

CALCUTTA HIGH COURT

Bhabaranjan Das Dewri

Vs

Nibaran Chandra Gupta

(Derbyshire, C.J.)

09.02.1939

JUDGMENT

Derbyshire, C.J.

1. The appellant appeals from the decision of the Additional District Judge, Fourth Court, Bakerganj, dated 23rd April 1938, whereby the learned Judge reversed the order of the Munsif whereby the respondent was ordered to pay a sum of Rs. 80 to the appellant under Section 144, Civil P.C. The facts are these : In 1928 an ex parte decree of ejectment was obtained by the decree-holder respondent against the appellant in respect of his homestead. The homestead was sold to satisfy the cost of that decree and the appellant took proceedings to set aside the sale. In the course of those proceedings on 13th June 1931 the appellant deposited the sum of Rs. 80 with the Court for payment to the auction-purchaser of the homestead, in accordance with the provisions of Order 21, Rule 89, Civil P.C. On 28th February 1933, in a suit by the appellant the decree of ejectment was set aside on the ground of fraud. On 29th March 1933, there was an appeal against the decree of setting aside the ejectment decree which was dismissed. There was a subsequent appeal in the same matter to this Court which was heard and dismissed on 18th February 1936. On 11th June 1937, the appellant applied to the Court for restitution in respect of the deposit and his application was granted by the learned Munsif but as stated above reversed on appeal by the Additional District Judge. The Additional District Judge held that the application for restitution was time-barred as being more than three years after 28th February 1933. Now the application for restitution was made under Section 144, Civil P.C., which provides thus: Where and in so far as a decree is varied or reserved 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 such part thereof as has been varied or reversed....

2. The order for restitution in this case is one for payment of Rs. 80 to compensate the appellant for the Rs. 80 he paid to the auction-purchaser when his homestead was sold. The appellant was entitled to apply under Section 144, Civil P.C., for that compensation when the decree under which those proceedings had arisen was varied or reversed. That date was 28th February 1933. That was the proper date for him to apply. Article 181, Limitation Act, is applicable in a case of this kind and that provides that the period of limitation is three years from the time when the right to apply accrues. Here the right to apply accrued on 28th February 1933. Consequently, the

applicant's application was time barred on 11th June 1937. In coming to that conclusion I am giving effect to the principles laid down by this Court in *Hari Mohan Dalal v. Parmeswar Shahu*¹ and in *Saraj Bhusan v. Debendra Nath* with which judgments I respectfully agree. It has been suggested that we should use our powers under Section 151, Civil P.C., in favour of the appellant. I do not agree. It appears to me that the appellant either forgot about this Rs. 80 or slept on his rights with regard to it. That is not such conduct as would induce this Court to invoke the special powers under Section 151, Civil P.C. In my opinion this appeal must be dismissed with costs, hearing fee being assessed at two gold mohurs.

B.K. Mukherjea, J.

3. I agree with my Lord, the Chief Justice, in holding that this appeal should be dismissed. There is no dispute about the facts of the case which lie within a short compass. The respondent Nibaran Chandra Gupta obtained an ex parte decree in an ejectment suit sometime in the year 1928. In execution of the decree for costs passed in that suit the homestead of the appellant was sold and he had to deposit a sum of Rs. 80 in that Court to set aside the sale. He instituted a suit in the Court of the First Munsif at Perojpur to set aside the ex parte decree on the ground of fraud. That suit succeeded and the ex parte decree was set aside by the Munsif by his judgment dated 28th February 1933. Against this decision there was an appeal taken by Nibaran which was dismissed by the First Appellate Court on 29th March 1934. Thereupon a second appeal was taken to this Court and this appeal was eventually dismissed on 18th February 1936. On 11th June 1937 the appellant started a proceeding for restitution under Section 144, Civil P.C., and he wanted to recover the sum of Rs. 80 as compensation for the loss of his deposit. This application was resisted principally on the ground that it was barred by limitation. The trial Court negatived this plea. On appeal the judgment of the trial Court was set aside and the Additional District Judge of Bakerganj rejected this application for restitution on the ground that it was time-barred.

4. The sole controversy in this appeal centres round the point as to whether the time would run from the date when the ex parte decree was set aside by the Munsif on 28th February 1933 or from 18th February 1936 when that judgment was affirmed in second appeal by this Court. It is not disputed by the learned advocate who appears for the appellant that the present case would be governed by Article 181, Limitation Act. Both the Courts below have proceeded on this footing and this is in accordance with the view taken in a majority of cases by this Court since the passing of the present Code. This is also the view of the Allahabad, Lahore and Patna High Courts, though contrary opinions have been expressed by the Madras and Bombay High Courts which still adhere to the view that an application for restitution is really an application in execution of the decree. The question therefore that really falls for determination is as to whether the time for such an application ought to be calculated from the date of the decision of the last appeal, or from the decree which for the first time gave the appellant a right to apply for restitution. It is conceded by the learned advocate for the appellant that he had undoubtedly the right to pray for restitution at the time when the judgment was passed by the Munsif. His contention is that it was not necessary for him to apply at the first opportunity as there was an appeal taken against that decision of the trial Judge and he could wait till the judgment of the Appellate Court was pronounced. After the Appellate Court had passed its decision the decree of the trial Court would no longer be in existence and he would be entitled to base his rights to get restitution on the Appellate Court's decree. I find myself unable to accept this contention as tenable. If the right to apply for restitution was available to the appellant as soon as the first Court

passed its judgment, time would certainly begin to run from that date under Article 181 and the mere fact that the judgment was challenged by way of an appeal which might eventually set it aside, does not, in my opinion, operate to suspend the running of time. Nor would the Appellate Court's decree into which the decree of the trial Court would undoubtedly merge give the party a fresh starting point for limitation.

5. Mr. Chatterjee who appears for the appellant has referred us to a number of cases. The decision in *Atul Chandra Sinha v. Kunja Behari Sinha*² has been distinguished and elaborately commented upon in . The other cases of which the decision in *Fazlar Rahaman v. Abdul Samed*³, may be taken as a type, proceed on the analogy of applications for 'making a decree final in a partition or mortgage suit. It has been held in *Uma Charan v. Nibaran Chandra*⁴ and also by the Judicial Committee in *Jowad Hussain v. Gendan Singh*⁵ that when a preliminary decree is affirmed in appeal, an application for making the decree final within three years from the date of the affirmance of the Appellate Court's judgment is within the prescribed period under Article 181, Lim. Act. I agree with Sir George Rankin in saying that the governing principle in such cases is, that only one decree can be made final and that is the decree of the Appellate Court. In cases therefore where an appeal has been taken from the trial Court's decision, it is the preliminary decree passed by the Appellate Court that can be made final and the right to apply to make the decree final would undoubtedly arise when the Appellate Court has affirmed the judgment of the trial Judge. This principle, in my opinion, is not applicable to the present case. Nothing here was dependent upon the affirmance of the trial Court's decision by the Appellate Court in order to entitle the appellant to pray for the relief which he now seeks. I am not also impressed by the decision of the Rangoon High Court *Muthukarappan Chettyar v. Annamalai Chettyar*⁶ to which our attention has been drawn by Mr. Chatterjee and which is to be found reported in *Muthukarappan Chettyar v. Annamalai Chettyar* (1933) 20 A.I.R. Rang. 180(SUUPRA). The Rangoon High Court has followed the Madras and the Bombay view and has held that in case of an application for restitution it is Article 182 and not Article 181, Limitation Act that is applicable. That as I have said, is quite different from the view which has been consistently taken by this Court since 1908. I therefore agree with my Lord, the Chief Justice, and following the decisions in *Saraj Bhusan v. Debendra Nath* and *Hari Mohan Dalal v. Parmeswar Shahu* , hold that the application for restitution has been rightly held to be time-barred.

6. A faint attempt has been made by the learned advocate for the appellant to induce us to hold that, at any rate, he was entitled to relief under Section 151, Civil P.C. As my Lord the Chief Justice has pointed out, the facts of this case are not such as would justify the Court in exercising its inherent powers. If the case according to the appellant does not come within the purview of Section 144 of the Code, it was open to him to seek his remedy by way of a separate suit. For these reasons I agree with my Lord the Chief Justice in the order that he has made.

Cases Referred.

1(1928) 15 A.I.R. Cal. 646

2(1918) 5 A.I.R. Cal. 457

3(1926) 13 A.I.R. Cal. 981

4(1923) 10 A.I.R. Cal. 389

5 (1926) 13 A.I.R. P.C. 93

