

Profulla Kumar Basu Vs. Mt. Sorojbala Basu and ors.

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Court : Kolkata

Decided On : Aug-25-1930

Reported in : AIR1931Cal332

Appellant : Profulla Kumar Basu

Respondent : Mt. Sorojbala Basu and ors.

Judgement :

Rankin, C.J.

1. This is an appeal from an order made in an execution case. It appears that the decree under execution was made upon the basis of an arbitrator's award. Then defendant 4, who claimed certain rights under the decree, took out proceedings in execution in order to recover a sum of Rs. 7,000 which it is said she was to receive.; from the plaintiff as the value of her share of a certain house. There are the several objections taken on part of the appellant to the order which has been made granting her execution of the decree. The first objection to be considered is the question of limitation. it appears that the date of the decree was 22nd November 1922 and the money claimed was payable within one year from that date. In December 1922 however the lady applied under O. 9, Rule 13, Civil P. C, to set aside the decree as having been passed against her ex parte. This application was dismissed in 1923 and she took an appeal to this Court which was dismissed on 28th July 1926. The application for execution with which we are now conjoined was brought on 16th January 1928. The learned Subordinate Judge

was of opinion that Section 14, Limitation Act, could be applied to a case of this character; but Mr. Mitter on behalf of the respondents very properly concedes that that view is untenable. He claims however that the application for execution was brought within time by reason of the provision in Clause 2, Article 182, Schedule 1, Limitation Act:

(Where there has been an appeal) the date of the final decree or order of the appellate Court.

2. And he cites as an authority for his contention the case of *Lutful Huq v. Sambhudin Pathak* [1882] 8 Cal. 248. He also cites as authority the case of *Somar Singh v. Deonandan Prosad Singh* A.I.R. 1927 Pat. 215 in further support of his contention. The view put forward is that the phrase 'where there has been an appeal' is not expressly limited to a case where there has been an appeal from the decree which is sought to be executed, and accordingly Mr. Mitter contends that, as there was time expended in appealing from the order refusing to restore the suit under O. 9, Rule 13, Civil P. C, that time must be taken into account in his clients' favour. I dissent altogether from the case which has been cited and I am glad to find that in the case of *Firaji v. Ram Chandra* [1892] 16 Bom. 123 and, more recently, in the case of *Fakir Chand Mondal v. Daiva Charan Parui* : AIR1927 Cal904, this case has been disapproved. It is quite true that the phrase is merely 'where there has been an appeal.' It has to be remembered that when this clause was first put into the schedule to the Limitation Act the law as to this matter had been well settled. The view was expressed in the case of *Ram Charan Basak v. Lakhi Kant Banik* 7 Bang. L.R. 704, the judgment of Dwarkanath Mitter, J., being subsequently canvassed in the Privy Council. Where there is an application to set aside a decree and restore a suit, that application may occupy a substantial period of time for its determination; exactly the same, if somebody brings a suit to set aside a decree on the ground of fraud. It may take more than a year to get that matter determined. But it is a mere accident that there should be, an appeal in either case from the order of the Court of first instance, and it seems to me to be quite impossible to say that Clause 2, Article 182, is intended to cover an appeal from an order refusing to set aside a decree. In my judgment that contention is entirely unfounded. I do not say that the case in *Somar Singh v. Deonandan*

Prosad Singh, to which I have referred, was itself wrongly decided. I observe that in that case the Court was most careful to distinguish and not to dissent from the opinion expressed in ' the case of Rai Brijraj v. Nauratan Lal [1918] 3 Pat. L.J. 119, which is an express authority in favour of the appellant in the present case.

3. In my judgment this appeal must be allowed and the whole proceedings in execution must be dismissed with costs in both the Courts. The hearing-fee in this Court is assessed at two gold mohurs.

C.C. Ghose, J.

4. I agree.

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