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barred the suit. The other pleas raised in the trial court were reiterated. On this new point the court below held that this particular *hundi* was really a promissory note and, therefore, did not fall within section 64 of the Negotiable Instruments Act. In this view we are unable to agree; but it seems to us that the provisions of section 76, clause (*d*), render presentation unnecessary in this case. According to that section no presentation for payment is necessary "as against the drawer, if the drawer could not suffer damage from the want of such presentation". In this case the drawer and the drawee were the same, and, therefore, both of them knew when the *hundi* was executed that it was payable ninety days thereafter, and on the expiration of the ninety days, both of them knew that it had not been paid. Thus, no question of damage can arise and the cases cited are, therefore, not applicable.

There remains another point, however, which has not been decided, and that is whether, when Bihari Lal executed this *hundi*, he was acting for the firm, and whether the money was required for the business of the firm. On this point there is no clear finding by the District Judge. We, therefore, refer an issue to the learned District Judge, namely, did Bihari Lal borrow this Rs. 2,000 for the business of the firm Bihari Lal Balmakund? No further evidence will be taken. On return of the finding the usual ten days will be allowed for objections.

Issue remitted.

Before Mr. Justice Walsh and Mr. Justice Ryves.

BRIJ LAL AND OTHERS (DECREE-HOLDERS) *v.* DAMODAR DAS (OBJECTOR)*

1922 April, 3.

Act No. IX of 1908 (*Indian Limitation Act*), *schedule I, article* 183—*Civil Procedure Code* (1908), *section* 144—*Application for restitution—Limitation.*

Held that an application under section 144 of the Code of Civil Procedure to recover mesne profits which became payable to the applicant in consequence of a decree of the High Court having been reversed by the Privy Council, though not a proceeding in execution, yet, being an application to enforce a decree of His Majesty in Council, was governed as to limitation by article 183 of the first schedule to the Indian Limitation Act, 1908. *Madhusudan Das* v. *Birj Lal* (1) referred to. *Jiwa Ram* v. *Nand Ram* (2) followed.

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*First Appeal No. 84 of 1921, from a decree of Preo Nath Ghose, Subordinate Judge of Bareilly, dated the 16th of November, 1920.

(1) (1921) 61 Indian Cases, 806. (2) (1922) Supra, p. 407.

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THE facts of the case material to this report are these :—Het Ram and others brought a suit for possession of certain zamindari property in the court of the Subordinate Judge of Bareilly. The suit was dismissed. The plaintiffs then assigned a portion of their rights to one Damodar Das on the latter undertaking to finance the litigation, and preferred an appeal to the High Court, which decreed the claim. The plaintiffs executed the decree and, having obtained possession of the property in suit, put Damodar Das in possession thereof. On appeal by the principal defendant, Brij Lal, the Privy Council by their judgment, dated the 6th of February, 1914, dismissed the suit and ordered the parties to bear their own costs. Brij Lal, without waiting for a sealed copy of the order of their Lordships of the Privy Council, made an application, purporting to be under section 144 of the Code of Civil Procedure, to the court of the Subordinate Judge of Bareilly for restoration of possession of the property to himself, and filed along with it a copy of the judgment of the Privy Council which he had received from his solicitors. The judgment-debtors objected, *inter alia*, that the applicant had not fulfilled the requirements of order XLV, rule 15, of the Code of Civil Procedure and that no order for execution could be passed in the absence of a formal copy of the order of His Majesty in Council. The objections did not find favour with the Subordinate Judge and were disallowed. On appeal the High Court gave effect to the objections and dismissed Brij Lal's application. [Vide *Damodar Das* v. *Birj Lal* (1).]

In the meantime a formal copy of the order of His Majesty in Council having been received and transmitted to the court of the Subordinate Judge under order XLV, rule 15, of the Code of Civil Procedure, Brij Lal applied again to the Subordinate Judge and obtained possession of the property from Damodar Das. Brij Lal next applied on the 10th of September, 1916, for the refund of costs which had been realized from him by Het Ram and others after their appeal to the High Court had been decreed. The application was opposed and the matter went up to the High Court, with the result that the costs were ordered to be refunded. Brij Lal then made a third application on the

(1) (1915) I. L. R., 37 All., 507.

4th of September, 1918, out of which this appeal arose, for restitution of mesne profits realized by Damodar Das under the decree of the High Court. Damodar Das opposed the application on the following grounds :—

(1) That the application having been made after more than three years from the date of the decree of His Majesty in Council, it was barred by time under article 181 of the Limitation Act.

(2) That the decree-holder not having asked for mesne profits in the previous applications, the present application was barred by the provisions of order II, rule 2, of the Code of Civil Procedure.

(3) That the objector, not having been made a party to the appeal to His Majesty in Council, was not liable to the applicant for mesne profits.

The learned Subordinate Judge decided all the three points in favour of Damodar Das and dismissed the application. Brij Lal came up in appeal to the High Court.

Dr. *Kailas Nath Katju*, for the appellant :—

The present application, being one to enforce an order of His Majesty in Council, is governed by article 183 of the Limitation Act which prescribes a period of twelve years from the time when the right to enforce such order accrues. Enforcement of an order may be by way of restitution, and the fact that this is an application under section 144 of the Code of Civil Procedure does not take the matter out of the purview of that article. The decree-holder by means of this application is only seeking to enforce what follows as a necessary consequence from the order of His Majesty in Council : *Madhusudan Das* v. *Birj Lal* (1). For the purposes of this application it is immaterial whether an application for restitution made under section 144 of the Code of Civil Procedure is an application for execution or not. The Bombay High Court and the Madras High Court have consistently held that such an application is one for execution : *Kurgodigouda* v. *Ningangouda* (2), *Sayad Hamidalli* v. *Ahmedalli* (3), *Unnamalai Ammal* v. *Mathan* (4) and *Somasundaram Pillai* v. *Chokkalingam Pillai* (5).

(1) (1921) 61 Indian Cases, 806.
(2) (1917) I. L. R., 41 Bom., 625.
(3) (1920) I. L. R., 45 Bom., 1137.
(4) (1917) 33 M. L. J., 413.
(5) (1916) I. L. R., 40 Mad., 780.

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A Division Bench of this Court has recently held in *Jiwa Ram* v. *Nand Ram* (1) that proceedings under section 144 of the Code are not execution proceedings, but the question of limitation was not considered.

As to the second objection, the provisions of order II, rule 2, of the Code are not applicable to such a case and the present application is maintainable.

The third objection has also no force. Damodar Das being an assignee *pendente lite* is bound by the decree of His Majesty in Council and is liable to pay mesne profits. Under section 52 of the Transfer of Property Act the rights of my client cannot be affected by any transfer made during the active progress of the suit. Section 146 of the Code of Civil Procedure also gives recognition to the same principle: *Dorasami Ayyar* v. *Annasami Ayyar* (2). Moreover, in view of the decisions on the previous applications for restitution between the parties, it is not open to Damodar Das now to say that the decree-holder is not entitled to recover mesne profits from him.

Munshi *Durga Prasad* (for Mr. *B. E. O'Conor*), for the respondent:

Under section 583 of the Code of Civil Procedure of 1882 proceedings for obtaining restitution were proceedings in execution of decree; but section 144 of the present Code is a new section, and the language used in this section makes it clear that proceedings under it are not proceedings in execution, and, therefore, the only article applicable is the general article 181. In execution something positive is required to be done, while in restitution no part of the order or decree is carried out and no specific relief granted by it is sought to be executed. Articles 182 and 183 govern cases of execution only and the expression "to enforce" used in article 183 is much narrower than the word "execution" used in article 182. We have to look to the character of the application, and the present application being one under section 144 of the present Code and having been made more than three years after the date of the Privy Council

(1) (1922) Supra, p. 407.

(2) (1899) I. L. R., 23 Mad., 306.

decree, is barred by time under article 181: *Jiwa Ram* v. *Nand Ram* (1), *Asha Bibi* v. *Nuruddin* (2), and *Krupasindhu Roy* v. *Mahanta Balbhadra Das* (3).

There was no order as to mesne profits passed by the Privy Council and what the decree-holder is now seeking is not the enforcement of any specific order of His Majesty in Council. The present application, therefore, does not fall under article 183.

Proceedings under section 144 of the Code of Civil Procedure are proceedings in the suit and the provisions of order II, rule 2, of the Code are applicable. The relief now sought, not having been asked for in the previous applications, cannot be granted.

As for the last point, Brij Lal was fully aware when he appealed to the Privy Council that the plaintiffs, Het Ram and others, had transferred some of their rights to Damodar Das and had also put him in possession of the property, and even then he did not make him a party to the appeal. Under these circumstances Damodar Das is neither bound by the Privy Council decree nor can restitution be claimed against him by the decree-holder.

Dr. *Kailas Nath Katju* replied.

WALSH, J.:—This appeal raises two points. It was an application in the court below against a person who had become a transferee of a decree which was subsequently set aside in the Privy Council in favour of the present appellants. The transferee was not a party to the proceeding in the Privy Council, but under the decree which the Privy Council set aside and of which he had become a transferee, he obtained possession of certain property and was, therefore, in the enjoyment of mesne profits in respect of it. The application to the court below, which was in substance a proceeding under section 144, but which adopted all the forms applicable to execution proceedings, asked that the respondent should account for mesne profits during the time for which he had been unlawfully in possession under a decree which had been set aside. The application was dismissed by the court below on the ground that it was time-barred by article 181

(1) (1922) Supra, p. 407. (2) (1915) 30 Indian Cases, 680.

(3) (1917) 3 Pat. L. J., 367.

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of the Limitation Act, and, secondly, on the ground that the respondent was not a party to the decree which gave rise to the application. A further point was raised under order II, rule 2, of the Code of Civil Procedure which obviously has no substance. The case has been extremely well argued on both sides before us and a great number of authorities have been cited on this vexed question. It is not desirable to add more than one is obliged to the tangle which appears to exist with regard to the method of reconciling proceedings under section 144 with other provisions of the law. It so happens that in the case before us the point whittles itself down to a comparatively narrow compass. We agree with the decision of this Court in the case of *Jiwa Ram* v. *Nand Ram* (1) that proceedings under section 144 of the Code are not execution proceedings, although they are, of course, in the nature of proceedings in execution to enforce either directly or indirectly the final decree. We do not agree with the lower appellate court that it is necessary that a party to an application under section 144 should have been a party to the decree. Section 144 is very wide in its terms. It includes matters which an execution court or an appellate court could not ordinarily deal with, and the word "party" is not used in that section in the sense "party to the suit", the expression ordinarily found in other parts of the Code dealing with execution matters, but must mean "party to the application." It so happens that in this particular case the matters arising out of the final decree of the Privy Council had been already on more than two occasions before this Court, although not always as between the identical parties now before us. We have decided to follow the view taken by this Court in the same or cognate matters arising out of this Privy Council decree. That is to say, firstly, this Court has already held that Damodar Das, although not a party to the Privy Council decree, was bound to give up possession and that an application under section 144 was properly made against him. We agree. That disposes of the second point decided in his favour by the lower court. Mr. Justice STUART, in a previous matter which came before him by way of first appeal in May of last year (the case

(1) (1922) Supra p. 407.

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is *Madhusudan Das* v. *Birj Lal* (1), held that the application was one justified by the provisions of section 144, and, inasmuch as its only authority was derived from the final decree of the Privy Council, it came within the expression used in article 183 of the Limitation Act, as being an application to enforce an order of His Majesty in Council. The words which we have just quoted are clearly capable of being read so as to cover an application of this kind, which is in substance one to enforce a decree of the Privy Council which restored the parties to the position they were in before the High Court interfered. We think the only logical course to take, whatever academic view one might take as a matter of construction in the interpretation of these somewhat difficult provisions, is to follow the view taken by Mr. Justice STUART in the case of *Madhusudan Das* v. *Birj Lal* (1). The appeal must be allowed and the case restored to the lower court to deal with on the merits. The applicants will have the costs of this appeal. Costs in the court below will abide the result.

RYVES, J. :—I agree generally. The facts out of which this case arises are as follows. Some persons sued the appellants for possession of land. They succeeded partially in the trial court, but, on appeal in this Court, succeeded entirely. Thereupon they executed their decree and got possession of the land, and then they transferred a part of the decree to the respondent and put him in possession of a corresponding portion of the land. Thereafter the appellants appealed to His Majesty in Council. The respondent was not made a party to that appeal. On the 9th of February, 1914, the Privy Council passed a decree reversing the decree of this Court and dismissed the suit. It went on to direct that the parties should bear their own costs. On the 8th of March, 1914, the appellants applied to the Subordinate Judge to obtain restitution of possession of the land of which they had been deprived. They based their application on a printed copy of the judgment of their Lordships of the Privy Council, which had been supplied to them by their solicitor in England. It was objected by the other side that the application to the Subordinate Judge was premature and that

(1) (1921) 61 Indian Cases, 806.

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in any case it could not be based on the report of the Privy Council. It was pointed out that under order XLV, rule 15, it was necessary to apply first of all to the High Court to transmit the decree of the Privy Council before its execution could be taken out. The Subordinate Judge over-ruled this objection. On appeal this Court upheld it. The judgment is reported in *Damodar Das* v. *Birj Lal* (1), and I will refer to it later. There were two further applications made to the Subordinate Judge, one for recovery of possession and the other for costs. Both of these were made within three years of the decree of the Privy Council, that is, the 9th of February, 1914. The present application was filed on the 4th of September, 1918, for mesne profits for the period during which the appellants had been kept out of possession of the property. The lower court rejected the application on three grounds. Firstly, that it was barred by article 181 of the schedule to the Limitation Act, on the ground that an application for restitution was not an application in execution of a decree, and, therefore, article 182 did not apply. It also held that article 183 was not applicable, because it was not an application to enforce *in terms* the decree of the Privy Council. It, therefore, held that the only other article possible was article 181 and that under that article the application was barred by time. It also held that, inasmuch as the respondents were no party to the appeal in the Privy Council, they were not bound by that decree. Thirdly, it applied order II, rule 2, as barring the application. On this ground also it dismissed the application. On appeal before us all the three points have been attacked. The third point has not been pressed. On the second point I think it is sufficient to say that in previous proceedings for restitution and costs in this very litigation arising out of this decree and in connection with the same property, it has been finally held by this Court that the respondents, though no party to the appeal, are bound by the decree. They, therefore, in my opinion, cannot raise that objection again. On the first point I feel considerable difficulty. It has now been held by this Court in the case of *Jiwa Ram* v. *Nand Ram* (2) that an application under section 144 of the Code

(1) (1915) I.L.R., 37 All., 567. (2) (1922) Supra p. 407.

is not a proceeding in execution under the Code of Civil Procedure. It is unnecessary, I think, to refer to any other rulings of other courts. The question, however, remains as to what, assuming that it is not an application for execution, is the article of limitation which would apply. It has been held in the cases of *Ram Singh* v. *Sham Parshad* (1), *Krupasindhu Roy* v. *Mahanta Balbhadra Das* (2) and *Asha Bibi* v. *Nuruddin* (3) from Burma, that applications under section 144 come within the purview of article 181 of the Limitation Act. On the other hand, the Bombay High Court in the case of *Sayad Hamidalli* v. *Ahmedalli* (4) and the Madras High Court in the case of *Unnamalai Ammal* v. *Mathan* (5) have held that applications under section 144 fall within article 182 of the Limitation Act. I may point out that all these cases refer to applications under section 144 from decrees of the High Court and that, therefore, article 183 was not and could not have been considered. It has been argued that in the case already mentioned, *Damodar Das* v. *Birj Lal* (6), this Court has really decided the matter and held that an application of this kind is really a proceeding in execution. In my opinion, however, in order to appreciate that decision it is necessary to examine what were the actual facts before the Court. There an attempt had been made to execute the decree of the Privy Council in the court of the Subordinate Judge on the basis of a copy of their printed judgment only, and without having adopted the procedure laid down in order XLV, rule 15. This Court held that order XLV, rule 15, provides that whosoever desires to obtain execution of any order of His Majesty in Council must first apply under that particular order before he can proceed further, and it goes on to say that the word "execution" in that order is intended to cover execution of any kind, because, as they point out, but for the presence of order XLV, rule 15, there would be nothing to show what steps should be taken to execute a decree, or to give effect to a decree, of His Majesty in Council.

(1) (1918) P. R., p. 224.

(2) (1917) 3 Pat. L. J., 367.

(3) (1915) 30 Indian Cases, 680.

(5) (1920) I. L. R., 45 Bom., 1137

(5) (1917) 33 M. L. J., 413.

(6) (1915) I.L.R., 37 All., 567.

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In my opinion that case takes us no further. The only case to which we have been referred in which a Privy Council decree has been the subject of decision, is Execution First Appeal No. 93 of 1920, decided by a single Judge of this Court, on the 7th of May, 1921, which has been reported in 61, Indian Cases, 806. There, although it appears from the report that Damodar Das was a party, he is not the same individual as is the respondent here. That case is not in any way *res judicata*, but it is a decision among other parties to the same litigation and gives effect to the same decree of the Privy Council. It was an application to recover certain costs, and although the order of the Privy Council as to costs was that there should be no order as to costs, this had the effect of reversing the order of the High Court which had given the respondent in that case costs, which he had recovered. Mr. Justice STUART held that the only authority for the recovery of costs which Brij Lal paid to Musammat Indar Kuar was the order of His Majesty in Council. He held, therefore, that although that application was under section 144 of the Code, nevertheless the period of limitation applicable was that provided by article 183. The language of article 183 is different from that of article 182. Article 182 provides for " the execution " of a decree or order of any Civil Court. Article 183 is " to enforce " a judgment, decree or order . . . of His Majesty in Council. It seems to me that the words " to enforce " there are wider in meaning than the words " to execute " in article 182 and should be interpreted as equivalent to " to give full effect to ", which is synonymous with " to enforce. " In my opinion, therefore, the order of Mr. Justice STUART was right and we should follow it. I would, therefore, allow the appeal.

BY THE COURT :—The order of the Court is that the appeal must be allowed and the case restored to the lower court to deal with on the merits. The appellants will have the costs of this appeal. Costs in the court below will abide the result.

Appeal allowed.