ALLAHABAD HIGH COURT

Gangadhar

Vs

Raghubar Dayal

Special Appeal No. 135 of 1968

(K.B. Asthana, C.S.P. Singh and N.D. Ojha, JJ.)

24.07.1974

JUDGEMENT

N.D. Ojha, J.

1. The dispute giving rise to this special appeal was in respect of three plots being No. 874, 875 and 878 situate in village Bambirpur, Pargana Atrauli, district Aligarh. One Shyam Lal, who was the servant of respondents 7 to 10, made an application under Section 145 of the Criminal Procedure Code on 26th July, 1950, in respect of the aforesaid plots. The appellants were the opposite parties in those proceedings. The Magistrate concerned on 29th Oct., 1951, passed an order under Section 146 of the Criminal Procedure Code as it stood at that time directing the properties to remain attached till a competent Court determined the rights of the parties. These plots were to remain in possession of a supurdar appointed by the Magistrate in those proceedings during this period. Subsequently, the appellants filed a suit for declaration that they were sirdars of the plots in dispute. This suit was numbered 377 of 1953 and only respondents 1 to 6 were arrayed as defendants to this suit. On 14th July, 1954, the suit was decreed *ex parte* and on the basis of the declaration granted by the aforesaid decree in their favour the appellants took possession from the Criminal Court over the plots in dispute on 8th October, 1954. Subsequently, an application was made for setting aside the *ex parte* decree which was allowed on 6th October, 1956, and the *ex parte* decree was set aside. The appellants thereafter made an application for impleadment of respondents 7 to 10 as defendants to the suit whereupon these respondents were impleaded in the suit on 2nd April, 1957. Respondents 1 to 10 thereafter made an application on 4th June, 1957, before the Munsif in whose Court the aforesaid suit was pending with a prayer to deliver back possession over the plots in dispute to the supurdar who had been appointed by the Criminal Court or in the alternative, to appoint a receiver. This application was, however, dismissed on 14th July, 1957. The suit was contested by respondents 1 to 10 and was dismissed on merits on 22nd May, 1958. Respondents 1 to 10 thereafter made an application on 4th June, 1959, under Section 144 of the Civil Procedure Code for restitution. The appellants had in the meantime filed an appeal against the decree dated 22nd May, 1958, dismissing their suit which was allowed by the Civil Judge on 17th August, 1959, whereby the decree dated 22nd May, 1958, was set aside and the suit was remanded for being decided afresh. The application under Section 144, Civil P. C. made on 4th June, 1959, was subsequently dismissed on the ground that

the decree dated 22nd May, 1958, on the basis of which the said application had been made had itself been set aside. The Munsif decided the suit afresh after remand and again dismissed it on 30th January, 1960. Respondents 1 to 10 thereupon made an application on 5th February, 1960, for restitution under Section 144, Civil P. C. The prayer made in this application was for delivery of possession to them and for mesne profits. This application was allowed by the Munsif on 28th May, 1960, but was dismissed on appeal by the Civil Judge on 18th August, 1960. Respondents 1 to 10 filed second appeal No. 5185 of 1960 against the aforesaid order. Before the appeal could finally be decided the village where the plots in dispute are situate was brought under consolidation operations. Before the consolidation authorities respondents 1 to 6 claimed to be bhumidhars of plot No. 878 and respondents 7 to 10 claimed to be sirdars of plots Nos. 874 and 875. The appellants, on the other hand, claimed to be sirdars of all the three plots on the basis of adverse possession. The claim of the appellants found favour with the consolidation authorities and they were held to have acquired sirdari rights by adverse possession. The Deputy Director of Consolidation found that the respondents were in possession in 1356 and 1357 Fasli and that had the plots in dispute not been attached in proceedings under Section 145 of the Criminal Procedure Code the respondents would have continued in possession in 1358 and 1359 Falsi and would have matured title under the U. P. Tenancy Act. He held that since the respondents 1 to 10 had failed to prove their possession from 1358 Fasli onwards, the appellants had become sirdars. Aggrieved against the orders passed by the consolidation authorities respondents 1 to 10 instituted Civil Miscellaneous Writ No. 428 of 1967 in this Court. Second Appeal No. 5185 of 1960 which had been filed by respondents 1 to 10 against the order of the Civil Judge dated 18th August, 1960, dismissing their application under Section 144, Civil P. C. came up for hearing on 30th January, 1967, and was disposed of by the following order :

> "This appeal arises out of proceedings under Section 144, Civil P. C. It appears that during the pendency of this appeal the village in suit came under consolidation operations and title to the land has been decided finally between the parties. In view of the final decision by the consolidation authorities, no useful purpose will be served in deciding this case on merits. The person who ultimately succeeds in proceedings for consolidation is to get the land in dispute. The rights of the parties are subject to the final decision which may be arrived at in the writ filed by the appellants in this Court. In view of the decision by the consolidation authorities this appeal has become infructuous. Accordingly it is hereby dismissed but without any order as to costs."

At this very place it may also be pointed out that the appellants had also filed an appeal against the decree passed by the Munsif dismissing their suit No. 377 of 1953 after remand and the said appeal, as would appear from paragraph 8 of the counter affidavit to Civil Miscellaneous Writ No. 428 of 1967, was stayed under Section 5 of the U. P. Consolidation of Holdings Act as it stood at that time. Civil Miscellaneous Writ No. 428 of 1967 came up for hearing before a learned Single Judge who allowed it on 8th December, 1967, and directed that respondents 1 to 10 will be recorded Lover the land in dispute as claimed by them. He held that the Deputy Director of Consolidation was in error in tacking on the period of 1358 and 1359 Fasli in favour of the respondents. After the commencement of the proceedings under Section 145. Criminal P. C. the plots were in custodia legis. That possession would not automatically enure for the benefit of the person who was in possession prior to the attachment. The respondents could not mature any title by tacking on to their pre-existing period of possession the time during which the land

was under attachment. Since the attachment the land was under litigation, the respondents could not validly acquire any title as sirdars.

2. Against the judgment of the learned Single Judge the present special appeal has been filed by the persons who were plaintiffs in suit No. 377 of 1953 and in whose favour the matter had been decided by the consolidation authorities. This special appeal was referred to a Full Bench by an order dated 24th January, 1974, passed by a Bench of this Court and it is thus that this special appeal has come up before us.

3. When the special appeal came up for hearing before a Bench of this Court learned counsel for the appellants made two submissions in its support (1) that the application made by respondents 1 to 10 on 4th June, 1957, was really an application for restitution under Section 144, Civil P. C. and it having been dismissed by the Munsif the subsequent applications dated 4th June, 1959, and 5th February, 1960, were not maintainable, being barred by the general doctrine of *res judicata* and the right of respondents 1 to 10 to claim restitution had been permanently lost; and (2) that at all events, when suit No. 377 of 1953 was decreed *ex parte* on 14-7-1954 and possession was taken by the appellants on 8-10-1954 from the Criminal Court it was incumbent upon respondents 1 to 10 to have filed a suit for possession under Section 209 of the U. P. Zamindari Abolition and Land Reforms Act and since no such suit was filed the appellants acquired sirdari rights under Section 210 of the said Act on the expiry of the period of limitation prescribed for filing a suit under Section 209 which was at that time three years from the next of July following the date of occupation.

4. In regard to the ground on which the learned single Judge had allowed the writ petition, as would appear from the referring order dated 24th January, 1974, the learned counsel for both the parties were agreed before the Division Bench that the fact of possession anterior to the proceedings under Section 145, Criminal P. C. will have no bearing on the question whether the appellants perfected their title to the plots in dispute by adverse possession and that the learned counsel for the appellants did not dispute the view of the learned single Judge on the said aspect of the matter namely that the fact that during 1356 and 1357 Fasli the appellants were in possession did not in any manner help them in the instant proceedings.

5. In regard to the first submission made by learned counsel for the appellants namely that as a result of the dismissal of the application filed by respondents 1 to 10 on 4th June, 1957, their subsequent applications were barred by the general doctrine of *res judicata* the learned Judges constituting the Division Bench took the view that the said submission had no substance inasmuch as the necessary material including the order dismissing the application dated 4th June, 1957, had not been placed on the record and it was not possible to know about the nature of the said order. Consequently, it was held that the contention of the learned counsel for the appellants in this behalf had to be rejected.

6. In regard to the claim of respondents 1 to 6 the learned Judges took the view that since in view of the decision of the Supreme Court in *M M. Barot v. P. M. Gokalbhai*[1]*,* wherein it was held that restitution proceedings are execution proceedings and Article 182 of the old Limitation Act, 1908, prescribed the period of limitation for the said proceedings the claim of these respondents was in no way barred even if the limitation to make an application for restitution started on 6th October, 1956, when the *ex parte* decree was set aside. It was held that since by U. P. Civil Laws

(Reforms and Amendment) Act, 1954, the period of limitation prescribed under Article 182 was enlarged from 3 years to 6 years and since admittedly the relevant notification under Section 4 of the U. P. Consolidation of Holdings Act had been issued in the year 1961 and second appeal No. 5185 of 1960 filed by respondents 1 to 10 against the order dismissing their application for restitution was pending when the notification under Section 4 (2) was issued, the rights of respondents 1 to 6 could be decided afresh by the consolidation authorities. The learned Judges, however, were of the view that the case of respondents 7 to 10 who were claiming sirdari rights in plots Nos. 874 and 875 was not free from difficulty inasmuch as they were not parties to suit No. 377 of 1953 on the dates when the *ex parte* decree was passed and Possession delivered to the appellants by the Criminal Court in pursuance of the said *ex parte* decree. Whether or not respondents 7 to 10 were entitled to make an application under Section 144, Civil P. C. in these circumstances and what was the effect of no suit under Section 209 of the U. P. Zamindari Abolition and Land Reforms Act being filed by respondents 7 to 10 were the main questions which according to the learned Judges required consideration by a larger Bench.

7. When the special appeal came up for hearing before us learned counsel for the appellants reiterated the submissions made by him before the Division Bench. For the reasons recorded by the Division Bench in its referring order dated 24th January, 1974, we are of the opinion that the submissions made by learned counsel for the appellants in regard to the subsequent applications for restitution dated 4th June, 1959, and 5th February, 1960, being barred by the general doctrine of *res judicata* on account of the dismissal of their earlier application dated 4th June, 1957, have no substance and must be rejected. We are also in respectful agreement with the finding recorded by the learned Judges that in so far as the claim of respondents 1 to 6 that they were bhumidhars of plot No. 878 is concerned, it was not barred by time and the consolidation authorities were competent to adjudicate upon their rights in respect of the said plot. Even though the appellants had been put in possession by the Criminal Court on 8-10-1954 the said possession being in pursuance of a declaration of title granted by the Civil Court could not be otherwise than in accordance with law for the time being in force at any rate till the *ex parte* decree was set aside on 6-10-1956 and if limitation to file a suit under Section 209 was counted from 6-10-1966, it had not expired when the notification under Section 4 of the U. P. Consolidation of Holdings Act was issued, it having been enlarged from 3 years to 6 years by notification dated 27th March, 1959.

8. Before dealing with the claim of respondents 7 to 10 it is necessary to dispose of one more argument made by learned counsel for the appellants before us namely that the claim of respondents 1 to 10 was barred by Section 144 (2) of the Civil Procedure Code. Since much of the argument of learned counsel for the appellants on this point as also in regard to the claim of respondents 7 to 10 will depend on the interpretation of Section 144. Civil P. C., it would be useful to refer to the said section which runs as under :

> "144. (1) Where and in so far as a decree or an order is varied or reversed in appeal, revision or otherwise, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will. So far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied or reversed; and, for this purpose, the Court may make any orders, including orders for the refund of

costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1)."

It would be seen that sub-section (2) bars the institution of a suit for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1). By no stretch of imagination can proceedings under the U. P. Consolidation of Holdings Act be equated with a suit of the nature contemplated by sub-section (2) of Section 144, Civil P. C. In fact the U.P. Consolidation of Holdings Act on an objection in regard to title being filed contemplates really an adjudication of title. This cannot be done in application under Section 144, Civil Procedure Code After an adjudication in regard to title has been made, it is the duty of the consolidation authorities to carve out chaks. In that process possession may be delivered but it cannot be said that the proceedings under the U. P. Consolidation of Holdings Act are proceedings for restitution or other relief which could be obtained by application under sub-section (1) of Section 144, Civil P. C.

9. Coming now to the claim of respondents 7 to 10 of being sirdars of plots Nos. 874 and 875 it is to be seen that it has not been asserted by either party that these respondents were not bound by the order passed on 29th October, 1951, under Section 146, Criminal P.C. In fact, as already pointed out above, the proceedings under Section 145, Criminal P. C. had been initiated by Shyarn Lal who was the servant of respondents 7 to 10. It has also not been disputed that the appellants too were bound by the order dated 29th October, 1951. The position in law, therefore, was that since the property in dispute including plots Nos. 874 and 875 was in custodia legis, it was not necessary for either party to file a suit for possession and a decree for declaration of rights was all that was needed for taking possession over the property from the supurdar. In such a case neither Section 28 nor Article 47 of the old Limitation Act applied: See *Venkatratnam v. Venkatanarasayamma*[2],

10. It was also not necessary that both the parties should file separate suits for declaration of their rights. Even if one of the parties filed such a suit impleading the other as a defendant, the necessary declaration would be available in the decree to be passed in the suit, particularly when no person other than the parties to the suit was claiming, or was being alleged to be entitled to, any right in the property in dispute. Such a suit was filed by the appellant being suit No. 377 of 1953. It is true that this suit was initially filed only against respondents 1 to 6 but on 2nd April, 1957, respondents 7 to 10 were also impleaded as defendants to the suit. As such at any rate on 2nd April, 1957, a suit for declaration of title filed by the appellants even as against respondents 7 to 10 became pending. The rights of the parties including respondents 7 to 10 were to be decided in this suit and if the effect of the appellants being put in possession on 8th October, 1954, by the Criminal Court in pursuance of the *ex parte* decree passed in this suit on 14th July, 1954, is ignored, there can be no manner of doubt that if ultimately this declaratory suit was decided in favour of respondents 7 to 10 they would have been entitled to take Possession from the supurdar appointed in proceedings under Section 145, Criminal P. C. in view of the order passed under Section 146, Criminal P. C. on 29th October, 1951. What is the effect of the *ex parte* decree and delivery of possession to the appellants on the rights of respondents 7 to 10 is, therefore, the crucial question. In resolving this question it would, inter alia, be necessary to find

out the stage when the right to claim restitution accrued and whether respondents 7 to 10 had a right to claim restitution.

11. The legal position no doubt is that a right to claim restitution arises, as urged by learned counsel for the appellants, even on an *ex parte* decree being set aside : see *Allahabad Theatres v. Ram Sajiwan*[3], and *Binayak Swain v. Ramesh Chandra*[4], But this legal position, in our opinion, is not of a universal application. Its applicability will have to be judged in the circumstances of each case. What is restitution ? Broadly speaking, it is the right of a party to being placed in the same position which he occupied before the decree or order which has subsequently been varied or reversed was executed. Suppose a landlord files a suit for ejectment against his tenant. The suit is decreed *ex parte* and in execution of this *ex parte* decree the tenant is ejected and the landlord is put in possession. Subsequently the *ex parte* decree is set aside. The tenant can certainly without waiting for the final decision in the suit apply for being put back in possession, i. e. being placed in the same position which he occupied before he was ejected in execution of the *ex parte* decree which has subsequently been set aside. It is so because the very setting aside of the *ex parte* decree entitles the tenant to be put back in possession. Similar was the situation in the cases referred to above, even though in different circumstances. Will the same situation, however, obtain if as in the instant case the mere setting aside of the *ex parte* decree does not entitle the defendants to the suit to claim possession ? In view of the order dated 29th October, 1951, passed under Section 146, Criminal P. C. only such person was entitled to be put in possession in whose favour a declaration of title was made. Suit No. 377 of 1953 was not a suit for possession, nor was the *ex parte* decree passed in this suit of such a nature in execution of which the appellants could be put in possession. They had in fact not been put in possession by the Court passing the *ex parte* decree in execution of the said decree so that a prayer could be made by the respondents on this decree being set aside to be out back in possession. Here in consequence of the *ex parte* declaratory decree the appellants were out in possession by the Criminal Court in pursuance of the order dated 29th October, 1951, passed under Section 146, Criminal P. C. The position in law is that after the Criminal Court puts such person in possession in whose favour subsequent to the order passed under Section 146, Criminal P. C. a declaration of title had been made, it becomes *functus officio* : See *Mohd Ashraf Khan v. Abdul Rehman*[5], The remedy of the person who has been dispossessed in consequence of a decree passed by the Civil Court either by the Criminal Court or even otherwise on such decree being varied or reversed is to apply for restitution in the Civil Court : see Second Appeal No. 2134 of 1956 decided on 1-2-1971; *Surya Datt v. Jumna Datt*[6], *Arya Pratinidhi Sabha v. Chhotey Lal*[7], and *Md. Hanif v. Khairat Ali*[8],

12. For the aforesaid reasons even though the respondents had been actually dispossessed by the Criminal Court they could make an application only in the Civil Court for being put in possession on the *ex parte* decree in consequence of which they were dispossessed being varied or reversed. In our opinion, however, such an application could not be made at the stage when the *ex parte* decree was set aside in the instant case but could be made only after a decree about declaration of title was passed in their favour. The only effect of the *ex parte* decree being set aside was that the declaration of title granted in favour of the appellants was wiped out and the position as it obtained before the said decree was passed was restored. It, however, did not result in the grant of a declaration of title in favour of the respondents which alone could entitle them to possession over the property in dispute in view of the order dated 29th October, 1951, passed under Section 146, Criminal P. C. Neither on the date when the *ex parte* decree was passed nor

on the date when the appellants took possession over the plots in dispute in consequence of such decree were the respondents in possession over the said plots. Possession over the plots was with the supurdar appointed in proceedings under Section 146, Criminal P. C. It is no doubt true that the possession of the supurdar was to enure for the benefit of the person in whom title to the plots vested, but a declaration about title was yet to be made in the suit. How could then the respondents claim to be put back in possession just because the *ex parte* decree had been set aside ? They could do so only when a declaration contrary to or in variance of that which had been granted by the *ex parte* decree in favour of the appellants was subsequently granted in their favour. This situation occurred only on 22nd May, 1958, and subsequently after remand on 30th January, 1960, when suit No. 337 of 1953 was dismissed on merits holding that the title did not vest in the appellants. The claimants to the plots in dispute being only those persons who were parties to suit No. 337 of 1953 and the dispute in the suit being whether title to the plots vested in the plaintiffs or the defendants, it is this stage when a declaration of title in favour of the respondents came into being and consequently it is this stage when a right accrued in their favour to make a prayer in the Civil Court for being put in possession over the plots in dispute in restitution proceedings. Before this stage no application could be made by the respondents for restitution. On the setting aside of the *ex parte* decree they had made an application on 4th June, 1957, as already pointed above, with the prayer to put back the supurdar appointed in proceedings under Section 145, Criminal P. C. in possession or, in the alternative, to appoint a receiver. This was in fact all which they could do at that stage. The Munsif, however, dismissed this application on 14th July, 1957. The respondents certainly cannot be blamed for the dismissal of the application nor can they be put to suffer on this count.

13. Whether the proceedings instituted by the respondents consequent upon the decrees dated 22nd May, 1958, and 30th January, 1960, are taken to be proceedings under Section 144, Civil Procedure Code or 151, Civil Procedure Code makes no difference for the necessary applications for restitution dated 4th June, 1959, and 5th February, 1960, were both made even within three years of 22nd May, 1958, and 30th January, 1960, respectively. The controversy raised for the appellants that even though the limitation for making an application for restitution under Section 144, Civil P. C. was six years, it was only three years if such an application is filed under Section 151, Civil P. C., therefore, loses its significance.

14. Whether respondents 7 to 10 had a right to claim restitution is the next point which falls for determination. It was urged for the appellants that since respondents 7 to 10 were not parties to the *ex parte* decree dated 14th July, 1954, they were not entitled to restitution and should have filed a suit under Section 209 of the U. P. Zamindari Abolition and Land Reforms Act within three years, the period of limitation prescribed for such a suit at that time, and since no such suit was filed by them their claim had become barred by time in 1961 when the relevant notification under Section 4 of the U. P. Consolidation of Holdings Act was issued and the appellants had acquired sirdari rights under Section 210 of the U. P. Zamindari Abolition and Land Reforms Act.

15. The argument raised in this behalf involves interpretation of the words "party" and "parties" occurring in Section 144, Civil P. C. According to learned counsel for the appellants, these words refer to party or parties to the decree or order on a variation or reversal of which the right to restitution accrued. On the other hand, it was urged by the respondents that the said words refer to the party or parties to the application for restitution.

16. There is a divergence of judicial opinion on this point but in our opinion, it is not necessary to resolve that conflict in the instant case in view of the fact that it is settled law that Section 144, Civil P. C. is not exhaustive and the Court had inherent jurisdiction to grant restitution. In *Jai Berham v. Kedar Nath*[9], the Privy Council was dealing with an execution sale of immovable property which took place in 1904. The sale and the certificate of sale were set aside by the Privy Council in 1913 reversing the decree of the High Court at Calcutta. The auction-purchasers had been in possession since February, 1905, and the price paid by them into Court had been distributed to the holders of the decrees against the judgment-debtor. The purchasers had paid off the two bonds secured on the property and mentioned as encumbrances in the certificate. Proceedings in restitution were thereafter started. It was held :

> "It is the duty of the Court under Section 144 of the Civil Procedure Code 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'.
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> Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns, L. C. in *Roger v. The Comptoir d' Escompte de Paris*[10],
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> 'One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression 'the act of the Court' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of law, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case.'
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> The auction-purchasers have parted with their purchase-money which they paid into Court on the faith of the order of confirmation and certificate of sale already referred to. This money has been distributed amongst creditors of the judgment-debtor who had attached the unencumbered property in question and could have realised their judgment debts by sale of this property in execution and it would be inequitable and contrary to justice that the judgment-debtor should be restored to this property without making good to the auction purchasers the moneys which have been applied for his benefit.
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> It was argued that the remedy of the auction purchasers was either to apply for a certificate of sale of the unencumbered property or to obtain from the judgment creditors repayment of the sums paid out to them under the orders of the Court. Their Lordships cannot agree with either of these suggestions, and for the reasons stated by the Judges of the High Court."

17. It would thus be seen that an auction purchaser who was not a party to the suit or decree was held entitled to apply for restitution and it was pointed out that even if Section 144, Civil P. C. was not applicable, relief could be granted to him under Section 151, Civil Procedure Code.

18. That the provisions of Section 144, Civil P. C. were not exhaustive and that the Court has

inherent power to restore any party which has suffered any injury by virtue of any order passed by the Court to the position which it would have occupied if the wrong order had not originally been passed by the Court was the view taken by the Privy Council in an earlier judgment in *Prag Narain v. v. Kamakhia Singh*[11], and was followed by the Lahore High Court in *Sohnun v. Mast Ram*[12], The same view was taken by the Madras High Court in *S. Chokalingam v. N. S. Krishna*[13], the Calcutta High Court in *Jotindra Nath v. Jugal Chandra*[14]. and the Jammu and Kashmir High Court in *Subhash Chander v. Bodh Raj*[15],

19. On the authority of these cases and on the principle contained in the maxim actus curiae neminem gravabit it is really the duty of the Court to grant restitution under its inherent powers when a person has been deprived of his property due to an order of Court which has subsequently been varied or reversed as being erroneous. In our opinion, on the facts of the instant case, even if respondents 7 to 10 could not invoke the Powers of the Court to grant restitution under Section 144, Civil P. C., they could certainly do so under Section 151, Civil P. C.

20. Since, as already observed above, the applications for restitution made on 4th June, 1959, and 5th February, 1960, were within limitation, even if the period for making an application for restitution under Section 151, Civil P. C., as held in some cases, is taken to be only three years as prescribed by Article 181 of the old Limitation Act, they were clearly maintainable notwithstanding the fact that Section 144, Civil P. C. may be inapplicable. Even if the application purported to have been made under Section 144, Civil P. C. it would make no difference. In *J. K. Steel Ltd. v. Union of India*[16], it was held :

> "If the exercise of a power can be traced to a legitimate source, the fact that the same was purported to have been exercised under a different power does not vitiate the exercise of the power in question. This is a well-settled proposition of law. In this connection reference may usefully be made to the decisions of this Court in *P. Balakotaiah v. Union of India*[17], and *Afzal Ullah v. State of U. P.*[18], "

21. In *N. B Sanjana v. E. S. and W. Mills*[19], it was held that the fact that the notice refers specifically to a particular rule which may not be applicable will not make the notice invalid on that ground.

22. In *Raja Shatrunji v. Mohd Azmat Azim Khan*[20], it was held that the substance and not the form of the application will be decisive.

23. It was next contended by learned counsel for the appellants that since respondents 7 to 10 were not parties to the *ex parte* decree dated 14-7-1954 the possession of the appellants as against them was otherwise than in accordance with the law for the time being in force with effect from 8th October, 1954, itself when they took possession from the Criminal Court and limitation to file a suit under Section 209 of the U. P. Zamindari Abolition and Land Reforms Act started running from July following the said date, i. e. from 1st July, 1955. It was urged that once limitation had started running it could not be arrested and the consequences of not filing a suit under Section 209 inevitably followed so that the rights of respondents 7 to 10 stood extinguished when the relevant notification under Section 4 of the U. P. Consolidation of Holdings Act was issued in 1961.

24. This argument too, in our opinion, cannot help the appellants on the facts of the present case. Here before the limitation to file a suit under Section 209 could expire on 1st July, 1958, the same being three years at that time, respondents 7 to 10 were impleaded as defendants in suit No. 377 of 1953 on 2nd April, 1957. The right to claim restitution, as observed above, accrued after these respondents had been impleaded namely on 22nd May, 1958, when the suit was dismissed initially and on 30th January, 1960, when it was dismissed after remand. These respondents had applied for restitution on both the occasions and second appeal No. 5185 of 1960 filed by them against the order dismissing the subsequent application for restitution was pending when the relevant notification under Section 4 of the U. P. Consolidation of Holdings Act was issued. So was pending the appeal filed by the appellants against the decree suit No. 377 of 1953. The former was disposed of by the order auoted above and the latter stayed under Section 5 of the U. P. Consolidation of Holdings Act as it then stood. But for the intervention of consolidation proceedings the rights of respondents 7 to 10 would have been finally decided in suit No. 377 of 1953. In view of Section 22 of the old Limitation Act suit No. 377 of 1953 would be deemed to have been instituted against respondents 7 to 10 on 2nd April, 1957, when they were impleaded as defendants. Even though the appellants may be treated to have been in possession otherwise than in accordance with law for the time being in force and without the consent of respondents 7 to 10 with effect from 8th October, 1954, thev had not perfected their, title as sirdars by 2nd April, 1957. The rights of the parties in suit No. 377 of 1953 would have been determined as they existed on the date of the suit. The possession of the appellants after 2nd April, 1957, could not be tacked on to their possession prior to that date for purposes of acquisition of sirdari rights under Section 210 of the U. P. Zamindari Abolition and Land Reforms Act. It is thus clear that neither the rights of respondents 7 to 10 had extinguished nor had sirdari rights accrued in favour of the appellants on 2nd April, 1957, and respondents 7 to 10 were bound to succeed in suit No. 377 of 1953. On getting a declaration of title in their favour these respondents would have succeeded in taking back possession in restitution proceedings. Since, as already pointed out above, the applications made by them in this behalf had been made well within three years from the date on which the right to claim restitution accrued, and since respondents 7 to 10 had admittedly been dispossessed in consequence of the *ex parte* decree which was subsequently varied on merits on the finding that title to the plots in dispute did not vest in the appellants, the application for restitution was also bound to succeed. Even if Section 144, Civil P. C. was not directly applicable on the facts of the instant case, restitution could have been granted under the inherent powers of the Court. If on 2nd April, 1957, when respondents 7 to 10 were impleaded in suit No. 377 of 1953, two remedies were available to these respondents for getting back possession over the plots in dispute, one by filing a suit under Section 209 of the U. P. Zamindari Abolition and Land Reforms Act and the other by defending suit No. 377 of 1953 and getting a declaration of title in their favour and thereafter instituting restitution proceedings, and they chose to avail of one of these two remedies even though the remedy chosen by them involved more risk than the other, it cannot be said that their rights, on the peculiar facts of this case, stood extinguished when the notification under Section 4 of the U. P. Consolidation of Holdings Act was issued in 1961.

25. Lastly, it was urged for the appellants that when respondents 7 to 10 were not in possession on 2nd April, 1957, namely on the date on which they were impleaded in suit No. 377 of 1953, they should have filed a suit for ejectment against the appellants irrespective of the pendency of suit No. 377 of 1953 which had been filed by the appellants for declaration of title. Reliance was placed on *Narayan v. Puttabai*[21], In that case one Gurunath was handed over the properties in

dispute on 24th February, 1920, by one Tungawa purporting to act under the terms of an award Gurunath filed a suit on 25th November, 1920, against Narayan Patil and others for a declaration that he was in possession and a permanent injunction restraining the defendants therein from dispossessing him and receiving rents from the tenants. On the same date he made an application for and obtained a temporary injunction to the same effect as the permanent injunction applied for by him. The order for temporary injunction was confirmed by the subordinate Judge on 6th February, 1922, and by the High Court in appeal on 22nd January, 1924. The declaration of title made in the suit in favour of Gurunath was subsequently set aside by the Privy Council and the Order in Council giving effect to the judgment was made on 10th November, 1932. The title of Narayan Patil to the lands in question was thus established. Thereupon Narayan Patil instituted a suit on 25th November, 1932, claiming possession of the suit properties on the strength of title established in his favour by the judgment of the Privy Council. The suit having been filed more than 12 years after 24th February, 1920, when Gurunath was put in possession. Narayan Patil claimed the benefit of Section 15 of old Limitation Act. He also made an application for restitution. The suit was dismissed as barred by time and his application for restitution was also held to be not maintainable. The matter was then taken up to the Privy Council by Narayan Patil and it was in this context that the Privy Council made the following observations relied upon by learned counsel for the appellants :

> "Sir Thomas Strongman contended strongly that since the title of the contending parties was involved in the suit, it would be quite futile to institute a suit for possession. Their Lordships are unable to appreciate this point for the institution of a suit can never be said to be futile, if it would thereby prevent the running of limitation."

26. From the facts stated above it would be clear that Narayan Patil' case is clearly distinguishable. Keeping in view the nature of the relief claimed and the decree passed in Gurunath' suit, Narayan Patil, who had not been dispossessed in execution or in consequence of the decree passed in that suit, was not entitled to get back possession in restitution proceedings on the case being ultimately decided in his favour by the Privy Council and he had, therefore, to file a suit for possession within limitation. In the instant case, however, suit No. 377 of 1953 being decided in their favour, respondents 7 to 10 who had been dispossessed in consequence of the *ex parte* decree passed in that suit would have, as already pointed out above, succeeded in getting possession in restitution proceedings and in these circumstances their non-institution of a suit under Section 209 of the U. P. Zamindari Abolition and Land Reforms Act would not be fatal for them.

27. The grounds on which the learned single Judge had allowed the writ petition not having been assailed, as already observed above, and the various submissions made in support of the appeal having failed, the appeal, in our opinion, deserves to be dismissed. It is accordingly dismissed with costs.

Appeal dimissed.

Cases Referred.

11965 All LJ 525
2AIR 1964 And Pra 109

3AIR 1949 All 730
4AIR 1966 SC 948
5AIR 1942 Pes 11
618 All LJ 729
71937 All LJ 1107
8AIR 1941 Pat 577
9AIR 1922 PC 269
10(1871) 3 PC 465
11(1909) ILR 31 All 551 (PC)
12AIR 1929 Lah 657
13AIR 1964 Mad 404
14AIR 1966 Cal 637
15AIR 1969 Jam and Kas 8
16AIR 1970 SC 1173
171958 SCR 1052
18(1964) 4 SCR 991
19AIR 1971 SG 2039
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21AIR 1949 PC 5