

(1968) 07 PAT CK 0027
In the Patna High Court
Case No : M.A. No. 319 of 1966

Raghunath Prasad

APPELLANT

Vs

Rakhi Sah

RESPONDENT

Date of Decision : 23-07-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 151

Citation : (1969) 17 BLJR 709

Hon'ble Judges : S.N.P. Singh, J;Kanhaiya Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

S.N.P. Singh, J.—This miscellaneous second appeal by the plaintiff arises from the order dated the 18th of December, 1964, passed by the Additional Munsif, Motihari, in Miscellaneous Case No. 27 of 1964. The learned Munsif by the said order allowed an application for restitution u/s 144 of the CPC filed by Rikhi Sah, one of the defendants. Being aggrieved by the said order of the learned Additional Munsif, the plaintiff preferred Miscellaneous Appeal No. 2 of 1965, which was heard by the 2nd Additional Subordinate Judge of Motihari. The learned Additional Subordinate Judge by his order dated the 5th of March, 1966, dismissed the miscellaneous appeal. The plaintiff then preferred this miscellaneous second appeal in this Court.

2. It appears that the plaintiff filed Title Suit No. 105 of 1955/56 for declaration of title and recovery of possession in respect of 3 Dhurs of land of Survey plot No. 14, khata No. 2 of village Belwa Piperapati in the district of Champaran. The trial court dismissed the suit with costs. The plaintiff then preferred an appeal being Title Appeal No. 57/2 of 1955/57. The first appellate court allowed the appeal and decree the suit. The plaintiff then filed Execution Case No. 38/57-365/57 and obtained delivery of possession over the suit land on the 30th of June, 1958. In the meantime, the said defendant being aggrieved by the judgment and decree of the first appellate court preferred a second appeal in this

Court which was numbered as Second Appeal 502 of 1957. The High Court by its judgment the 12th of November, 1959, allowed the appeal and remanded the case to the lower appellate court for a fresh hearing of the appeal in accordance with law. The first appellate court after a fresh hearing of the appeal dismissed it by its judgment dated the 30th of April, 1960. The plaintiff thereupon preferred a second appeal in the High Court which was numbered Second Appeal 550 of 1960. That appeal was ultimately dismissed on the 12th of July, 1961. The application for restitution u/s 144 of the Code of Civil Procedure, which has given rise to the present appeal, was filed by the defendant on the 12th of June, 1964.

3. It appears that the plaintiff appellant filed a rejoinder to the petition for restitution which has been filed by the defendant. The plaintiff objected to the prayer of the defendant for restitution on two grounds, namely, (1) that the application for restitutions barred by limitation, and (2) that defendant Rikhi Sah was not entitled to claim restitution of the properties because the lower appellate court in its judgment dated the 30th of April, 1960, did not hold that the settlement with the defendant had been proved according to law. In other even according to the judgment of the lower appellate court and as such he was not entitled to claim restitution of the suit lands. The learned Munsif overruled both the objections and allowed the miscellaneous case, as already stated. The lower appellate court, agreed with the view of the learned Munsif on both the points and dismissed the appeal.

4. Mr. Thakur Prasad, learned Counsel appearing for the appellant contended in this Court, as it was contended in the courts below that the application for restitution filed by the defendant was barred by limitation. According to learned Counsel, Article 181 of the Indian Limitation Act, 1908, applies in the case of an application for restitution u/s 144 of the Code of Civil Procedure. The courts below have held that an application in execution, Article 182 of the Indian Limitation Act, 1908, will be applicable. It is now well-settled by a decision of the Supreme Court in the case of Mahjibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai and Others, that an application for restitution is an application for execution of a decree, and, therefore, such an application is governed by Article 182 of the Limitation Act and not by Article 181 of the Limitation Act, which is a residuary article of limitation. As provided in Articles 182 of the Limitation Act 1908, the period of three years is to be counted from the date of the final decree or order of the appellate court or the date of withdrawal of the appeal. As I have already stated, the High Court dismissed Second Appeal No. 650 of 1960 on the 12th of July, 1961. The period of three years, therefore, began to run from the 12th of July, 1961. Before the expiry of the period of three years the application for restitution was filed on the 12th of June, 1964. Therefore, if the old Limitation Act was applicable, the application u/s 144 of the CPC filed by the defendant was well within-time. There is another aspect which has to be considered in this connection. The new Limitation Act came into force on the 1st of January 1964. under Article 136 of the new Limitation Act, twelve years limitation has been prescribed for the execution of any decree (other than the decree granting a

mandatory injunction) or order of any civil court. As provided under that article, the time begins to run from the date when the decree or order becomes enforceable. As I have already stated, the first appellate court dismissed the appeal on the 30th of April, 1960. Even if that be taken as the starting point for Limitation, the application for restitution filed on the 11th of June, 1964, was well within time. Therefore, in any view of matter, the application filed by defendant Rikhi Sah for restitution cannot be held to be time-barred.

5. Mr. Thakur Prasad next contended that the restitution application filed by Rikhi Sah ought not to have been allowed as Rikhi Sah has not been by any court to be the rightful owner of the disputed land. According to learned Counsel, as the defendant is a trespasser he cannot claim restitution of the lands in suit. It is really difficult to appreciate the argument made on behalf of the appellant. It is not disputed that according to the ultimate finding of the first appellate court the plaintiff was never in possession of the lands in dispute whereas the defendant was in possession thereof. It further appears that the lower appellate court held that the plaintiff had no subsisting title to the lands. One of the points which was formulated for decision by the first appellate court was whether the defendant acquired valid title by virtue of settlement or, in the alternative, by adverse possession. While considering that point, the learned Additional Subordinate Judge observed that it was not of any importance in the case as the plaintiff was to win or loss on his own case. He, however, expressed the view, disagreeing with the trial court, that the defendant has not proved the settlement. Mr. Thakur Prasad based his contention on the above finding of the first appellate court and relied on a decision of the Privy Council in the case of *S.N. Banerji and Anr. v. The Kuchwar Lime and Stone Company Ltd.* 8 BR 261 in Liquidation. I must state at once that the decision of the Privy Council in the above-mentioned case is of no assistance to learned Counsel appearing for the appellant. In that case there was no variation of decree. The question before their Lordships of the Judicial Committee was whether a restitution could be granted u/s 151 of the CPC to a trespasser who has been dispossessed by the rightful owner. Their Lordships held that a trespasser is not entitled to restitution against the person who is lawfully in possession. In the instant case the plaintiff's title and possession have been negatived in the suit and his suit has been dismissed. Admittedly before possession was delivered to the plaintiff, the defendant was in possession of the lands in suit. The defendant was deprived of his possession by the act of the Court. In that view of the matter, when the decree on the basis of which the executing court had put the plaintiff in possession was varied by the appellate court, the executing court has to restore the defendant back to possession of the disputed land. It is not at all material to consider as to what was the nature of possession of the defendant when he was dispossessed. For the reasons stated above, there is no substance even in the second contention of Mr. Thakur Prasad.

6. As both the above contentions fail, this appeal is dismissed with costs.

Kanhaiyaji, J.

7. I agree.