1923

MULLER MACLEAN & Co. v. ATAULLA & Co.

Interest at 8 per cent. from date of judgment until realisation.

Attorneys for the plaintiff company: *Orr, Dignam & Co.*

Attorneys for the defendant company: *H. C. Banerjee.*

N. G.

APPELLATE CIVIL.

Before Chatterjea and Panton JJ.

BAIKUNTHA NATH CHATTORAJ

v.

PROSANNAMOYI DEBI.*

1923

Aug. 2.

Restitution—Who can claim it—Civil Procedure Code (Act V of 1908), s. 144.

Articles in the possession of X and taken into the custody of the commissioner appointed by Court were delivered to X after the reversal of the judgment of the District Judge by the High Court. The High Court judgment being subsequently reversed by His Majesty in Council, Y, who was not in possession of the articles, before the commissioner took charge of them, applied for restitution of the properties to him.

Held that the properties not being taken out of Y's possession under any decree or order of Court, Y was not entitled to claim restitution.

Jai Berhma v. *Kedar Nath Marwari* (1) referred to.

APPEAL from ORDER by Baikuntha Nath Chattoraj, the applicant, for letters of administration.

One Mandakini Debi died leaving cash and ornaments in an iron-safe and certain boxes. On the 1st October, 1918, Baikuntha Nath Chattoraj applied for

*Appeal from Order, No. 167 of 1923, against the order of H. M. Veitch, District Judge of Bankura, dated April 9, 1923.

(1) (1922) I. L. R. 2 Pat. 10, 16.

letters of administration to the estate of the deceased. It appearing to the Court that an inventory of the properties left by the deceased should be made, the District Judge appointed a commissioner for the purpose. The commissioner was opposed in the execution of his duty by one Prosannamoyi Debi, a sister of the deceased and the widow of the deceased's husband's brother, who claimed the property under a will. Notices were issued upon her to show cause why she should not be prosecuted, and in the meantime the District Judge ordered the boxes and the safe to be kept in a separate room under seal, the key to remain with the commissioner. On the 3rd February, 1919, the commissioner filed a list of the articles in the boxes and safe. On the 20th February, 1920, the District Judge granted letters of administration to Baikuntha Nath Chattoraj on the usual terms as to security. That decision was reversed by the High Court and probate was granted on the 28th March, 1922, on security, of Rs. 7,500 being permitted to cover the value of movables. In the meantime, the properties in the safe and boxes had remained under seal and on the 29th March, the commissioner was ordered to remove the seals on the application of Prosannamoyi. Subsequently the Privy Council reversed the High Court's decision and letters of administration were issued to Baikuntha Nath Chattoraj. He then asked for an order on Prosannamoyi to return these articles. She contended that the District Judge had no power to make such an order. The material portion of the learned District Judge's judgment was as follows:—

"It appears that Prosannamoyi claims that many of the articles belong to her and not to the estate. It is suggested that this claim is not *bonâ fide* and that Prosannamoyi admitted previously that the articles belonged to the estate. But I cannot find that she made any definite admission on the subject after the list was prepared on 3rd February, 1919. It is no part of the Probate Court's duty to enter into question as to what properties

1923

BAIKUNTHA NATH CHATTORAJ v. PRASANNAMOYI DEBI.

do or do not belong to the estate. The argument, however, apart from this is that as Prosannamoyi got them from the Court she should be made to restore them by way of restitution. On the other hand it is contended that this Court had no authority to detain the articles and that Prosannamoyi having obtained probate could have broken the seal herself and taken possession of the articles without applying to the Court at all. The original order, it seems to me, was certainly passed to enable the Commissioner to prepare the inventory and I do not think there was any intention that the articles should be detained indefinitely pending the disposal of the cases. In fact I think the opposite party is correct in saying that a Probate Court has no such general power to direct the detention of property. I can find no reference to such an authority in the Probate or Succession Acts or with regard to English practice in Williams in Executors. The only power of the Court seems to be in cases of necessity to appoint an administrator *pendente lite*. And the point to be remembered is that Prosannamoyi has given security. Further it seems that the petitioner only suggests that the articles should be kept in the Court's custody while the parties settle their dispute as to which of the articles belong to the estate. In these circumstances I do not think the order asked for should be granted. And that the administrator must be left to take elsewhere such steps as he may think fit to recover any properties which he alleges to belong to the estate of the deceased. The application is accordingly rejected."

The administrator, thereupon, preferred this appeal to the High Court making Prosannamoyi the respondent.

Babu Dvarkanath Chakrabarti (with him *Babu Bimala Charan Deb*), for the appellant. The articles in question were clearly claimed by the appellant as belonging to the estate of the deceased and it was, in order that they might not be lost, that they were taken charge of by the Court. They were in the custody of the Court for some time and were given to the respondent on the strength of the decree of the High Court. These decrees being reversed on appeal to the Privy Council, a clear case for restitution arose. See Civil Procedure Code, section 144. The lower Court thinks it has no jurisdiction. That is not correct.

The jurisdiction to order restitution is very wide. See *Jai Berhma* v. *Kedar Nath Marwari* (1). In the earlier stages, the respondent never clearly claimed those properties or any of them as her own. On the contrary, she asserted they were bequeathed to her by the deceased. This case only means that she also admitted that the articles belonged to the deceased. The will failing, on the reversal of the High Court decrees, she was bound to restore them to the custody of the Court, if not directly to the appellant.

Dr. Dwarkanath Mitter (with him *Babu Phanindra Nath Das*), for the respondent. The respondent claimed some of the properties as hers, though not very clearly at the outset, it may be. The statements at the beginning do not negative such claim. Section 144 of the Code has no application to this case, since these articles were not taken out of the appellants' custody. Further, the respondent has furnished security.

Babu Bimala Charan Deb, in reply.

CHATTERJEA AND PANTON JJ. We do not think that this is a case in which restitution can properly be ordered.

It appears that the appellant applied for letters of administration to the estate of one Mandakini Debi, and the respondent set up a will of the deceased. The movable properties in dispute were at that time in the possession of the respondent. The Court appointed a commissioner to make an inventory of the properties, and in the course of the proceedings she set up a title to many of the properties as belonging to herself. An inventory was made by the commissioner and the properties were locked up in a room under seal, the keys remaining with the commissioner. Letters of

(1) (1922) I. L. R. 2 Pat. 10, 16.

1923

BAIKUNTHA NATH CHATTORAJ v. PROSANNAMOYI DEBI.

administration were granted to the appellant and probate of the will was refused to the respondent. On appeal by the respondent to the High Court the decision of the District Judge was reversed and probate of the will was ordered to be granted to the respondent. She then applied for removal of the seals and for delivery of the properties belonging to the deceased under the terms of the will to her, and the District Judge made an order accordingly. The order of the High Court granting probate was, however, reversed by His Majesty in Council. The letters of administration to the appellant were thereupon restored, and the appellant applied for restitution of the properties to him. That has been disallowed by the Court below, and the appellant has preferred this appeal.

Now section 144 of the Civil Procedure Code provides that where and in so far a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed. In the case of *Jai Berhma* v. *Kedar Nath Marwari* (1) the Judicial Committee observed :—" It is the duty of the Court, under section 144 of the Civil Procedure Code, to ' place the parties in the position which ' they would have occupied, but for such decree or such ' part thereof as has been varied or reversed.' Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was

(1) (1922) I. L. R. 2 Pat. 10, 16.

said by Cairns L. C. in *Rodger* v. *Comptoir D'Escompte de Paris* (1): 'One of the first and highest duties of 'all Courts is to take care that the act of the Court 'does no injury to any of the suitors, and when the 'expression *the act of the Court* is used, it does not 'mean merely the act of the Primary Court, or of any 'intermediate Court of appeal, but the act of the Court 'as a whole, from the lowest Court which entertains 'jurisdiction over the matter up to the highest Court 'which finally disposes of the case.'

Now in the present case, the properties were never in the possession of the appellant, they were not taken out of his possession and made over to the respondent under any decree or order of Court. They were in the possession of the respondent at the time, and it was because the respondent had opposed the commissioner in making an inventory of the articles that they were locked up in a room under seal, the keys remaining with the commissioner. That custody of the commissioner was removed upon the application of the respondent and the properties delivered to her upon the application of the respondent when the probate case was decided in her favour by the High Court. It is to be observed that no administrator *pendente lite* had been appointed by the Court.

The probate Court could not, after the decision of His Majesty in Council, direct the properties to be made over to the appellant by way of restitution, because they had never been in his possession nor taken out of his possession. The appellant is in the same position which he would have occupied but for the order of the High Court which has been reversed by His Majesty in Council.

The contention of the appellant in the Court below (and in this Court also), however, was that the

(1) (1871) L. R. 3 P. C. 465, 475.

1923

BAIKUNTHA NATH CHATTORAJ v. PROSANNAMOYI DEBI.

respondent should be ordered to restore the properties to the custody of the commissioner after the disposal of the case by His Majesty in Council. But after the probate case was decided in favour of the respondent the probate Court became *functus officio*, and it could not resume custody of the properties merely because the order of the High Court was set aside by the Judicial Committee.

The best thing would have been to ascertain which properties belonged to the deceased Mandakini and which to the respondent. But the probate Court cannot enquire into, nor decide, any question of title to the properties, and the question must be decided in other proceedings.

The respondent, it appears, had furnished security for Rs. 7,500 to cover the value of the movable properties.

In all these circumtances we are unable to hold that the Court below was wrong in refusing restitution to the appellant as prayed for by him.

The appeal is accordingly dismissed, each party bearing its own costs in both Courts.

S. M. *Appeal dismissed.*