

(1917) 08 CAL CK 0029
In the Calcutta High Court

Atul Chandra Singha by his Mother and Next Friend Srimati Nani Bala Dassi APPELLANT

Vs

Kunja Behari Singha RESPONDENT

Date of Decision : 22-08-1917

Acts Referred:

Limitation Act, 1963 — Article 181(1)

Citation : 43 Ind. Cas. 775

Hon'ble Judges : Beachcroft, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This is an appeal against an order for restitution made by the lower Appellate Court in confirmation of that of the trial Court. The appellant was the plaintiff in a suit for partition of joint property brought against the respondent and other person. A preliminary decree was made on the 9th September 1910. The defendant other than the respondent preferred an appeal against that decision. That appeal was ultimately allowed and the preliminary decree was set aside in its entirety on the 29th November 1911. The appellant thereupon preferred a second appeal to this Court. That appeal was dismissed on the 19th April 1915. Meanwhile, on the 1st September 1911 the final decree had been made by the Court of first instance on the basis of the preliminary decree of the 9th September 1910. The appellant was entitled to receive certain sums from the respondent under the final decree so made, and on the 29th April 1911 he realised these sums. On the 10th April 1916 the respondent applied for restitution of those sums of money. The Court of first instance allowed the application on the 17th June 1916 and that order was confirmed by the lower Appellate Court on the 24th August 1916. The question in controversy is whether the order for restitution has been properly made.

2. It is clear that the effect of the cancellation of the preliminary decree was to render inoperative the final decree. This view is supported by the decision in Abdul Jalil v. Amar Ghand Paul 21 Ind. cas. 510 : 18 C.L.J. 223, where it was

ruled that when a preliminary decree for partition has been set aside on appeal, no effect remains in the final decree which may have been passed pending the appeal from the preliminary decree. We must take it, then, that the final decree is no longer operative. Consequently the respondent is entitled to restitution of the sums levied from him by the appellant on the basis of that decree. This is clear from the decision in *Asutosh Goswami v. Upendra Prosad Mitra* 38 Ind. Cas. 17 : 24 C.L.J. 467 : 21 C.W.N. 564. It was there pointed out that the doctrine of restitution applies, not only when the decree has been set aside directly on review or by way of appeal, but also where the decree ceases to be operative by reason of cancellation of another decree or order which forms its foundation. The respondent is thus entitled to restitution from the appellant if his claim is not barred by limitation.

3. The appellant contends that the rule applicable to eases of this character is contained in Article 181 of the First Schedule to the Indian Limitation Act, and that the application should have been made within three years from the date when the preliminary decree was reversed by the lower Appellate Court, that is, from the 29th November 1911, As explained in *Asutosh Goswami v. Upendra Prasad Mitra* 38 Ind. Cas. 17 : 24 C.L.J. 467 : 21 C.W.N. 564 it is not necessary, for us to decide whether any rule of limitation is applicable to eases of this character, because even if Article 181 applies, time ran against the respondent from the date when the final pronouncement was made in the proceedings instituted to test the propriety of the preliminary decree. An application for restitution immediately on reversal of the preliminary decree by the first Appellate Court would have been futile; the appellant, who had preferred a second appeal, cannot very well maintain the position that the respondent should have pressed for restitution at a time when the appellant was seriously controverting the decision of the lower Appellate Court as to the correctness of the preliminary decree. If an application had been made at that stage, it would have been undoubtedly contended that no restitution should be allowed till the question of the correctness of the preliminary decree had been finally decided by the ultimate Court of Appeal where the appellant had lodged an appeal.

4. We are accordingly of opinion that the order of the District Judge must be affirmed and this appeal dismissed with costs. We assess the hearing fee at one gold mohur.