of limitation is Article 181 and I need not, I think, discuss that aspect of the matter any further. But Mr. Baleshwari Prasad goes on to say that that does not dispose of the matter. He says in the first place, that, even accepting Article 181 as the correct article to apply, the period of limitation must be taken from the date of the decision of the second appeal in this Court and not from the date of the decision of the first appeal.

5. I regret that I do not agree with him as regards this. We have, after all, in this case simply to apply to the best of our ability the words of the article. No words could be simpler. They are "when the right to apply accrues." Now, it seems to me, at any rate as regards the sum of L 384-

3-0, that the right to apply to have that sum restored to him under Section 144 arose the moment the first appeal was decided, perhaps it would be more accurate to say at the moment the decree consequent upon the first appeal was drawn up. The practical result of the first appeal was that no preemption remained and no moneys need, or ought to have been, paid into Court by Dhyan Singh. Had he chosen to do so, he could at once have claimed to get those moneys back. If he had tried to, he would have discovered that a part of this money still remained in Court, whereas a part of it had been paid out to Likha Singh and Day a Mahesh. As Mr. Baleshwari Prasad rightly points out, no application under Section 144, Civil Procedure Code, would have been necessary in respect of the money still remaining in Court. But as regards those moneys which had found their way into the hands of Likha Singh and Daya Mahesh respectively the right to apply under Section 144 immediately arose. The only distinction between the sum of L 384-3-0 withdrawn by Likha Singh and the sum of L 163-8-0 withdrawn by Daya Mahesh is that the latter sum was not drawn until February 1931, whereas the former sum had already been withdrawn when the first appeal was allowed. In the latter case therefore the terminus a quo for limitation would be the date when it was actually withdrawn, whereas in the former case the date would be the date of the decision in the first appeal.

6. Then Mr. Baleshwari Prasad goes on to say that this cannot be so because at all relevant times his client was in complete ignorance of the payment having been made out of Court to Likha Singh and Daya Mahesh respectively. He points out, as regards the payment out of Court to Daya Mahesh, that it was to put it at its lowest most improperly made, because at that date the first appeal had already been allowed and the money in Court was no longer the money of Likha Singh. It was either the money of the plaintiff or else was in suspense pending the hearing of the second appeal. Upon either view, it is extremely difficult to understand how any Court could have allowed it to be attached. In both cases the plaintiff says that these payments out of Court were made without notice to him and that he was in ignorance of them. But, allowing for all these circumstances in the appellant's favor, I still do not see how it affects the matter. What, we have to consider is when his "right to apply accrued." Now, a man's "right" is one thing and his opportunity to take advantage of that right is another thing altogether. A person may possess a right although he is in complete ignorance of it. A relative may have died a month ago, leaving a person a legacy by his or her will. Can it be said that the right of the legatee does not exist because he has remained in ignorance of the testator's death? Analogies are unsafe I know, but it seems to me that it must be conceded here that the appellant's right to get his money back existed notwithstanding that he did not know, or may not have known, that the money had ever been paid out of Court.

7. The next argument addressed to me is that it was impossible for the appellant to have made an application under Section 144 pending his own second appeal. It is pointed out with considerable force that to have applied to get his money back pending the appeal would have been inconsistent with the appeal itself. Whatever may be the truth of that, I think there are at least two answers to it. The first is that there was nothing in the world to compel Dhyan Singh to appeal at

all. It must always be remembered that what we are considering is when, the right accrued. If the right once existed it is, in my view, neither defeated nor postponed, by the exercise by Dhyan Singh quite voluntarily of an option to appeal. It would have been quite open to Dhyan Singh to say "I am now content with matters as they stand and I will try to get my money back." Instead of that he appealed. But that does not alter the fact that his right to get his money back had accrued. That is one answer. Another answer, equally satisfying to my mind, is that I do not believe there was any inconsistency at all. If Dhyan Singh had wanted to recover this L 547-11-0 from the persons into whose hands it had got, he could surely have made an application for its restitution, not perhaps by payment to himself, but by payment of it back again into Court. The Court has ample power under Section 144 to make all such orders as the nature of the case may require and, if the Court had felt that there was any difficulty or inconsistency about ordering payment to the appellant himself, the Court could very well have ordered that the money should be paid back into Court where it came from pending the hearing of the second appeal. I do not believe that as a practical matter there was any real difficulty at all.

8. Apart altogether from authority, I should have felt little or no difficulty in this case. But there is a substantial volume of authority in the Court, of which I only propose to refer to two cases. The first is *Dhapo v. Baqridi*¹ That is a decision of Mukerji and Bennet JJ., in which the exact point was decided. It was held, in precisely similar circumstances to these, that the proper article of limitation was Article 181 and that the period of three years prescribed by the article was to be counted from the date of the lower appellate Court's decree reversing the decree of the trial Court and not from the date of the High Court's decree confirming that of the lower Appellate Court, The learned Judges in this case say:

"To this application of Baqridi Article 181 applies. This is the view taken in this Court. Then the limitation of three years begins to run from the date on which the right to apply accrues.... The right to apply for restitution accrued as soon as Baqridi's appeal succeeded in the first appellate Court. That right to apply for restitution was not in any way suspended by the fact that Ramji Lal filed a second appeal. It has been argued that Baqridi took the precaution of waiting to see how the second appeal fared.... We have the simple words of the third column of Article 181 to interpret, and the only way in which we can interpret it is to say that the right to apply accrued as soon as the decree in favour of Ramji Lal was reversed."

9. The other case to which I desire to refer is the Pull Bench case in *Parmeshar Singh v. Sitladin Dube*² This was a Full Bench case to which the late Sir Shah Sulaiman C.J. and Mukerji and King JJ. were parties. It is unfortunate perhaps that on two of the questions involved the decision is by a majority. But it is all the same a decision binding on me. It concludes that the proper article of limitation is Article 181, Limitation Act, and it concludes, moreover, that in a simple case such as the one before me the terminus a quo from which limitation runs is the date of the lower Appellate Court's decree by which the first Court's decree is reversed. An elaborate

argument had been addressed to the Full Bench in that case to the effect, if I have understood it rightly, that where an appeal is brought either from an original decree or from a prior appellate decree, it is only the decree of the ultimate Appellate Court that conclusively and once and for all decides the rights of the parties. For that reason it was suggested that in a case such as the present one you have to look at the point of time when the right, the accrual of which is the starting point of limitation, was finally and conclusively established. That could only be done by the final and conclusive decree in the proceedings, that is to say, the decree of the second Appellate Court. So the argument ran and it found favor with the then learned Chief Justice. He says in a dissenting judgment:

am therefore of opinion that the expression 'where and in so far as a decree is varied or reversed' which occurs in Section 144, must mean where the decree is

¹(34) 19 A.I.R. 1932 All. 609

²(34) 21 A.I.R. 1934 All. 626

reversed either temporarily or finally. No doubt a successful party is entitled to apply for restitution immediately after there is a temporary or provisional reversal, but if he chooses to wait till the reversal is complete and absolute he would nevertheless be in time if he comes in within the prescribed time from the date when the decree is finally declared to be reversed without any further question or doubt.

10. The learned Chief Justice was prepared, therefore, to hold that limitation ran from, the date of the decree in second appeal. The opposite view, which was the decree of the Court, is expressed in the following passage from the judgment of Mukerji J. He says:

The argument at the Bar however, was that it is the final decree that is the principal decree in the case, and it is that decree alone which can be executed. There can be no doubt that the proposition is true, but only so far as it goes. We are not considering whether the final decree is not (sic "now") the decree which finally defines the rights of the parties; but the fact remains that it was open to the defendants to apply for restitution on an earlier date and, unless the law postpones that right and gives a fresh right, the limitation must begin to run from the date when the right to apply first accrues.

11. If I am at liberty to express my own view, I should with great respect prefer the view which found favor with a majority of the Court in this case. For all these reasons, in my judgment, the view of the lower Courts is correct and this appeal must be dismissed with costs. I have been asked for leave to appeal under the Letters Patent, but it is not a case in which I feel justified in granting leave.