

Birendra Nath Basu Thakur and anr. Vs. Surendra Kumar Basu Thakur and ors.

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Court : Kolkata

Decided On : Jan-19-1940

Reported in : AIR1940Cal260

Appellant : Birendra Nath Basu Thakur and anr.

Respondent : Surendra Kumar Basu Thakur and ors.

Judgement :

1. These three appeals arise in three proceedings started under Section 144, Civil P.C., by three sets of plaintiffs. The said plaintiffs brought a suit in the Court of the Subordinate Judge at Dacca for possession of 3 annas, 12 gandas share of a property known as the Taltola hat and bazar (Title Suit No. 33 of 1920). There were twenty-two defendants in that suit. On 23rd January 1922 the learned Subordinate Judge dismissed the suit except with regard to a share in four small parcels of land. No cost was awarded to any of the parties. The plaintiffs appealed to this Court. On 28th May 1925 that appeal was decreed against nine of the defendants and the plaintiffs were awarded costs of both Courts against the said defendants. The said nine defendants preferred an appeal to His Majesty in Council and while the said appeal was pending the plaintiffs took possession (in Title Execution No. 174 of 1925) and took proceedings for realizing the costs decreed by the High Court from one of the defendants, Surendra Kumar Basu Thakur, in Title Execution No. 200 of 1925. Surendra Kumar deposited in Court a

sum of Rs. 3434-4-3 representing the said cost on 17th December 1925 and the plaintiffs withdrew the same from Court on 6th January 1926. The appeal to His Majesty in Council was allowed on 27th February 1930. The decree of the learned Subordinate Judge was restored, except with regard to the share of the aforesaid four small parcels of land in respect of which a further enquiry was directed : Kamini Kumar Basu v. Birendra Nath Basu . The order of His Majesty in Council directed the parties to bear their costs throughout up to that stage. It further directed that 'any costs paid under the said decree of that Court (High Court) ought to be returned' : (Part I, page 56).

2. Three applications for restitution were made under Section 144, Civil P.C. The particulars are shown in the following table.

(The table is given on page 262)

3. One of the said nine defendants, Benoy Kumar Basu, did not make any application but was an opposite party. At the hearing Krishna Kumar and Paresh Chandra expressly stated that they were all along in possession and so they did not claim mesne profits. The learned Subordinate Judge by his order dated 6th July 1936 held that the applications were not barred by time.

Date of applic- ation.	No. in Lower Court.	Corresponding No. of the appeal.	Nama of the applicants.	Relief prayed for.
12.8. 1935	Misc. Case No. 656 of 1935	No. 56 of 1936	SurendraKumar Basu for self	1. Restoration of possession join-ly with the other seven defendants.

|| |ting his bro-|

|| |ther Debendra|

|| |Kumar Basu. |

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|| |2. Refund of the cos-

|| |ts realized by the

|| |plaintiff (Rs. 3434

|| |-4-3) with interest.

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27.1. | Misc. Case | No. 658 fo |Kamini Kumar |1. Restoration of pos-

1936 | No. 22 of | 1936. |Basu and four| session jointly

| 1936. | |of the other | with the other

|| |nine defenda-| the other defend-

|| |ants, includ-| ants.

|| |ing Debendra |

|| |Kumar Basu. |

|| |2. Mesne profits.

20.3 | Misc. Case | No. 657 of |Krishna Kumar| Restoration of

1936. | No. 23 of | 1936. |and Paresh | possession joi-

| 1936. | |Chandra Basu.| ntly with the

| | | | other defendants.

4. He directed restoration of possession and decreed mesne profits to the applicants of the first two applications according to their shares. He also directed the plaintiffs to refund to Surendra Kumar Basu the said sum of Rs. 3434-4-3 with interest at 12 per cent, per annum from 6th January 1926 till payment.

5. The following points have been urged by the learned Advocate for the appellants : (i) the applications are barred by time, (ii) Assuming that the applications are not barred by time : (a) interest cannot be claimed on the aforesaid sum of Rs. 3434-4-3; (b) in any event the rate of interest allowed is very high; (c) mesne profits cannot be allowed in favour of the applicants of Miscellaneous Case No. 56 of 1935 and (d) the share of the applicants of the Miscellaneous Case No. 22 of 1936 and of 56 of 1935 in the mesne profits is less than what has been declared.

6. The learned Subordinate Judge has held that the applications are governed by Article 183, Limitation Act. His view is that the applications are for enforcement of the Order of His Majesty in Council. This view, which has the support of the High Court of Allahabad Brij Lal v. Damodar Das (1922) 9 A.I.R. All 238 and Sohan Bibi v. Baijnath Das (1928) 15 A.I.R. All. 293, has been challenged by the appellants' advocate, who contends that Article 181 is applicable, time running from 27th February 1930, when the Order in Council was made. As far as we are aware there is no decision of this Court on the point.

7. One matter must be taken to be settled in this Court, namely that an application for restoration under Section 144, Civil P.C. is not an application for execution of the decree] of the final Court of Appeal. A different view has been taken in some of the other High Courts, but in Saraj Bhusan Ghose v. Debendra Nath Ghose (1932) 19 A.I.R. Cal. 308, Rankin C.J. declined to refer the matter to a Full Bench for reconsideration of the view taken by this Court on the ground that other High Courts had taken a different view. We are not prepared to dissent from the long line of cases decided by this Court and must hold that such an application is not

application for execution. It may however be pertinent to point out - though there are weighty authorities of some of the other High Courts the other way - the view taken by this Court, has the approval of two Full Benches, namely of the Patna and of the Allahabad High Courts *Balmukund Marwari v. Basanta Kumari Dassi* (1925) 12 A.I.R. Pat. 1 and *Parmeshwar Singh v. Sital Din Dube* : AIR1934 All626 . We are not unmindful of the fact that a Special Bench of the Patna High Court *Bhaunath Singh v. Kedarnath Singh* (1934) 21 A.I.R. Pat. 246, has overruled *Balmukund Marwari v. Basanta Kumari Dassi* (1925) 12 A.I.R. Pat. 1. It has accordingly been held in this Court that where restitution is required by reason of a final decree passed by a Court in India in an appeal from a mufassil decree Article 181 and not Article 182, Limitation Act is applicable to an application made under Section 144, Civil P.C. If Article 183 is of the same scope as Article 182, the case before us would be governed by Article 181 in spite of the fact that restitution here is required by reason of the order of His Majesty in Council. It has however been urged before us by the respondents' advocate that the language used in col. 1 of Article 183 is different from the language used in col. 1 of Article 182.

8. The last-mentioned Article contemplates, says he, only applications for execution of decrees not falling within Article 183 and no other application, while Article 183 contemplates not only such applications, i.e., for execution but applications :of other kinds. This, he submits, is indicated by the use of the additional word 'enforce' used in the last-mentioned Article. There is authority for the proposition that the word 'enforce' is of wider import than the word 'execute'. The way in which an application to have a final decree under Order 34, Rule 5 on the basis of a preliminary decree passed by this Court in its ordinary original jurisdiction was sought to be distinguished by Sanderson C.J. and Buckland and Mukherji JJ., in *Pell v. Gregory* : AIR1925 Cal834 from an application for a personal decree under Order 34, Rule 6 after the sale of the mortgaged properties in pursuance of a decree of that Court, lends some support to the contention that the word 'enforce' is of wider import than the word 'execute.' The observation of Rankin J. (as he then was) at p. 846 of the report would however indicate that there is no substantial difference between the word 'enforce' and 'execute,' an observation which gets support from the language of Order 21, Rules 31 and 32 and the marginal note and provisions of Order 45, Rule 15, Civil P.C. Be that as it

may, in our judgment it does not necessarily follow from the said distinction that an application made under Section 144 to have restitution in consequence of an Order of His Majesty in Council is governed by Article 183. The matter has to be examined on broader grounds.

9. The power of a Court to direct restitution is inherent in the Court itself. It rests on the principle that a Court of justice is under a duty to repair the injury done to a party by its act *Rodger v. Comptoir d' Escompte de Paris* (1871) L.R. 3 P.C. 465 and *Jai Berham v. Kedar Nath Marwari* (1922) 9 A.I.R. P.C. 269. The right of a party to have restitution and the duty of the Court to give him restitution do not rest on the provisions of Section 144, Civil P.C., which defines the procedure only in one class of cases requiring restitution by enacting that the application for restitution is to be made in the Court of first instance. The other part of the Section gives the measure of restitution and empowers that Court to determine the form and amount of restitution. Such being the principle of restitution, the fiction of an implied direction by the final Court of appeal which had reversed an intermediate decree need not and, in our judgment, cannot be introduced. The wider words 'enforce a judgment, etc.,' used in Article 183, Limitation Act should, in our judgment, be given their ordinary significance, namely 'carrying out what has been directed to be done in the judgment,' etc. That final judgment or decree furnishes only the foundation to a claim for restitution gives authority for the view that restitution is necessary. An application for restitution is not one for enforcement of that judgment or decree, but in the words of Rankin C.J., it is an application for relief which is consequential upon the Appellate Court's decree of reversal *Hari Mohan Dalal v. Parmeshwar Shau* : AIR1928 Cal646 at p. 77. Proceedings for restitution, in our judgment, are proceedings which are no doubt dependent upon the final result of the suit, but they are in a sense independent of the proceedings in the suit, for new issues which were not issues in the suit, require adjudication for giving complete or adequate relief. The order for restitution is in effect a new decree, which has to be enforced by another execution. Accordingly, on the principles laid down by the Full Bench in *Pell v. Gregory* : AIR1925 Cal834 , an application for restitution cannot be regarded as one for enforcement of the final judgment or decree within the meaning of Article 183. We cannot accordingly agree with decisions of the Allahabad High Court in *Madhu Sudan Das v. Brij Lal*

(1921) 61 I.C. 806; Brij Lal v. Damodar Das (1922) 9 A.I.R. All 238 and Sohan Bibi v. Baijnath Das : AIR1928 All293 . We prefer to follow the reasonings of Sen J. in the last mentioned case, who in spite of his own personal views agreed with the decision in Brij Lal v. Damodar Das (1922) 9 A.I.R. All 238 on the ground that that was a binding authority on him. Article 183 being out of the way the residuary Article, Article 181 applies and the applications made by the respondents for restitution are barred by time.

10. We now proceed to deal with the other points raised in the appeals, though they are not necessary on the view we have taken on the question of limitation. The order of His Majesty in Council has expressly given a direction for the return of the costs which the appellants had realized from Surendra Kumar Basu, one of the respondents, in execution of the decree passed by this Court. If that portion of the Order in Council were enforced in execution thereof interest could not have been realized, as there is no direction for payment of interest *Forester v. Secretary of State* (1877) 3 Cal. 161. In these circumstances it would not have been proper to allow interest, though ordinarily interest is a part of the normal relief given in restitution *Guran Ditta v. T.R. Ditta* . Even if interest had to be awarded we think that 12 per cent, per annum would be a high rate. Six per cent could have been a proper rate.

11. We think that the applicants of Miscellaneous Case No. 56 of 1935 would have been entitled to have mesne profits, if their application for restitution had not been barred by time. No doubt they did not make a prayer for the same, but in their application they expressly stated that the appellants had taken possession in execution of the decree of this Court and were still in possession. They prayed for restoration of possession. In these circumstances it would have been the duty of the Court in pursuance of the power conferred on it by Section 144 of the Code, to allow them mesne profits. There is a slight miscalculation of the shares. The share of the applicants in Miscellaneous Case No. 56 is $\frac{2}{10}$ ths and of the applicants in Miscellaneous Case No. 22 of 1936 is $\frac{5}{10}$ ths.

12. At the conclusion of the hearing we were told that proceedings for execution of the order of the learned Subordinate Judge made under Section 144 of the Code

have been started. The claim of the respondent, Surendra Kumar Basu, to get a refund of Rupees 3434-4-3 which has been realized from him by the appellants is not barred by time even now, for that claim can be enforced in execution of the order of His Majesty in Council as that order expressly directs a refund. Article 183, Limitation Act would apply to such an execution. If the order of His Majesty in Council had been put into execution for realizing the said sum, interest could not have been allowed to Surendra Kumar Basu. The money had, however, been realized by the appellants from him in 1926. In these circumstances we intimated to the learned Advocates if their clients would consent to treat the application for execution already made as an application for execution of the order of His Majesty in Council so far as it related to the realization of the said sum. They have given their consent. We accordingly direct the lower Court to convert the said application for execution into an application by Surendra Kumar Basu for execution of the order of His Majesty in Council for the realization of the said sum of Rupees 3434-4-3. We have already ruled that no interest can be allowed on the same.

13. The result is that all these appeals are allowed. We direct the parties to bear respective costs of this Court and of the Court below, except that the appellants would be entitled to realize from the contesting respondents the amount they had paid as court-fees on the Memoranda of Appeals and one fifth of the paper-book costs.