APPELLATE CIVIL.

Before Mitter and Roxburgh JJ.

BIRENDRA NATH BASU THAKUR

1940

Jan, 4, 5, 8, 19.

v.

SURENDRA KUMAR BASU THAKUR.*

Limitation.—*Application for restitution—Interest on costs to be refunded under the order of Privy Council—Code of Civil Procedure (Act V of 1908), s. 144—Indian Limitation Act (IX of 1908), Sch. I, Arts. 181, 183.*

An application for restitution under s. 144 of the Code of Civil Procedure filed by reason of the Order of His Majesty in Council reversing the decree of the High Court is not an application in execution or for enforcing the Order of His Majesty in Council within the meaning of Art. 183, but such application is governed by Art. 181 of the Limitation Act. But an Order of His Majesty in Council, which expressly directs the refund of costs realised under the decree so reversed, shall be enforced in execution and Art. 183 of the Limitation Act would be applicable to such a case.

No interest on the amount to be so refunded can be claimed in execution when such an Order of His Majesty in Council is silent about it.

Sarojebhushan Ghosh v. *Debendranath Ghosh* (1); *Pell* v. *Gregory* (2) and *Hari Mohan Dalal* v. *Parameshwar Shau* (3) referred to.

Forester v. *Secretary of State for India in Council* (4) followed.

The power of a Court to direct restitution is inherent in the Court itself and is not given by s. 144 of Code, which merely prescribes a procedure for restitution in respect of a particular class of cases.

Rodger v. *The Comptoir D'Escompte de Paris* (5) and *Jai Berhma* v. *Kedar Nath Marwari* (6) referred to.

APPEALS by plaintiffs arising out of proceedings for restitution under s. 144 of the Code of Civil Procedure.

*Appeals from Original Orders Nos. 656 to 658 of 1936, against the orders of Rajendra Lal Chakrabarti, Fourth Subordinate Judge of Dacca, dated July 6, 1936.

(1) (1931) I. L. R. 59 Cal. 337.
(2) (1925) I. L. R. 52 Cal. 828.
(3) (1928) I. L. R. 56 Cal. 61.
(4) (1877) I. L. R. 3 Cal. 161; L. R. 4 I. A. 137.
(5) (1871) L. R. 3 P. C. 465.
(6) (1922) I. L. R. 2 Pat. 10; L.R. 49 I. A. 351.

1940

Birendra Nath Basu Thakur v. *Surendra Kumar Basu Thakur.*

Shortly stated, the following are the facts of the case. The Privy Council reversed the decree of the High Court and dismissed the plaintiffs' suit and further ordered the refund of all costs realised by the plaintiffs under the decree of the High Court. It is an admitted fact that Rs. 3,434-4-3 were realised by the plaintiffs as costs due under the High Court decree prior to its reversal by the Privy Council. Three sets of defendants, purporting to claim restitution in accordance with the order of His Majesty in Council, filed three applications under s. 144 of the Code of Civil Procedure and *inter alia* claimed the aforesaid amount of Rs. 3,434-4-3 with interest. The plaintiffs opposed these applications as barred by limitation and contended that the claim for interest is illegal. The learned Subordinate Judge ordered the refund of the aforesaid costs with interest at 12 per cent. per annum. Hence these three appeals by the plaintiffs to High Court.

Hiralal Chakravarti, *Bhupendra Nath Roy Choudhury* and *Satya Priya Ghose* for the appellants. No application under s. 144 of the Code is maintainable, because the Privy Council ordered the refund of costs, which must be realised in execution. Applications under s. 144 of the Code are not applications in execution. *Pell* v. *Gregory* (1); *Hari Mohan Dalal* v. *Parameshwar Shau* (2) and *Sarojebhushan Ghosh* v. *Debendranath Ghosh* (3). Some of the other High Courts have taken a different view in holding that applications under s. 144 of the Code are applications in execution. The current of decision of this Court is uniformly against this view. Assuming that application under s. 144 of the Code is maintainable, Art. 181 of the Limitation Act is applicable and under that Article limitation of three years would run from February 27, 1930, on which the

(1) (1925) I. L. R. 52 Cal. 828. (2) (1928) I. L. R. 56 Cal. 61.
(3) (1931) I. L. R. 59 Cal. 337.

1940

Birendra Nath Basu Thakur v. *Surendra Kumar Basu Thakur.*

Privy Council reversed the decree of the High Court and the present applications under s. 144 of the Code were filed on different dates in 1935 and 1936. Hence these applications are barred by limitation. Interest has been allowed by the learned Subordinate Judge. This is illegal, because the order of His Majesty in Council does not direct any payment of interest. *Forester* v. *Secretary of State for India in Council* (1).

Surajit Chandra Lahiri, with him *Deva Prosad Ghose* for the respondents. Application under s. 144 of the Code is not governed by Art. 181 of the Limitation Act, but by Art. 183 of the Limitation Act. The learned Subordinate Judge was right in following the case of *Brij Lal* v. *Damodar Das* (2) and *Sohan Bibi* v. *Baijnath Das* (3). Article 183 of the Limitation Act is worded differently from Art. 182 and it contemplates not only application for execution but also applications under s. 144 of the Code. This is indicated by the use of the word "enforce" in the third column of Art. 183. I submit that the word "enforce" has a wider meaning than the word "execute" and includes an application under s. 144 of the Code. The learned Sub-Judge rightly granted interest, which is the usual relief given in restitution. The order of His Majesty in Council did not say that no interest could be claimed. Therefore, the ordinary rule about granting interest in restitution should be followed.

Chakravarti, in reply. The distinction sought to be made between the two words "enforce" and "execute" is without any difference. Both the words have the same meaning.

Cur. adv. vult.

MITTER J. These three appeals arise in three proceedings started under s. 144 of the Code of

(1) (1877) I. L. R. 3 Cal. 161; L. R. 4 I.A. 137.
(2) (1922) I. L. R. 44 All. 555.
(3) (1928) I. L. R. 50 All. 767.

Civil Procedure by three sets of plaintiffs. The said plaintiffs brought a suit in the Court of the Subordinate Judge at Dacca for possession of 3 annas 12 *gandâs* share of a property known as the Taltala *hât* and *bâzâr* (Title Suit No. 33 of 1920). There were twenty-two defendants in that suit. On January 23, 1922, the learned Subordinate Judge dismissed the suit, except with regard to a share in four small parcels of land. No cost was awarded to any of the parties. The plaintiffs appealed to this Court. On May 28, 1925, that appeal was decreed against nine of the defendants and the plaintiffs were awarded costs of both Courts against the said defendants. The said nine defendants preferred an appeal to His Majesty in Council and while the said appeal was pending the plaintiffs took possession (in Title Execution No. 174 of 1925) and took proceedings for realizing the costs decreed by the High Court from one of the defendants, Surendra Kumar Basu Thakur, in Title Execution No. 200 of 1925. Surendra Kumar deposited in Court a sum of Rs. 3,434-4-3 representing the said cost on December 17, 1925, and the plaintiffs withdrew the same from Court on January 6, 1926. The appeal to His Majesty in Council was allowed on February 27, 1930. The decree of the learned Subordinate Judge was restored, except with regard to the share of the aforesaid four small parcels of land, in respect of which a further enquiry was directed: *Kaminikumar Basu* v. *Birendranath Basu* (1). The order of His Majesty in Council directed the parties to bear their costs throughout up to that stage. It further directed that "any costs paid under the said decree "of that Court" (High Court) "ought to be returned" (Part I p. 56).

(1) (1930) I.L.R. 57 Cal. 1302; L.R. 57 I.A. 117.

1940

Birendra Nath Basu Thakur
v.
Surendra Kumar Basu Thakur.

Mitter J.

Three applications for restitution were made under s. 144 of the Civil Procedure Code. The particulars are shewn in the following table:—

Date of application.	No. in lower Court.	Corresponding No. of the appeal.	Name of the applicants.	Relief prayed for.
12-8-1935	Misc. Case No. 56 of 1935.	No. 656 of 1936.	Surendra Kumar Basu for self and as receiver, representing his brother Debendra Kumar Basu.	1. Restoration of possession jointly with the other seven defendants. 2. Refund of the costs realised by the plaintiffs (Rs. 3,434-4-3) with interest.
27-1-1936	Misc. Case No. 22 of 1936.	No. 658 of 1936.	Kamini Kumar Basu and four of the other nine defendants, including Debendra Kumar Basu.	1. Restoration of possession jointly with the other defendants. 2. Mesne profits.
20-3-1936	Misc. Case No. 23 of 1936.	No. 657 of 1936.	Krishna Kumar and Paresh Chandra Basu.	Restoration of possession jointly with the other defendants.

One of the said nine defendants, Binay Kumar Basu, did not make any application, but was an opposite party. At the hearing Krishna Kumar and Paresh Chandra expressly stated that they were all along in possession and so they did not claim mesne profits. The learned Subordinate Judge, by his order dated July 6, 1936, held that the applications were not barred by time. He directed restoration of possession and decreed mesne profits to the applicants of the first two applications according to their shares. He also directed the plaintiffs to refund to Surendra Kumar Basu the said sum of Rs. 3,434-4-3 with interest at 12 per cent. per annum from January 6, 1926, till payment.

The following points have been urged by the learned advocate for the appellants:—

(i) The applications are barred by time.

(ii) Assuming that the applications are not barred by time,

(a) interest cannot be claimed on the aforesaid sum of Rs. 3,434-4-3;

(b) in any event, the rate of interest allowed is very high;

(c) mesne profits cannot be allowed in favour of the applicants of Miscellaneous Case No. 56 of 1935: and

(d) the share of the applicants of the Miscellaneous Case No. 22 of 1936 and of No. 56 of 1935 in the mesne profits is less than what has been declared.

The learned Subordinate Judge has held that the applications are governed by Art. 183 of the Indian Limitation Act. His view is that the applications are for enforcement of the Order of His Majesty in Council. This view, which has the support of the High Court of Allahabad [*Brij Lal* v. *Damodar Das* (1) and *Sohan Bibi* v. *Baijnath Das* (2)] has been challenged by the appellants' advocate, who contends that Art. 181 is applicable, time running from February 27, 1930, when the Order in Council was made. As far as we are aware there is no decision of this Court on the point.

One matter must be taken to be settled in this Court, namely, that an application for restitution under s. 144 of the Civil Procedure Code is not an application for execution of the decree of the final Court of appeal. A different view has been taken in some of the other High Courts, but in the case of *Sarojebhushan Ghosh* v. *Debendranath Ghosh* (3)

(1) (1922) I. L. R. 44 All. 555. (2) (1928) I. L. R. 50 All. 767.
(3) (1931) I. L. R. 59 Cal. 337.

1940

Birendra Nath Basu Thakur v. *Surendra Kumar Basu Thakur.*

Mitter J.

Rankin, C. J. declined to refer the matter to a Full Bench for reconsideration of the view taken by this Court on the ground that other High Courts had taken a different view. We are not prepared to dissent from the long line of cases decided by this Court and must hold that such an application is not an application for execution. It may, however, be pertinent to point out that, though there are weighty authorities of some of the other High Courts the other way, the view taken by this Court has the approval of two Full Benches, namely, of the Patna and of the Allahabad High Courts: *Balmakund Marwari* v. *Basanta Kumari Dasi* (1) and *Parmeshwar Singh* v. *Sitaldin Dube* (2). We are not unmindful of the fact a Special Bench of the Patna High Court, *Pathak Bhaunath Singh* v. *Thakur Kedar Nath Singh* (3), has overruled *Balmakund's* case. It has, accordingly, been held in this Court that where restitution is required by reason of a final decree passed by a Court in India in an appeal from a *mofussil* decree, Art. 181 and not 182 of the Indian Limitation Act is applicable to an application made under s. 144 of the Code of Civil Procedure. If Art. 183 is of the same scope as Art. 182, the case before us would be governed by Art. 181, in spite of the fact that restitution here is required by reason of the Order of His Majesty in Council. It has, however, been urged before us by the respondents' advocate that the language used in the first column of Art. 183 is different from the language used in the first column of Art. 182. The last mentioned Article contemplates, says he, only applications for execution of decrees not falling within Art. 183 and no other application, while Art. 183 contemplates not only such applications, *i.e.*, for *execution*, but applications of other kinds. This, he submits, is indicated by the use of the additional word "enforce" used in the last mentioned Article. There is authority for the proposition

(1) (1924) I. L. R. 3 Pat. 371. (2) (1934) I. L. R. 57 All. 26.
(3) (1934) I. L. R. 13 Pat. 411.

that the word "enforce" is of wider import than the word "execute". The way in which an application to have a final decree under O. XXXIV, r. 5 on the basis of a preliminary decree passed by this Court in its Ordinary Original Jurisdiction was sought to be distinguished by Sanderson C. J. and Buckland and Mukerji JJ. in *Pell* v. *Gregory* (1) from an application for a personal decree under O. XXXIV, r. 6 after the sale of the mortgaged properties in pursuance of a decree of that Court, lends some support to the contention that the word "enforce" is of wider import than the word "execute". The observation of Rankin J. (as he then was) at p. 846 of the report would, however, indicate that there is no substantial difference between the words "enforce" and "execute", an observation which gets support from the language of O. XXI, rr. 31 and 32 and the marginal note and provisions of O. XLV, r. 15 of the Code of Civil Procedure. Be that as it may, in our judgment, it does not necessarily follow from the said distinction that an application made under s. 144 to have restitution in consequence of an Order of His Majesty in Council is governed by Art. 183. The matter has to be examined on broader grounds.

The power of a Court to direct restitution is inherent in the Court itself. It rests on the principle that a Court of justice is under a duty to repair the injury done to a party by its act: *Rodger* v. *The Comptoir D'Escompte de Paris* (2); *Jai Berhma* v. *Kedar Nath Marwari* (3). The right of a party to have restitution and the duty of the Court to give him restitution do not rest on the provisions of s. 144 of the Code of Civil Procedure, which defines the procedure only in one class of cases requiring restitution by enacting that the application for restitution is to be made in the Court of first instance. The other part of the section gives the measure of

(1) (1925) I. L. R. 52 Cal. 828. (2) (1871) L. R. 3 P. C. 465.
(3) (1922) I. L. R. 2 Pat. 10; L. R. 49 I. A. 351.

1940

Birendra Nath Basu Thakur v. *Surendra Kumar Basu Thakur.*

Mitter J.

restitution and empowers that Court to determine the form and amount of restitution. Such being the principle of restitution, the fiction of an implied direction by the final Court of appeal which had reversed an intermediate decree need not and, in our judgment, cannot be introduced. The wider words "enforce a judgment *etc.*" used in Art. 183 of the Limitation Act should, in our judgment, be given their ordinary significance, namely "carrying out "what has been directed to be done in the judgment *etc*". The final judgment or decree furnishes only the foundation to a claim for restitution,—gives authority for *the view* that restitution is necessary. An application for restitution is not one for enforcement of that judgment or decree, but in the words of Rankin C. J. it is an application for relief which is *consequential* upon the appellate Court's decree of reversal: *Hari Mohan Dalal* v. *Parameshwar Shau* (1). Proceedings for restitution, in our judgment, are proceedings which are no doubt dependent upon the final result of the suit, but they are in a sense independent of the proceedings in the suit, for new issues, which were not issues in the suit, require adjudication for giving complete or adequate relief. The order for restitution is in effect a new decree, which has to be enforced by another execution. Accordingly on the principles laid down by the Full Bench in *Pell* v. *Gregory* (*supra*) an application for restitution cannot be regarded as one for *enforcement* of the final judgment or decree within the meaning of Art. 183. We cannot, accordingly, agree with decisions of the Allahabad High Court in *Madhusudan Das* v. *Brij Lal* (2); *Brij Lal* v. *Damodar Das* (3) and *Sohan Bibi* v. *Baijnath Das* (4). We prefer to follow the reasonings of Sen J. in the last mentioned case, who, in spite of his own personal views, agreed with the decision in *Brij Lal's* case on the ground that that was a binding authority on him. Article 183 being

(1) (1928) I. L. R. 56 Cal. 61.
(2) (1921) 61 Ind. Cas. 806.
(3) (1922) I. L. R. 44 All. 555.
(4) (1928) I. L. R. 50 All. 767.

out of the way, the residuary Art. 181 applies and the applications made by the respondents for restitution are barred by time.

We now proceed to deal with the other points raised in the appeals, though they are not necessary on the view we have taken on the question of limitation.

The Order of His Majesty in Council has expressly given a direction for the return of the costs which the appellants had realised from Surendra Kumar Basu, one of the respondents, in execution of the decree passed by this Court. If that portion of the Order in Council were enforced in execution thereof interest could not have been realised, as there is no direction for payment of interest: *Forester* v. *Secretary of State for India in Council* (1). In these circumstances, it would not have been proper to allow interest, though ordinarily interest is a part of the normal relief given in restitution: *L. Guran Ditta* v. *T. R. Ditta* (2). Even if interest had to be awarded we think that 12 per cent. per annum would be a high rate. Six per cent. would have been the proper rate.

We think that the applicants of Miscellaneous Case No. 56 of 1935 would have been entitled to have mesne profits, if their application for restitution had not been barred by time. No doubt they did not make a prayer for the same, but in their application they expressly stated that the appellants had taken possession in execution of the decree of this Court and were still in possession. They prayed for restoration of possession. In these circumstances, it would have been duty of the Court in pursuance of the power conferred on it by s. 144 of the Code, to allow them mesne profits. There is a slight miscalculation of the shares. The share of the applicants in Miscellaneous Case No. 56 is 2/10th and of the applicants in Miscellaneous Case No. 22 of 1936 is 5/10th.

(1) (1877) I. L. R. 3 Cal. 161; L. R. 4 I. A. 137.

(2) (1934) 39 C. W. N. 377.

1940

Birendra Nath Basu Thakur v. *Surendra Kumar Basu Thakur.*

Mitter J.

At the conclusion of the hearing we were told that proceedings for execution of the order of the learned Subordinate Judge made under s. 144 of the Code have been started. The claim of the respondent, Surendra Kumar Basu, to get a refund of Rs. 3,434-4-3, which had been realised from him by the appellants, is not barred by time even now, for that claim can be enforced in execution of the Order of His Majesty in Council, as that order expressly directs a refund. Article 183 of the Limitation Act would apply to such an execution. If the Order of His Majesty in Council had been put into execution for realising the said sum, interest could not have been allowed to Surendra Kumar Basu. The money had, however, been realised by the appellants from him in 1926. In these circumstances, we intimated to the learned advocates if their clients would consent to treat the application for execution already made as an application for execution of the Order of His Majesty in Council, so far as it related to the realisation of the said sum. They have given their consent. We, accordingly, direct the lower Court to convert the said application for execution into an application by Surendra Kumar Basu for execution of the Order of His Majesty in Council for the realisation of the said sum of Rs. 3,434-4-3. We have already ruled that no interest can be allowed on the same.

The result is that all these appeals are allowed. We direct the parties to bear respective costs of this Court and of the Court below, except that the appellants would be entitled to realise from the contesting respondents the amount they had paid as court-fees on the memoranda of appeals and one-fifth of the paper-book costs.

ROXBURGH J. I agree.

N. C. C.

Appeals allowed.