

(1975) 12 CAL CK 0002**Calcutta High Court****Case No:** Letters Patent Appeal No. 97 of 1972

Moni Mohan Modak

APPELLANT

Vs

Swarnalata Dasi

RESPONDENT

Date of Decision: Dec. 10, 1975**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 144, 151, 47

Citation: AIR 1976 Cal 371 : (1976) 2 ILR (Cal) 138**Hon'ble Judges:** S.K. Bhattacharyya, J; A.K. Janah, J**Bench:** Division Bench**Advocate:** R.P. Bagchi and D.K. Das, for the Appellant; D.N. Chakraborti and Ashim Kumar Mukherjee, for the Respondent**Final Decision:** Dismissed**Judgement**

A.K. Janah, J.

This appeal is from a decision of A.K. Mukherji J. in S.A. No. 1195 of 1962.

2. The facts giving rise to this appeal are briefly as follows:

The Respondent No. 1 Swarnalata Dasi filed an application under Sections 144, 151 and 47 of the CPC for restitution of a certain property which was sold in execution and was taken possession of by the Appellants. Krishnadhyan Modak, the husband of Swarnalata Dasi, purchased the said property in the name of Swarnalata. For non-payment of rent the disputed property was sold in Rent Execution Case No. 836 of 1952 of the Second Court of Munsif Baruipur. In the said Rent Execution case the property was purchased by the Appellants who are the brothers of Krishnadhyan. After the sale was confirmed the Appellants took possession of the property through Court. Thereafter, Swarnalata filed T.S. 173 of 1958 in the Court of Munsif, Baruipur, for a declaration that the rent suit and the sale held in execution of the decree passed therein were all fraudulent and were void and that her title was not affected by the said sale. There was a prayer for permanent injunction, but that

prayer was refused and the suit was decreed in part declaring the sale to be fraudulent and null and void. After obtaining that decree the Respondent No. 1 Swainalata filed the aforesaid application under Sections 144, 151 and 47 of the CPC for restitution of the said property.

3. The trial Court allowed her application and ordered restitution. Against the said order the Appellants preferred an appeal. This appeal was registered as a Title Appeal although it ought to have been registered as a Misc. Appeal, inasmuch as it was an appeal against an order passed in a misc case. The appeal was allowed by the learned Subordinate Judge upon the view that as the decree in execution of which possession was taken by the present Appellants had not been reversed or varied in appeal the remedy by way of restitution was not available to the Respondent No. 1. Against the said decision the Respondent No. 1 preferred an appeal to this Court and the same was registered as S.A. No. 1195 of 1962. This appeal was allowed by A. K. Mukherji J. It is the correctness of this decision which is under challenge in this Letters Patent Appeal.

4. Mr. Bagchi, learned Advocate for the Appellants, has con-tended before us that the provisions of Section 144 of the Code is not applicable in the present case, as the decree in execution of which his clients had obtained possession had not been reversed or varied in appeal. The Respondent No. 1, on the other hand, obtained a declaratory decree in the subsequent suit. That decree, according to Mr. Bagchi, was incapable of being executed and therefore, the Respondent No. 1 was not entitled to get restitution. In support of this contention Mr. Bagchi relied on the observations of the Supreme Court in Mahjibhai Mohanbai Barot Vs. Patel Manibhai Gokalbhai and Others, where the Supreme Court observed that an application for restitution u/s 144, Code of Civil Procedure, is an application for execution of a decree. In that case the question arose in connection with the period of limitation for filing an application u/s 144. In the present case, even assuming that the provisions of Section 144 of the Code does not apply in terms the Court undoubtedly had ample power to pass an order for restitution u/s 151 of the Code. In *Ramnath Karmakar v. Shaikh Asanulla* 34 C.W.N. 746 a Division Bench of this Court held that an order similar to the one which has been passed in the present case is a proper order u/s 151 for the purpose of doing justice between the parties. A similar view was taken by another Division Bench of this Court in the case of *Raicharan Bhuiya v. Debi Prasad Bhakat* 34 C.W.N. 408. In so far as the Court's power to grant restitution u/s 151 of the Code is concerned, Mr. Bagchi submitted that if restitution is allowed u/s 151, then there is no right of appeal and the remedy of the aggrieved party would be by way of revision only. Apart from the fact that this point is covered by a number of decisions of this Court, vide *Maharaja Sasikanta Acharjee v. Jalii Baksha Munshi* 35 C.W.N. 105, Gopal Laskar Vs. Harihar Mukherjee and Others, *Jnanada Sundari Majumdar v. Chandra Kumar Dev* 31 C.W.N. 290, the submission made by Mr. Bagchi does not help his client in any way. In the present case the Court of first instance allowed the prayer for restitution, the Appellants

went up in appeal against the said order. If no appeal lay then the appeal before the first appellate Court was incompetent and the result will be that the order of the Court of the first instance ordering restitution in favour of the Respondent No. 1 will stand.

5. There is also another important aspect in this case which has to be taken into consideration. It appears from the certified copy of the judgment of T.S. No. 173 of 1958 which was filed by Swarnalata against the present Appellants and which has been marked as Ex. 2, that the learned Munsif came to the clear finding that the rent suit and all subsequent proceedings thereto were fraudulent and collusive and the present Appellants fraudulently manipulated everything and caused the property to be sold and they themselves purchased the property. No appeal was preferred against that decision of the trial Court and these findings of the learned Munsif stand. The Appellants, therefore, were not bona fide third party purchasers and therefore no question arises regarding the protection of their interest. Fraud vitiates the entire proceedings and no litigant should be allowed to retain any benefit obtained by him as a result of fraud practised by him. This view is supported by the decision of the Privy Council in *Jain-ul-Abdin Khan v. Muhammad Asgar Ali Khan ILR 10 All. 166*. A similar view was taken by the Supreme Court in [Binayak Swain Vs. Ramesh Chandra Panigrahi and Another](#).

6. For the reasons mentioned above, we are of the view that the second appeal was rightly allowed by A.K. Mukherji J. This appeal is accordingly dismissed but in the circumstances of the case there will be no order as to costs.

S.K. Bhattacharyya J.

7. I agree,