

Raj Kumar Sen Vs. Annoda Charan Sen

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Court : Kolkata

Decided On : Jan-24-1911

Reported in : 9Ind.Cas.246

Judge : Chitty and ;Coxe, JJ.

Appellant : Raj Kumar Sen

Respondent : Annoda Charan Sen

Judgement :

1. The case out of which this appeal arises was a suit; brought by the plaintiff against the defendant for rent under the Bengal Tenancy Act. That suit came on for hearing before the Munsif, and the defendant summoned the plaintiff to appear as his witness. The plaintiff was examined as the defendant's witness and the Munsif allowed him Rs. 36 as his expenses in the matter of giving his evidence in that case. The plaintiff executed that order at once and realized that amount.
2. The Munsif decreed the plaintiff's claim with costs. The Rs. 36 did not form any part of the substantive decree, both because it had been already paid, and because it was part of the defendant's costs, but it was scheduled as an item in the defendant's costs.
3. In the appeal before the Subordinate Judge, the defendant took exception both to the decree for rent and to this order for compensation as it has been called. The Subordinate Judge dismissed the defendant's appeal in the rent suit, but passed

an order that the plaintiff must re-pay to the defendant the Rs. 36 which he had recovered from him as above stated. This was on the 10th of April 1906. In September 1908; the defendant applied for execution of that order and a notice under Section 248 of the Civil Procedure Code of 1882, was issued. It appears that the defendant realized Rs. 5 out of the Rs. 36 but failed to obtain the rest.

4. The plaintiff appealed against the order and on the 11th of June 1909, the learned District Judge held that execution could be taken out. Before this appellate order, namely, on the 26th of March 1909., the defendant applied to the Munsif for transfer of his decree or order for execution to another Court namely that of the Sudder Munsif. The present application for execution was filed before the Sadder Munsif on the 23rd of July 1909.

5. Both the Court of first instance and the lower appellate Court have held that the defendant's application for execution was barred by limitation and the defendant has appealed.

6. The first question which arises is whether the application for transfer, which was made on the 26th of March 1909, can be said to be the initiation of the present application for execution. If it can, the present application would be within three years from the date of the order of the 10th of April 1906.

7. This point was, however, decided against the contention of the present appellant so long ago as 1889 in the case of Nilmony Singh Deo v. Biressur Banerjee 16 C. 744. So far as we know, that case has never been overruled or dissented from, though there have been other cases which are distinguishable from that case, namely, cases where it has been held that an application for transfer may be regarded as an application to the Court to take a step-in-aid of execution within the meaning of Article 179 of the Limitation Act of 1877.

8. The contention, therefore, of the present appellant that his present application really commenced on the 26th of March 1909 cannot be supported.

9. Then it is said that the Bengal Tenancy Act has no application to this case and that the provisions of Article 6 of Schedule III. to that Act cannot be made

applicable to it That article was amended in 1908, and for the words under this Act or any Act repealed by this Act' were substituted, the words in a suit between the landlord and tenant to whom the provisions of this. Act are applicable.' It is not easy to comprehend the precise argument of the applicant's, pleader, because at one moment he described this order for restitution as a decree and at another moment he characterized it as an order for restitution arguing that as an order for restitution, it would fall under Section 144 of the present Code of Civil Procedure; and that Article 179 of the Limitation Act of 1877, that is, Article 182 of the Limitation Act of 1908, would apply. We do not think that there is any force in this contention. This order can only be regarded as an order or a decree of the appellate Court ordering the plaintiff-respondent to pay a portion of the defendant's costs which had been awarded against the defendant in the Court below. It was certainly made in a suit between the landlord and tenant to whom the provisions of the Bengal Tenancy Act are applicable and as such it seems to us to fall directly within the purview of Article 6 of Part III of Schedule III to that Act. It would, therefore, be out of time, the period of limitation prescribed by that article being 'three years from, the date of the decree or order or where there has been an appeal, the date of the final decree or order of the appellate Court.

10. It was next argued, that the Court made an illegal order in awarding compensation, and that it would be a gross injustice to allow the plaintiff to retain this sum, and that the Court should interfere under Section 151 of the Civil Procedure Code of 1908 and pass an order on the plaintiff to re-pay the amount. We are of opinion that Section 151 has no application to such a case as the present. It says, 'Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.' That section does not authorize this Court to override the express provisions of the Limitation Act or Bengal Tenancy Act and, we may point out that as a matter of fact the order upon the defendant to pay this compensation is no longer in existence, because, it was reversed and an order was passed upon the plaintiff to re pay the money by the Subordinate Judge so long ago as the 10th of April 1908. It is only by his own laches in not prosecuting the execution proceedings upon that order, that the defendant has now lost the remedy which he at one time possessed.

11. The appeal, therefore, must be dismissed but in the circumstances we make no order as to costs.

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