APPELLATE CIVIL.

Before Dawson Miller, C. J. and Jwala Prasad, J.

BASANTA KUMARI DASI

v.

BALMAKUND MARWARI.*

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Nov., 13.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 144—*Restitution, application for, is an application in execution—Auction-purchaser under mortgage decree, whether is a representative of judgment-debtor—Limitation Act*, 1908 (*Act IX of* 1908), *Schedule* 1, *Article* 182.

An application for restitution under the Code of Civil Procedure, 1908, in consequence of a decree having been set aside, is an application in execution of that decree and is governed by Article 182 of the Limitation Act, 1908.

Somasundaram Pillai v. *Cholkkalingam Pillai*(1), followed.

Plaintiffs mortgaged a certain house to *B*, and subsequently obtained an *ex parte* decree for ejectment against the defendant who was in possession of the house and who claimed it as her son's, and obtained delivery of possession under the decree. The decree was afterwards set aside at the instance of the defendant and the suit was restored. Pending the disposal of the suit *B* obtained a decree on his mortgage and in execution thereof he purchased the house and obtained delivery of possession. Subsequently the plaintiffs' suit was dismissed on the ground that they had no title to the house and an appeal from that decision was also dismissed. The defendant thereupon applied for restitution under section 144, Civil Procedure Code, 1908, making the plaintiffs and *B* parties to the application. It was objected that *B* was not a representative in interest of the plaintiffs and that, therefore, no application for restitution was maintainable as against him.

* Miscellaneous Appeal No. 144 of 1922, from an order of Babu Kamala Prashad, Subordinate Judge of Purulia, dated the 29th March, 1922, confirming an order of Babu Shyam Narayan Lal, Munsif of Purulia, dated the 26th November, 1921.

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Held, that *B* as purchaser under his mortgage decree was a representative of the judgment-debtors (*i.e.*, the plaintiffs) and that therefore the application for restitution was maintainable against him.

Appeal by the defendant.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

Atul Krishna Rai, for the appellant.

Abani Bhusan Mukherjee, for the respondents.

DAWSON MILLER, C. J.—This is an appeal from an order of the Subordinate Judge of Purulia, dated the 29th May, 1922, refusing the appellant's application for restoration under section 144 of the Civil Procedure Code. It appears that a suit was instituted on behalf of Abinash Chandra Karmakar and Satish Chandra Karmakar, the respondents 2 and 3 against the appellant and her brother, claiming to eject them from the house in question. In that suit a decree was passed *ex parte* on the 10th January, 1917, and on the 29th March, in the same year, the plaintiffs in that suit got possession of the house. On the 18th June, in the same year, the *ex parte* decree was set aside and the suit was restored for hearing. It came on for hearing and in the following year on the 7th March, 1918, the suit which was one claiming rent and ejectment of the defendants was dismissed, and on the 13th July, 1918, an appeal from that decision to the District Judge was also dismissed on the ground that the plaintiffs had not title to the house. The defence of the appellant in that suit was that the house had been acquired by her husband from one Dwarkanath Karmakar and on her husband's death devolved upon her son and that she and her brother were living in the house and were in possession with the consent of her son. The *ex parte* decree having been set aside and the suit, after being restored, having been dismissed, the appellant preferred an application on the 29th June, 1921, under section 144 of the Civil Procedure

Code, asking that she might be restored to possession of the house and put in the same position as she would have been had the original *ex parte* decree, which was set aside, not been passed. At that time it appears that the plaintiffs in the suit were no longer in possession but the respondent No. 1, Balmakund Marwari, was in possession. I ought to mention here how it was that Balmakund came into possession of the house. Sometime in the year 1914 the respondents Abinash and Satish had mortgaged the house to Balmakund, the respondent No. 1, and on the 25th February, 1916, Balmakund having brought a suit upon his mortgage obtained a decree against the respondents 2 and 3. In execution of that decree the house was put up for sale and purchased by Balmakund himself. That was on the 16th April, 1918. On the 24th May in the same year Balmakund got delivery of possession from the other respondents, who, as already pointed out, had dispossessed the appellant in March, 1917. Both Balmakund and his mortgagors were made parties to the present application.

Before the learned Munsif who tried the application, originally, two points were argued. It was contended that section 144 had no application in the circumstances of the present case as it could not be contended that Balmakund was the representative in interest of the other two respondents and that any rights which the appellant might have as against the other two respondents, after their *ex parte* decree was set aside, could not be enforced against Balmakund who had got possession of the house at a subsequent period in pursuance of the execution of his mortgage decree. The learned Munsif was of opinion that restitution might be granted even against Balmakund but on the second point which was raised before him, which was one of limitation, he came to the conclusion that the appellant's application was barred by limitation. It is not disputed that the period of limitation for an application of this sort is three years. A question has arisen whether it comes under Article 181 or under

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Article 182 of the Limitation Act and I shall deal with that point presently, but the learned Munsif came to the conclusion that as the plaintiff's right to make the application accrued on the 18th June, 1917, when the *ex parte* decree was set aside and as the application was not made until just over four years later her right to apply was barred by limitation.

From that decision the appellant appealed to the Subordinate Judge. The learned Subordinate Judge took a different view upon the first point from that taken by the Munsif and came to the conclusion that no application under section 144 could be made by the appellant against Balmakund. The learned Subordinate Judge apparently took the view that the appellant was never in possession of the house in her own right but was only claiming to be in possession through the right of another, namely, her son and, therefore, as far as I understand his judgment, he arrived at the conclusion that the appellant was not entitled to regain possession from anybody. Having arrived at that conclusion he thought it was unnecessary to deal with the question of limitation. In fact he says no question of limitation arises when it is found that the petition under section 144 of the Civil Procedure Code is not maintainable.

From that decision the appellant has appealed to this Court and the first question to be decided is whether the application is maintainable against Balmakund or not. I ought perhaps to mention that Balmakund obtained his possession of the house as mortgagee from the other two respondents and although that possession was obtained in execution of a decree in his mortgage suit at a sale by the Court I cannot see how that fact can give Balmakund any better rights than those which his mortgagors originally had. When the *ex parte* decree was set aside on the 18th June, 1917, it seems to me that the appellant who, before the decree, was in possession of the house and living there with her brother had a right to be restored to the same position as she would have been in if that decree had never been passed.

Therefore the rights as between the appellant and the respondents 2 and 3, the plaintiffs in the suit originally, were crystallised from that moment and the appellant was entitled clearly at that time, and within the period of limitation, to be restored to the possession of which she had been wrongfully deprived under the *ex parte* decree of the plaintiffs. The only question, therefore, which arises is whether Balmakund having derived his title under the mortgage from the respondents 2 and 3 can set up any better defence to an application under section 144 than his predecessors could. It has been argued before us that Balmakund is not the representative of the judgment-debtors whose property he purchased. I can see no difference between a person who purchases by private treaty and a person who acquires by a sale under a mortgage decree property from the mortgagor. No authority has been cited to us in support of the proposition that the mortgagee auction-purchaser stands in any better position against a person in the place of the present appellant than the mortgagor himself and, in my opinion, I confess I can see no reason why he should be treated as having any better rights than the person whose property he has acquired. Therefore, whatever the rights may be that were determined as between the respondents 2 and 3 and the respondent No. 1 in the mortgage suit those rights cannot, in my opinion, deprive the appellant of the right she acquired under section 144, to be restored to the same position as she was in previously, namely, in possession of the house when the *ex parte* decree was set aside on the 18th June, 1917. As a matter of fact, although perhaps it is unnecessary to refer to this for the purposes of my judgment, it was found when the suit was restored and re-tried that the respondents 2 and 3 who were claiming to eject the appellant had no title to the house in question, the title being not in them but in the appellant's husband originally and subsequently in her son. I think therefore that, apart from the question of limitation which must be considered presently, the decision of the learned Subordinate Judge cannot stand.

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On the question of limitation it is not very easy for us sitting here in second appeal to determine that question. The facts which were before the Munsif appear to some extent from his judgment but it is not quite clear from that how far any application for execution of the decree was made or how far that application included a claim to be restored to possession of the property. The learned Subordinate Judge, as I have already pointed out, did not deal with this matter at all. He, however, would be entitled to go into the evidence upon this matter and arrive at a conclusion about it, an advantage which we sitting in second appeal have not got. Before, however, sending back the case for determination upon this question by the lower appellate Court we must be satisfied that even upon the facts so far as we know them the appellant really has a case to present upon this part of the appeal. Assuming that an application under section 144 of the Civil Procedure Code is to be treated as an application in execution then I think that there is sufficient in the learned Munsif's judgment to indicate that the facts of this case might bring it within the provisions of Article 182 of the Limitation Act so as to extend the time of limitation beyond the three years from the date of the decree or order, that is to say the order setting aside the *ex parte* decree. If, on the other hand, an application under section 144 cannot be treated as an application in execution then it is quite clear that the cause of action having arisen on the 18th June, 1917, and the present application having been presented some four years later, the application would be barred by limitation. We have been referred to the case of *Somasundaram Pillai* v. *Chokkalingam Pillai* (1) where it was laid down, following an earlier case of the Madras High Court, that an application for restitution is an application for execution under the present Civil Procedure Code just as it was under the old Procedure Code. In my opinion that case was properly decided. Although an application under

(1) (1917) I. L. R. 40 Mad. 780.

section 144 is not included in Order XXI, which lays down the rules of procedure in execution cases, still in substance, I think, that an application asking for restitution in consequence of a decree having been set aside is just as much an application in execution of that decree as any other application which seeks to have the actual declarations in the decree enforced. It is true that the order setting aside the decree only deals with it in a negative sort of way, but in fact the result of setting aside a decree made in favour of one party is to give the other the right to be restored to the same position as he was in before that decree was passed and to set aside any advantage that the decree-holder might have obtained by executing the decree. In the present case the appellant had been deprived of possession and the effect of setting aside that decree which gave the respondents the right to possession was to my mind just the same in effect as if the order setting aside the decree had in the circumstances ordered that possession should be delivered to the appellant. I think, therefore, that it is only right and proper to regard an application under section 144 as an application made in execution of a decree. If I am right in that view then, although it is more than three years since the decree was set aside giving rise to the present claim of the appellant, still I find from the Munsif's judgment that on the 12th June, 1918, that is to say about a year after the decree was set aside, an application for execution was made by the appellant, and we are told that on the same day a stay of that application was granted for two weeks in order to allow an application to the District Judge for the purpose of staying this very execution because there was at that time an appeal pending to the District Judge from the decision in the principal suit. The principal suit on appeal was decided by the District Judge on the 13th July, 1918, and, therefore, from that date one must take it that the stay was removed so that if one deducts the time between the 12th June, 1918, and the 13th July, 1918, from the period allowed for bringing execution

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proceedings within the meaning of Article 182 of the Limitation Act it would follow that the present application, having been made on the 29th June, 1921, was within three years of the time when the last application for execution was made deducting the time during which that application was stayed. Whether there was in that previous execution application an application for possession is not absolutely clear but it does appear from the judgment of the Munsif that when the application for execution was made the applicant obtained a *parwana* for possession. Therefore one is entitled to assume, unless it is clearly shown to the contrary, that at that time the appellant was asking the Court to assist her by giving her possession of the property of which she had been deprived. If in fact that application was made then I think it being, as I have already said, an application in execution and governed by Article 182 of the Limitation Act, the present application must be regarded as in time. This, however, is to some extent a question of fact which the learned Judge of the lower appellate Court will have to consider. In the result we set aside the decision of the Subordinate Judge refusing the appellant's application but as the appellant's right to succeed in that application must still depend upon the question of limitation we direct that the learned Subordinate Judge, before finally disposing of the appeal, do consider the question of limitation and come to a decision thereon in the light of the facts already before him. For this purpose he will be entitled of course to consider any orders in the case that have been made and that appear in the order-sheet or in the court records or in the record before him. The costs of this appeal will be governed by the final decision of the lower appellate Court.

JWALA PRASAD, J.—I agree to the order passed.

Order set aside.