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DUBRI MISIR v. KING-EMPEROR.

Hasan, C. J.

A further question which I was asked to consider is as to whether it is a fit case in which I should order a retrial. I think I should not. The applicant has already been tried and acquitted under a charge of criminal misappropriation for a much larger sum of money and I am also informed that he is being tried even now under another charge of the same nature. The trial court in its judgment in the present case observes that "the accused have taken undue advantage of the slackness or absence of supervision and of friendship or connivance of the superior officers." I share the view expressed in these observations. It appears to me that the District Board of Fyzabad is more to blame than the individual accused persons in this behalf. I therefore decline to order a retrial. At this stage I am informed that the applicant was released on bail. If that is so, he need not surrender.

Application allowed.

MISCELLANEOUS CIVIL.

Before Mr. Justice Muhammad Raza and Mr. Justice Bisheshwar Nath Srivastava.

1930. *November*, 4.

CHANDIKA SINGH AND OTHERS (OPPOSITE PARTY-APPELLANTS) *v.* BITHAL DAS AND ANOTHER (APPLICANTS-RESPONDENTS).*

Civil Procedure Code (Act V of 1908), section 144—Final decision of a case by the High Court—Trial court's decree modified in appeal—Application for restitution under section 144 of the Code of Civil Procedure—Limitation, commencement of—Limitation Act (IX of 1908), Schedule I, Article 182, applicability of.

Held, that an application under section 144 of the Code of Civil Procedure is an application for execution of a decree passed in appeal when that decree varies or reverses the decree

*Miscellaneous Appeal No. 24 of 1930, against the order of Babu Mahabir Prasad Varma, Subordinate Judge of Lucknow, dated the 21st of March, 1930, setting aside the decree of Babu Hiran Kumar Ghoshal, Munsif, South, Lucknow, dated the 6th of May, 1929.

of the court of first instance, it being in substance an application made for seeking the aid of the court in working out the final decree.

Therefore if a case is decided finally in appeal by the High Court and an application under section 144 of the Code of Civil Procedure for restitution is made, Article 182 of the Limitation Act applies and limitation begins to run from the date of the order of the High Court. *Sant Sahai* v. *Chhutai Kurmi* (1), relied on. *Hamid Ali* v. *Ahmad Ali* (2), *Somasundaram Pillai* v. *Chokalingam Pillai* (3), *Basanta Kumari Dasi* v. *Balmakund Marwari* (4), *Rambujhawan Thakur* v. *Bankey Thakur* (5), *Gajadhar Singh* v. *Kishan Jiwan Lal*, (6), *Jewad Husain* v. *Gendan Singh* (7), and *Balmakund Marwari* v. *Basanta Kumari Dasi* (8), referred to.

Messrs. *K. P. Misra* and *Ram Charan*, for the appellants.

Mr. *Makund Bihari Lal*, for the respondents.

RAZA and SRIVASTAVA, JJ. :—This is an appeal from a decree of the Subordinate Judge, Lucknow, dated the 21st of March, 1930, setting aside a decree of Munsif, South, Lucknow, dated the 6th of May, 1929. The appeal arises out of the proceedings held under section 144 of the Code of Civil Procedure.

Chandika Singh and others obtained a preliminary decree for redemption in respect of certain immoveable property against Bithal Das and another on the 30th of September, 1924. The final decree was passed on the 11th of February, 1925. In the meantime the defendants (mortgagees) had appealed against the preliminary decree. On the 14th of March, 1925, the plaintiffs (mortgagors) applied for possession of the mortgaged property. They got possession of the same a few days after making the application. The mortgagees' appeal was decided on the 6th of July, 1925. The result was that the decree of the first court was modified to this extent that the trees in dispute were

(1) (1925) 3 O.W.N., 65.
(2) (1920) I.L.R., 45 Bom., 1137.
(3) (1916) I.L.R., 40 Mad., 780.
(4) (1922) I.L.R., 2 Pat., 277
(5) (1928) I.L.R., 7 Pat., 794.
(6) (1917) I.L.R., 39 All., 641.
(7) (1926) I.L.R., 6 Pat., 24 P.C
(8) (1924) I.L.R., 3 Pat., 371.

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held not to form part of the mortgaged property and the amount payable on redemption was reduced. Both parties appealed to the Chief Court and their appeals were dismissed on the 22nd of November, 1926. The final decree was amended on the plaintiffs' application on the 21st of May, 1927. This was done to bring it in conformity with the decree of the appellate court. No new final decree was prepared. The defendants (mortgagees) appealed challenging this amendment. The parties then entered into a compromise. The mortgagors agreed to pay a certain sum in excess of the amount entered in the final decree as amended. On the 18th of December, 1928, the defendants (mortagees) put in the present application under section 144, for restitution, claiming the trees in dispute. The mortgagors took various objections. The objection relevant to this appeal is the plea of limitation. It was contended on their behalf that the application was barred by time. This contention was accepted by the first court. It was held by that court on the 6th of May, 1929, that the case was governed by Article 181 and time began to run from the 6th of July, 1925.

The defendants (mortgagees) appealed and their appeal was allowed by the learned Subordinate Judge on the 21st of March, 1930. He held that the case was governed by Article 182 and time began to run from the 22nd of November, 1926.

Chandika and others have now come to this Court in second appeal. It is contended on their behalf that Article 181 applies to the case and time should be taken to run from the 6th of July, 1925.

We think there is no substance in this appeal.

We have heard the learned counsel on both sides at some length. In our opinion the learned Subordinate Judge is perfectly right in holding that the present application under section 144 of the Code of

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Civil Procedure falls within Article 182 of the Limitation Act. It is admitted that if the application falls under Article 182 of the Limitation Act, it is within time. The learned counsel on both sides have referred to several authorities on the point of limitation to be decided in this case. We have considered the rulings cited by the learned counsel on both sides. We do not think it necessary to refer to them in detail. In our opinion the ruling of this Court in the case of *Sant Sahai* v. *Chhutai Kurmi* and another (1) is clearly in favour of the respondents. It was held in that case that an application under section 144 of the Code of Civil Procedure is an application for execution of a decree passed in appeal when that decree varies or reverses the decree of the court of first instance, it being in substance an application made for seeking the aid of the court in working out the final decree. Almost all the authorities which have been referred to in the course of arguments were considered in that case. The rulings in the cases of *Hamid Ali* v. *Ahmad Ali* (2), *Samasundaram Pillai* v. *Chokalingam Pillai* (3), and *Basanta Kumari Dasi* v. *Balmakund Marwari* (4) were followed in the case decided by this Court. These rulings are directly in point and help the respondents. The view which was taken in *Sant Sahai* v. *Chhutai Kurmi* (1) appears to us to be correct. We take the same view. This being the case, the application under consideration must be held to be within limitation. The respondents' learned counsel has argued before us that even if the application is held to be governed by Article 181 of the Limitation Act, it is within time as time should be taken to run from the 22nd of November, 1926, the date on which the decree of the lower appellate court was confirmed by the Chief Court. We do not think it necessary to express any opinion on that point, though we should like to note that the ruling in the case of *Rambujhawan Thakur* v. *Bankey Thakur* (5) supports the contention of the respondents'

(1) (1925) 3 O.W.N., 65. (2) (1920) I.L.R., 45 Bom., 1137.
(3) (1916) I.L.R., 40 Mad., 780. (4) (1922) I.L.R., 2 Pat., 277.
(5) (1928) I.L.R., 7 Pat., 794.

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learned counsel. The cases of *Gajadhar Singh* v. *Kishan Jiwan Lal* (1) *Jowad Husain* v. *Gendan Singh* (2), and *Balmakund Marwari* v. *Basanta Kumari Dasi* (3) were referred to in that case. It was held in that case that where an appellate court has ordered restitution under section 144 of the Code of Civil Procedure, to a person who has been dispossessed under a decree, and an appeal against that order has been dismissed by the High Court, the period of limitation under Article 181 of the Limitation Act for an application for assessment of mesne profits by way of restitution, begins to run from the date of the order of the High Court.

The result is that the appeal fails and must be dismissed. Hence we dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

1930. *November*, 8.

Before Mr. Justice A. G. P. Pullan.

CHHUTKAO (JUDGMENT-DECREE-APPELLANT) *v.* LALA GAMBHIR MAL (DECREE-HOLDER-RESPONDENT).*

Muhammadan law—Waqf—*User*—*Land described as* takia *for many years and used as burial ground*—*Presumption of* waqf *and inalienability*—*Civil Procedure Code (Act V of* 1908), *section* 47(2)—*Objection to sale by judgment-debtor of land used for burial of dead, maintainability of*—*Court's power to treat the objection as a suit.*

It is a well understood principle of the Muhammadan law that a *waqf* may be established by the evidence of user.

Where a plot of land is described as a *takia* and has been used for many years as a place for burial by Muhammadans whether they are members of one family or not a presumption arises that there is a *waqf* by user, and as such the land is inalienable. The distinction between a private and public *waqf* has no application in the case of land used for the burial

*Execution of Decree Appeal No. 58 of 1930, against the decree of Babu Mahabir Prasad, Subordinate Judge of Lucknow, dated the 28th of May, 1930, reversing the decree of Babu Hiran Kumar Ghoshal, Munsif, South, Lucknow, dated the 1st of February, 1930.

(1) (1917) I.L.R., 39 All., 641. (2) (1926) I.L.R., 6 Pat., 24 P.C. (3) (1924) I.L.R., 3 Pat., 371.