

APPELLATE CIVIL.

Before Das and Adami, J. J.

JUGAL KISHORE MARWARI

v.

HOMESHWAR SINGH*

1926.

Oct., 28.

Code of Civil Procedure, 1908, (Act V of 1908), section 144 and order XLV, rule 15, whether applies to an application for restitution—Order-in-Council, copy of, filed subsequently but before order is passed—irregularity.

Order XLV, rule 15, does not apply to an application for restitution.

Balmakund Marwari v. Basanta Kumari Dasi (1), followed.

Where an applicant for restitution was unable to put before the trial court a copy of the Order-in-Council in his favour, but, before the order for restitution was passed, the trial Court had been furnished with a copy of the Order, held, that there was no irregularity.

Appeal by the plaintiffs.

The appellants instituted a suit for damages for breach of contract against the respondents claiming six lakhs, before the Subordinate Judge. This suit was dismissed and an appeal was made to the High Court where the appellants were successful in obtaining a decree for two lakhs. As soon as the decree in this appeal was passed the appellants sought execution of their decree. Meanwhile the respondents appealed to the Privy Council with the result that the judgment and decree of the Subordinate Judge were upheld and the appellants' suit was dismissed. The respondents, when the appellants sought execution of the decree, deposited two lakhs due under the decree of the High Court and the appellants immediately withdrew this sum. When the respondents heard by telegram of their success in the Privy

* Appeal from original Order no. 274 of 1925, from an order of Maulavi Najabat Husain, Subordinate Judge of Bhagalpur, dated the 28th October, 1925.

(1) (1924) I. L. R. 3 Pat. 371, F. B.

Council, they applied at once to the Subordinate Judge for restitution in regard to the two lakhs which the appellants had withdrawn. The Subordinate Judge granted the application and awarded the respondents the two lakhs of rupees in restitution. Against this order the present appeal was presented.

C. C. Das (with him *N. C. Sinha* and *S. N. Bose*), for the appellants.

Hasan Imam (with him *L. K. Jha* and *N. C. Ghosh*), for the respondents.

ADAMI, J.—It is argued that the procedure followed in this case was wrong inasmuch as under Order XLV, rule 15, the respondents were bound to make the application to this Court as directed in that rule. In this point there is no merit. It is merely a technical point and is met by the decision of the Full Bench of this Court in *Balmakund Marwari v. Basanta Kumari Dasi* (1), where it is held that proceedings for restitution are not proceedings in execution. Order XLV, rule 15, will not, therefore, apply. Section 144 of the Civil Procedure Code lays down that an application must be made before the trial Court and the respondents fully complied with the directions in that section. Though the respondents were unable to put before the trial Court a copy of the decree of the Privy Council, yet before the order was passed, the trial Court had been furnished with a copy of that order and there was no irregularity.

The next point taken is that the appellants are entitled to Rs. 10,000 being five per cent. compensation payable to the auction-purchaser on the setting aside of the execution sale. In this point also there is no merit. The appellants themselves were decree-holders and auction-purchasers and having failed in their suit, they cannot deprive the respondents of any part of the two lakhs of rupees which they deposited.

The appeal is dismissed with costs.

DAS, J.—I agree.

Appeal dismissed.

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