

(1928) 05 PAT CK 0007

In the Patna High Court

Rambu Jhawan Thakur and Others

APPELLANT

Vs

Bankey Thakur and Others

RESPONDENT

Date of Decision : 07-05-1928

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Citation : AIR 1928 Patna 598

Hon'ble Judges : Macpherson, J;Kulwant Sahay, J

Bench : Full Bench

Judgement

Kulwant Sahay, J.—The question involved in this appeal is, whether an application for restitution filed u/s 144, Civil P.C., is barred by limitation. The appeal is by the plaintiffs. The suit was for recovery of possession of 7 bighas 6 kathas 15 dhurs of land in mauza Basua. The plaintiff claimed possession of the land as a tenant on the ground that he had been dispossessed by the defendant who is his landlord. The suit was decreed on 11th February 1921, and in execution of the decree possession was delivered to the plaintiff on 18th February 1921. There was an appeal by the defendant which was decreed on 26th April 1922, and a second appeal to the High Court was dismissed on 21st April 1925, The defendant thereupon applied for restitution and possession was redelivered to him by Court in Asin 1333 (September or October 1925). The defendant thereupon, on 4th May 1926 made an application for ascertainment of mesne profits by way of restitution and for the recovery thereof for the period between 18th February 1921 and September 1925 during which period the plaintiff was in possession in execution of the decree of the trial Court. The question is whether this application is barred by limitation.

2. It is settled, so far as this Court is concerned, that the article applicable to an application for restitution is Article 181, Lim. Act. This point was decided by a Full Bench of this Court in Balmukund Marwari v. Basanta Kumari Dasi AIR 1925 Pat. l. The question is, from what date the period of three years under Article 181 is to be computed.

3. It is contended on behalf of the appellants that the period of three years should be computed from 26th April 1922 which was the date of the decree of the first appellate Court setting aside the decree of the trial Court and that as the application of 4th May 1926 was made more than three years after that date, the application was barred by limitation.

4. It is contended on behalf of the respondents that the period of limitation should be computed from the date of the High Court decree, viz., 21st April 1925, which was the date of the final decree in the suit. It is further contended on behalf of the respondents that under Art., 181 time began to run from the date when the right to apply accrued, and the right to apply for ascertainment of mesne profits accrued from the date of delivery of possession to the defendant in September or October 1925 and the present application made on 4th May 1926 was within the period of limitation.

Both the Courts below have held that the application was not barred by limitation.

5. The first question for decision, therefore, is, whether the three years should be computed from the date of the decree of the first appellate Court or from the date of the decree of the High Court. Article 181 provides that the period of three years is to be computed from the time when the right to apply accrues. The right to apply accrued in the present case on the passing of the final decree in the suit. The final decree was the decree of the High Court and, therefore, I am of opinion that the right to apply accrued from the date of the decree of the High Court as held by the Courts below. As was pointed out by Banerji. J., in *Gajadhar Singh v. Kishan Jiwan Lal* [1917] 89 All. 641, which was approved of by the Privy Council in *Jowad Hossain v. Gendan Singh* AIR 1926 P.C. 93, when an appeal has been preferred, it is the decree of the appellate Court which is the final decree in the case. No doubt this observation was made with reference to an application for & final decree in a mortgage suit and the question was whether the period of three years provided for by Article 181 should be computed from the date of the preliminary decree made by the trial Court or the decree made by the appellate Court on appeal against that decree. The principle, however, is the same. In every suit there can be only one final decree and that final decree is the decree of the Court of final appeal. I am, therefore, of opinion that the view taken by the Courts below in the present case that time began to run from the date of the decree of the High Court, viz., 21st April 1925, is correct and the application is not barred.

6. Even assuming that the right to apply accrued on the passing of the decree by the first appellate Court, viz., 26th April 1922, I am of opinion that the right to apply for ascertainment of mesne profits did not accrue until after the delivery of possession to the defendant which took place in September or October 1925. The period for which mesne profits were to be ascertained could only be determined after the delivery of possession. The first application for restitution relating to the delivery of possession was admittedly made within time, and the second application, if it cannot be considered to be in continuation of the first

application, could only be made after possession had been delivered in pursuance of the first application. In this view of the case also the application made on 4th May 1926 was not barred.

7. This appeal is dismissed with costs.

8. Macpherson, J. I agree that this appeal must be dismissed with costs. Even though Article 181 be applicable there are insuperable difficulties in the way of the view pressed on us on behalf of the appellants.