

**(1925) 08 CAL CK 0040****Calcutta High Court****Case No:** None

Fazalar Rahaman and Others

APPELLANT

Vs

Abdul Samad and Others

RESPONDENT

**Date of Decision:** Aug. 19, 1925**Citation:** AIR 1926 Cal 981**Judgement**

1. This is an appeal against an order granting an application for restitution. The original decree was passed on the 12th June 1916. In execution of the decree certain money was realized, by the appellants on the 17th February 1917. The decree was reversed on appeal on the 7th January 1920. There was a further appeal to this Court and the decree of the appellate Court was affirmed on the 20th December 1921. This application for restitution was made on the 9th February 1923. On the authorities it is clear that the period of limitation is three years under Article 181 of the Limitation Act: see *Asutosh Goswami v. Upendra Prosad Mitra* 21 C.W.N. 564. The point we have to decide is whether this period of limitation runs from the 7th January 1920 when the decree of the first Court was set aside or from the date of its confirmation on second appeal to this Court.

2. In our opinion the lower Courts are right in holding that the time should be calculated from the later date. Though the facts are not the same we think the principles in the case of *Uma Charan Chakrabarti and Others Vs. Nibaran Chandra Chakrabarti*, are applicable in the present case. There attention has been drawn to the lucid exposition of Mr. Justice Dwarka Nath Mitter in the case of *Ram Charan v. Lakhi Kanta* 7 B.L.R. 704 of the true effect of the disposal of an appeal upon the decree of the primary Court:

If the decree of the lower Court is reversed by the appellate Court, it is absolutely dead and gone. If, on the other hand, it is affirmed by the appellate Court, it is equally dead and gone, though in a different way, namely, being merged in the decree of the superior Court, which takes its place for all intents and purposes. Both the decrees cannot exist simultaneously.

3. On the passing of the decree by this Court in second appeal the petitioners had a right to apply for restitution within three years of that decree, and this they have done.

4. We accordingly dismiss this appeal. We make no order as to costs.