

REVISIONAL CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice E. M. Nanavutty

1936
January, 29

RAJA BIRENDRA BIKRAM SINGH (PLAINTIFF-APPLICANT) v.
BASDEO AND OTHERS, PLAINTIFFS AND OTHERS, CREDITORS
(OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), section 73(2) and 115 and Order XLV, rule 15—Revision—Limitation—Revision not entertainable, if made too late—Delay, when to be condoned—Revision whether maintainable if another remedy open—Order of Court for payment of deposit without notice to other party and before receipt of order of Privy Council, whether irregular—Revision against the order, if lies—Application under section 144, C. P. C., nature of—Application under section 144, C. P. C., whether one for execution—Order XLV, rule 15, C. P. C., whether mandatory—Original order in Council alone to be acted upon—Jurisdiction—Parties, whether can invest Court with jurisdiction which it does not possess.

Held, that interference in revision being discretionary, if a revision application is made too late it is not entertainable and an explanation should be called for delay in case it is made more than 90 days after passing of the order. Where, however, the applicant was not a party to the order under revision which was passed behind his back and without notice to him, the delay is excusable and should be condoned.

Where a remedy is open to an applicant for revision by the filing of a suit under section 73(2), C. P. C., an application for revision under section 115 is not maintainable. *Har Narain Sethi v. Messrs. Bird & Co.* (1), followed.

Where a Court directs payment to the depositor of money held in deposit by it to the credit of a party without any notice to that party and before the order of His Majesty in Council is transmitted to it under order XLV, rule 15, C. P. C., the Court acts with material irregularity, if not altogether without jurisdiction. Where, therefore, pre-emptors in order to defeat the claim of an applicant for costs confess judgment in collusive suits brought by their creditors and the Court allows payments

*Section 115 Application No. 162 of 1934, against the order of Babu Gauri Shankar Varma, Subordinate Judge of Gonda, dated the 30th of May, 1934.

to them without any notice to the applicant and without awaiting receipt of the order of His Majesty in Council as provided for under order XLV, rule 15, C. P. C., the applicant has ground for real grievance, and the Court's order is open to revision.

An application under section 144, C. P. C., being in substance one made for seeking the aid of the Court in working out the final decree should be regarded as an application for execution of the decree passed in appeal. *Chandika Singh v. Bithal Das* (1), followed.

The provisions of order XLV, rule 15, C. P. C., are mandatory. Orders violating such provisions are irregular. Even certified copies of orders in Council should never be acted upon without the production of the original order in Council signed by the clerk of the Council. *Damodar Das v. Birj Lal* (2), relied on.

Where an applicant for costs of appeal accepted by Privy Council in a pre-emption case himself obtains possession of lands for which decrees for pre-emption are passed by High Court and also takes a rateable share out of a portion of pre-emption money before any proceedings are taken by him under rule 15, order XLV, C. P. C., his action cannot invest a Court with a jurisdiction which it does not possess, nor regularise its action in making an order for payment if otherwise irregular, as two wrongs cannot make a right.

Messrs. *Ishuri Prasad* and *Girja Shankar Srivastava*, for the applicants.

Mr. *Suraj Narain*, for the opposite party.

SRIVASTAVA and NANAVUTTY, JJ.:—The facts which have given rise to these applications are these: Two suits for pre-emption were instituted against the Raja of Payagpur. One of these No. 86 of 1928 was instituted by Basdeo, Ram Ujagar and Ram Samujh in respect of village Bakrauli and the other No. 89 of 1928 was instituted by Birj Mohan Pande in respect of village Patijia Buzurg. Both these suits were dismissed by the trial Court, but decrees for pre-emption were passed in both the suits by this Court on appeal. In execution of these decrees the pre-emptors in the two suits obtained possession over the villages which formed the subject of pre-emption on deposit of the pre-emption money amounting to Rs.25,736 in suit No. 86 and Rs.10,542-8

(1) (1930) I.L.R., 6 Luck., 448.

(2) (1915) I.L.R., 37 All., 567.

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in suit No. 89. The defendant Raja of Payagpur did not withdraw the money which was deposited to his credit in the Court of the Subordinate Judge of Gonda and appealed to His Majesty in Council against the decree of this Court. On the 30th of April, 1934, their Lordships of the Privy Council recommended to His Majesty the King-Emperor that the aforesaid decrees of this Court should be reversed. These recommendations were accepted by His Majesty the King-Emperor on the 14th of May, 1934, and the said order in Council was printed in London by His Majesty's printers on the 16th of June, 1934, and handed over to the applicant's counsel about the end of July, 1934. An application was made by the Raja to this Court for transmission of the aforesaid order to the lower Court under order XLV, rule 15 of the Code of Civil Procedure on the 1st of August, 1934. On the 21st of September, 1934, the abovementioned order along with the memorandum of costs prepared in the office of this Court was transmitted to the Subordinate Judge of Gonda who received the said order on the 25th of September, 1934.

In the meantime on the 2nd of May, 1934, one Pyare Lal instituted a suit against Birjmohan Pande, the pre-emptor in suit No. 89 of 1928, and obtained a simple money decree against him on the 16th of May, 1934. The same day Birjmohan Pande made an application stating that having come to know that his suit had been dismissed by the Privy Council Rs.8,286-2 out of the pre-emption money which had been deposited by him and was still in deposit in the Court be paid to Pyare Lal. The application was granted and an order for payment of the sum of Rs.8,286-2 to Pyare Lal was made the same day. This order forms the subject of section 115 Application No. 165 of 1934.

A few days later on the 28th of May, 1934, the Subordinate Judge ordered that a sum of Rs.114-8 out of the aforesaid pre-emption money which had been

deposited by Birjmohan Pande be rateably distributed amongst his creditors. Section 115 Application No. 166 of 1934 is directed against this order.

Similarly on the 7th of May, 1934, a suit was instituted by one Mahant Badri Das against Basdeo, Ram Ujagar and Ram Samujh plaintiffs in suit No. 86, and a money decree for Rs.23,000 odd was passed in favour of Mahant Badri Das on the 13th of July, 1934. On the 17th of July, 1934, the Subordinate Judge ordered that Rs.18,762-12 out of the pre-emption money which had been deposited in suit No. 86 and had not been withdrawn by the Raja of Payagpur be paid to Mahant Badri Das. This order is sought to be revised in section 115 Application No. 163 of 1934.

On the 30th of May, 1934, the Subordinate Judge ordered that a sum of Rs.311-4 out of the pre-emption money of suit No. 86 which was kept in deposit in his Court be given to certain creditors of the pre-emptors namely the decree-holders of S. C. C. Execution case No. 173 of 1934 of the Subordinate Judge's Court, Gonda. Section 115 Application No. 162 of 1934 is directed against this order.

Subsequently on the 23rd of July, 1934, the Subordinate Judge ordered that a further sum of Rs.4,968-11-7 minus Rs.25-7-3 be given to Mahant Badri Das out of the aforesaid pre-emption money. Section 115 Application No. 164 of 1934 challenges the correctness of this order.

A preliminary objection has been raised on behalf of the opposite parties that these applications for revision which were filed on the 7th of December, 1934, having been made more than ninety days after the passing of the order in question were barred by time. Interference in revision being discretionary the practice of this Court has been to refuse to entertain applications for revision if they are made too late and to demand an explanation from the applicant for the delay in case the application is made more than ninety days after the

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passing of the order. In the present case the applicant Raja Birendra Bikram Singh of Payagpur was not a party to any of the orders which he seeks to revise. They were all passed behind his back and without notice to him. In the circumstances we think that the delay is excusable and should be condoned.

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Another objection raised by the opposite parties is that section 115 Application No. 166 of 1934 is not maintainable inasmuch as the applicant if he has any grievance against it has his remedy by a suit under section 73(2) of the Code of Civil Procedure. It should be noted also that the applicant himself has received a sum of Rs.5-4 as a result of the rateable distribution made by the Subordinate Judge. It has recently been held by a Bench of this Court to which one of us is a party in *Har Narain Sethi v. Messrs. Bird & Co.* (1) that where a remedy is open to an applicant for revision by the filing of a suit under section 73(2) of the Code of Civil Procedure an application for revision under section 115 of the Code of Civil Procedure is not maintainable. We therefore uphold this objection, and dismiss with costs section 115 Application No. 166 of 1934 on this preliminary ground.

Turning now to the remaining applications we note that the main contention of the applicant the Raja of Payagpur is that the Subordinate Judge acted without jurisdiction and with material irregularity in directing the payments in question being made out of the money which was held in deposit by him to the credit of the applicant before the order of His Majesty in Council had been transmitted to him from this Court under order XLV, rule 15 of the Code of Civil Procedure. It is further pointed out that under the order of His Majesty in Council the applicant was entitled not only to the recovery of possession of the villages for which a decree for pre-emption had been passed against him but also to certain costs which had been decreed to him.

(1) (1936) O.W.N., 116.

If the pre-emptors had applied to withdraw the pre-emption money and orders had been passed after notice to the applicant the applicant could have claimed deduction of the costs payable to him from the said money. It is also suggested that the pre-emptors in order to defeat the claim of the applicant for costs confessed judgment in the collusive suits which were brought by their creditors and that the Subordinate Judge played into their hands by allowing the payments in question to be made to them without any notice to the applicant and without awaiting receipt of the order of His Majesty in Council as provided for under order XLV, rule 15 of the Code of Civil Procedure. We think that the applicant has ground for real grievance against the orders of the lower Court. If the applicant had withdrawn the pre-emption money which had been deposited to his credit in the Court of the Subordinate Judge the pre-emptors could not recover the money except by means of an application for restitution under section 144 of the Code of Civil Procedure. It is not disputed by the learned counsel for the opposite parties that the application made by the pre-emptors requesting that the pre-emption money deposited by them be paid to their creditors was in substance one under section 144 of the Code of Civil Procedure. Although there is a conflict of opinion amongst the High Courts in this country as to whether a proceeding under section 144 of the Code of Civil Procedure is or is not a proceeding in execution, but the view which has prevailed in this Court is that an application under section 144 of the Code of Civil Procedure being in substance one made for seeking the aid of the Court in working out the final decree should be regarded as an application for execution of the decree passed in appeal—*Chandika Singh v. Bithal Das* (1). Order XLV, rule 15 lays down the procedure for enforcement of orders of the King in

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Council. It might well be that the order for transmission which was passed at the instance of the applicant could enure in favour of the pre-emptors also and entitle them to apply for execution of the order of His Majesty in Council in so far as it entitled them to a refund of the pre-emption money, but in the present case the Subordinate Judge made orders for the payments in question long before the order of His Majesty in Council was even put in print or handed over to the counsel of the applicant-decree-holder. In *Damodar Das v. Birj Lal* (1), it was held that the word "execution" as used in order XLV, rule 15 was intended to cover a case of restitution also and a person who desired to obtain execution of any kind, whether by way of restitution or otherwise, must apply in the first instance to the Court indicated by rule 15. It was further held that the Subordinate Judge was not entitled to take any action on the printed copy of the judgment of their Lordships of the Privy Council without proof that an order in Council had followed thereon. It may be mentioned that the Registrar of the Privy Council has repeatedly emphasised that even certified copies of orders in Council "should never be acted upon without the production of the original order in Council signed by the clerk of the Council." The provisions of order XLV, rule 15 are mandatory, and we are of opinion that the orders of the lower Court made in violation of its provisions were quite irregular if not altogether without jurisdiction.

It has been contended on behalf of the opposite parties that the applicant himself obtained possession of the villages for which decrees for pre-emption had been passed by this Court and also took a rateable share out of a portion of the pre-emption money before any proceedings were taken by him under order XLV, rule 15 of the Code of Civil Procedure. It would be enough

(1) (1915) I.L.R., 37 All., 567.

to say that two wrongs cannot make a right. The action of the applicant above referred to could not invest the Subordinate Judge with a jurisdiction which he did not possess, nor regularise his action in making the orders for payments in question if otherwise irregular.

We would accordingly allow applications Nos. 162 to 165 with costs and set aside the orders of payment made by the lower Court.

Application allowed.

APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava and
Mr. Justice E. M. Nanavutty*

KANDHAI LAL (DECREE-HOLDER-APPELLANT) *v.* SHEO NATH
(JUDGMENT-DEBTOR-RESPONDENT)*

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*Groves—Village custom recording groves to be unalienable—
Execution of decree—Groves, whether liable to attachment
or sale—Second appeal—Village custom—Plea of custom
being qualified not raised—Lower Court's finding that custom
absolute—Second appeal, whether lies.*

Where according to a village custom as recorded in the *wajib-ul-arz* groves are unalienable, and the judgment-debtor has no saleable interest in them, the groves are not liable to attachment or sale in execution of decree. *Baij Nath v. Mauji Mal* (1), *Ali Mohammad Khan v. Chhedan* (2), and *Gaya Prasad v. Beni Madho* (3), distinguished.

Where a decree-holder does not plead in lower courts that a custom is qualified in the sense of a restraint against alienation being merely for the benefit of the proprietor, and the courts below find the custom to be absolute under which the judgment-debtor has no saleable interest in the property, a second appeal is concluded by the finding of the lower courts about the existence of the custom.

*Execution of Decree Appeal No. 67 of 1934, against the order of Thakur Surendra Vikram Singh, Subordinate Judge of Partabgarh, dated the 14th of July, 1934, upholding the order of Babu Gopal Chandra Sinha, Munsif, Kunda at Partabgarh, dated the 21st of February, 1934.

(1) (1932) 9 O.W.N., 1144.

(2) (1912) 15 O.C., 91.

(3) (1931) L.L.R., 7 Luck., 111.