APPELLATE CIVIL.

Before Rankin C. J. and Pearson J.

SAROJEBHUSHAN GHOSH

v.

DEBENDRANATH GHOSH.*

1931
May 19, 20.

Limitation—Application for restitution—Code of Civil Procedure (Act V of 1908), s. 144—Indian Limitation Act (IX of 1908), Sch. I, Art. 181.

An application for restitution under section 144 of the Code of Civil Procedure (1908) is not an application in execution and is governed by Article 181 of the Limitation Act.

Case law on the point reviewed.

The time for limitation should be counted from the decree which for the first time gave the applicant the right to restitution.

Hari Mohan Dalal v. *Parmeshwar Shau* (1) followed.

The facts and material dates appear fully from the judgment.

Sharatchandra Ray Chaudhuri and *Satindranath Ray Chaudhuri* for the appellants.

S. C. Maiti, Apurbacharan Mukherji and *Manmathanath Das Gupta* for the respondents.

APPEAL FROM APPELLATE ORDER by the applicants for restitution.

RANKIN C. J. In this case, there was a suit for redemption and the suit was, in July, 1922, decreed and an order made for redemption and restoration of possession. Possession was delivered through court to the plaintiffs, but, on an appeal being brought, the decree was set aside on the 9th of July, 1924. An appeal was brought to the High Court, which was dismissed, and a further appeal was brought under the Letters Patent, which was also dismissed on the 7th of February, 1928. On the 27th of June, 1929, the present appellants made an

*Appeal from Appellate Order, No. 388 of 1930, against the order of R. R. Garlick, District Judge of 24-Parganas, dated May 19, 1930 reversing the order of Mahammad Abul Ashan, Second Munsif of Baruipur, dated Jan. 8, 1930.

(1) (1928) I. L. R. 56 Calc. 61.

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application for restitution under section 144 of the Code of Civil Procedure. The first court gave effect to the claim and ordered restitution. The second court has dismissed their application as being time-barred under Article 181 of the Schedule to the Limitation Act, 1908.

Mr. Ray Chaudhuri, who appears for the appellants in this case, has given us a most careful and interesting argument and he asks us, in effect, to deal with two points. First of all, he asks us to say that an application under section 144 is an application in execution and that, in the present case, the Article which governs it is Article 182. There being certain rulings of this Court against him on this point, his argument before us is really directed to persuade us to differ from those rulings and to refer the matter to a Full Bench. The second question upon which Mr. Ray Chaudhuri has given us a careful argument is this: On the assumption that an application under section 144, Code of Civil Procedure, is not an application in execution, he still contends that in the present case the time from which the period of limitation starts is the 7th of February, 1928, the dismissal of the Letters Patent appeal and not the date in July, 1924, when the decree in the redemption suit dismissed the claim for redemption. On that matter also there is authority against the contention put forward by Mr. Ray Chaudhuri and there again the purpose of his argument is that we should refer that question to a Full Bench.

We have been taken through all the cases and the short effect of them, in my judgment, is this: Since the Code of 1908 has altered the language of section 144 and placed the section in a different part from the previous section 583, there has been one ruling, *Madanmohan Dey* v. *Nogendra Nath Dey* (1), by a Judge, sitting singly, as a Taxing Judge, namely,

(1) (1917) 21 C. W. N. 544.

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Mr. Justice Chatterjea, in favour of the view that an application under section 144 is an application in execution. Otherwise, the Calcutta cases come to this: Whether the matter has been reasoned out or whether the matter has been dealt with *obiter* or otherwise, the cases do show an opinion that an application under section 144 is not an application in execution. On each of the cases cited, there is some room for comment. There is first of all, the case of *Harish Chandra Shaha* v. *Chandra Mohan Dass* (1), where the opinion of Stevens and Pratt JJ. was expressed tentatively and *obiter*. There is also the case of *Gangadhar Marwari v. Lachman Singh* (2), which appears to have been directly concerned with the old Code and which, while it takes the view that Article 181 is applicable, has also in it certain observations which tend in an opposite direction. There is the case of *Asutosh Goswami* v. *Upendra Prosad Mitra* (3). In that case, it may be noted that, besides relying upon the decision in the case of *Harish Chandra Shaha* v. *Chandra Mohan Dass* (1) and the decision in the case of *Kurupam Zamindar* v. *Sadasiva* (4), the learned Judges appear to have relied upon the decision in *Nand Ram* v. *Sita Ram* (5), which upon being carefully read appears to be an authority the other way. There was a decision in 1912 by Mr. Justice Sharfuddin and Mr. Justice Coxe where they followed the decision in *Harish's* case (1): but this, too, was an *obiter dictum*. Then there comes a recent case, to the decision of which I was a party, where a Division Bench holding that Article 181 was applicable to an application under section 144, referred the question whether, in the circumstances, it was to be applied as on the date of the appellate court's decree or on the date of the decree which first reversed the decree which had to be executed. Before the

(1) (1900) I. L. R. 28 Calc. 113.
(2) (1910) 11 C. L. J. 541.
(3) 1916) 21 C. W. N. 564.
(4) (1886) I. L. R. 10 Mad. 66.
(5) (1886) I. L. R. 8 All. 545.

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Division Bench, both the learned Judges, on a review of the cases, came to the conclusion that an application under section 144 was governed by Article 181, and, when the Special Bench came to hear the reference made by those learned Judges, it is to be noticed that they thought it their duty under the Code to accept that finding and to determine the question referred to them not quarrelling with the assumption which underlay the question. The decision, however, of the Division Bench was a decision in the same sense as the previous decisions that is to the effect that Article 181 is the Article applicable to an application under section 144. I think it may be said, on the Calcutta decisions, that, in no one of the cases cited, has the question been discussed very elaborately or reasoned very closely. But, if we look at the matter broadly, there has for a number of years been a settled opinion in this High Court to the effect that Article 182 is not to be applied to an application under section 144. Now, it is quite true that the Bombay High Court in the case of *Kurgodigouda* v. *Ningangouda* (1) and in the case of *Hamidalli* v. *Ahmedalli* (2) has come to a contrary opinion and its view is that execution is a phrase which covers all applications provided for by section 144. A similar view was taken in 1916 in the case of *Somasundaram Pillai* v. *Chokkalingam Pillai* (3). On the other hand, in recent years, no less than three High Courts have considered the matter and come to a different conclusion. It is quite clear that the rulings of the Lahore High Court, the Allahabad High Court and the Patna High Court are in the same sense as the decisions of the Calcutta High Court. The case in which the Allahabad High Court came to the conclusion that an application under section 144 was not an application in execution is the case of *Jiwa Ram* v. *Nand Ram* (4), in which the learned Judges disagreed with the view taken

(1) (1917) I. L. R. 41 Bom. 625.
(2) (1920) I. L. R. 45 Bom. 1137.
(3) (1916) I. L. R. 40 Mad. 780.
(4) (1922) I. L. R. 44 All. 407.

under the old Code. This was followed by another Division Bench in the case of *Brij Lal* v. *Damodar Dass* (1), and again by a single Judge in the case of *Baijnath Das* v. *Balmakund* (2). The matter was very elaborately discussed before a Full Bench of the Patna High Court in the case of *Balmakund Marwari* v. *Basanta Kumari Dasi* (3), where the decision of Dawson Miller C. J., in the case of *Basanta Kumari Dasi* v. *Balmakund Marwari* (4), was differed from. The result is that there is a good deal of authority in the recent decisions of other High Courts supporting the view that has been generally taken by this High Court upon the question and, before we are justified in sending this question to a Full Bench, we have to say that we are prepared to disagree with the Calcutta decisions which are against the contention of the present appellants. The matter is a difficult one; but I am not prepared to say that I disagree with those decisions. There are a good many matters to be canvassed, but it does seem to me that, having regard to the fact that execution proceedings are not within section 141 having regard to the fact that large claims for damages may have to be entertained under section 144 and that section 144 has not been put in that part of the Code which deals with execution but in the chapter of the Code which deals with miscellaneous matters, it is by no means clear that the contention that an application for restitution is an application in execution ought to be accepted. I realize, however, that, in view of the language of section 47 and in view of the fact that it constantly happens that questions of execution become entangled with questions of restitution where the decree of an appellate court has varied the decree of a court below affirming it on some points and overruling it on others, there is much to be said as a question of convenience for the view that applications for restitution should be dealt with as

(1) (1922) I. L. R. 44 All. 555.
(2) (1924) I. L. R. 47 All. 98.
(3) (1924) I. L. R. 3 Pat. 371.
(4) (1922) I. L. R. 2 Pat. 277.

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execution matters. On the whole, however, I am not prepared to say that I disagree with the decisions which in this Court stand against the appellants and, while it might be convenient to refer the matter to a Full Bench merely for the purpose of preventing the question being argued over and over again, I am not in a position to say that a reference should be made. Some day, no doubt, the matter will come before some other Bench which may disagree with this view and, in that case, it may be referred to a Full Bench.

As regards the second point, Mr. Ray Chaudhuri has pointed out that the question, dealt with by the judgment in *Hari Mohan Dalal* v. *Parmeshwar, Shau* (1), was whether, assuming that an application under section 144, Code of Civil Procedure, was not an application for execution, the time for such an application ought nevertheless to be calculated from the decree of the last appeal and not from the decree which for the first time gave the applicant the right to restitution. This matter was dealt with in the judgment which I gave on that occasion; and with regard to that, Mr. Ray Chaudhuri desires to point out that, in the case of *Saiyid Jowad Hussain* v. *Gendan Singh* (2) and again in the case of *Fitzholmes* v. *The Bank of Upper India, Limited* (3), the Privy Council have affirmed the proposition that the time for applying for final decree runs from the date when the appeal was decided on the question of the preliminary decree. The passage, in particular, in the former of these cases is pointed out to us where their Lordships agreed with what was said by that very learned Judge Mr. Justice Pramada Charan Banerji in the case of *Gajadhar Singh* v. *Kishan Jiwan Lal* (4). There the learned Judge said: "It seems to me that this rule contemplates the "passing of only one final decree in a suit for sale "upon a mortgage. The essential condition to the

(1) (1928) I. L. R. 56 Calc. 61.

(2) (1926) I. L. R. 6 Pat. 24; L. R. 53 I. A. 197.

(3) (1926) I. L. R. 8 Lah. 253; L. R. 54 I. A. 52.

(4) (1917) I. L. R. 39 All. 641, 643.

"making of a final decree is the existence of a "preliminary decree which has become conclusive "between the parties. When an appeal has been "preferred, it is the decree of the appellate court "which is the final decree in the cause." In the case of *Hari Mohan Dalal* v. *Parmeshwar Shau* (1), the principle in the case of *Uma Charan Chakrabarti* v. *Nibaran Chandra Chakrabarti* (2) and in the decision of the Full Bench of Allahabad was recognised and affirmed. The question, however, is whether, for the purposes of applying Article 181 on the footing that an application under section 144 is not an application in execution, it is necessary to disregard altogether the decree which, for the first time, gave a right of restitution to the applicant. I cannot say that a consideration of the cases, to which our attention has been drawn by Mr. Ray Chaudhuri, has converted me to a different opinion from that which I expressed in *Hari Mohan Dalal's* case (1). That being so, I do not think that that point either should be referred by this Court to a Full Bench.

In the circumstances, the appeal fails and must be dismissed with costs, hearing-fee three gold mohurs.

PEARSON J. I agree.

Appeal dismissed.

N. G.

(1) (1928) I. L. R. 56 Calc. 61.

(2) (1922) 37 C. L. J. 452.