APPELLATE CIVIL.

Before Mr. Justice Mukerji and Mr. Justice Sen.

SOHAN BIBI (JUDGEMENT-DEBTOR) *v.* BAIJNATH DAS AND OTHERS (DECREE-HOLDERS).* 1928 *March*, 9.

Civil Procedure Code, section 144, *order XLV, rule* 15—*Application for restitution as a necessary consequence of an order of His Majesty in Council—Limitation—Act No. IX of* 1908 *(Indian Limitation Act), schedule I, article* 183—*Accidental misdescription of court to which order transmitted for execution—Jurisdiction.*

Where an application is made to obtain restitution as the necessary result of an order of His Majesty in Council, that application must be taken as one to "enforce" an order in Council and will be governed by article 183, and not by the general article 181 of the Indian Limitation Act, 1908.

Baijnath Das v. *Balmakund* (1), *and Brij Lal* v. *Damodar Das* (2), referred to.

In the case of an application under order XLV, rule 15, of the Code of Civil Procedure made within 12 years from the date of the order of the Privy Council, the fact that by inadvertence the papers were directed to be sent to a wrong court would not amount to an illegality such as would either vitiate the proceedings or deprive the court, to which the papers were intended to be sent down, of its jurisdiction to proceed with the execution of the decree of the Privy Council.

THE facts of this case were as follows:—

The appellant Sohan Bibi instituted a suit in the court of the Judge of Small Causes at Benares, exercising the powers of a Subordinate Judge, against several persons, to obtain a declaration that a certain compromise entered into in a certain case, the decree that followed the compromise and the transfer of property that was to take place in pursuance of the compromise, were not binding on her. The suit was transferred to the court of

*First Appeal No. 87 of 1927, from a decree of Hanuman Prasad Verma, Subordinate Judge of Benares, dated the 19th of January 1927.

(1) (1924) I. L. R., 47 All., 98. (2) (1922) I. L. R., 44 All., 555.

1928

SOHAN BIBI v. BAIJNATH DAS.

the District Judge of Benares and was decided by him. The District Judge dismissed the suit. The plaintiff appealed and the decree of the court below was set aside and the suit was remanded for trial on the merits. The District Judge again dismissed the suit and, on appeal, this Court set aside the decree of the learned Judge and decreed the suit in part. There was an appeal to the Privy Council by the defendants and it was successful. The Privy Council decree was passed on the 14th of May, 1914. In the meanwhile, Musammat Sohan Bibi, as the successful litigant in India, had executed her decree and had realized all the costs that had been decreed to her.

On the 9th of May, 1917, the defendants made an application to this Court, purporting to be one under order XLV, rule 15, of the Code of Civil Procedure, asking this Court to transmit a copy of the order of His Majesty in Council to the court of first instance for execution. In that application they also prayed that a sum of Rs. 735-6, being costs incurred in India, on account of the Privy Council appeal, should also be allowed to be recovered by them. On the 10th of January, 1918, two learned Judges of this Court passed the following order :—

"Let the order of His Majesty in Council be sent down to the Small Causes Court Judge at Benares with powers of a Subordinate Judge, for execution according to law and let the amount taxed by this Court be certified to the court below."

Long after this order had been made, on the 22nd of February, 1926, the respondents made the application out of which this appeal has arisen for execution of the Privy Council decree and for recovery of such moneys as the appellant had realized under the decree that stood in her favour, to the District Judge of Benares. The District Judge ordered, on the 5th of May, 1926, that the execution case be transferred to the Subordinate Judge

(Judge, Small Causes Court, exercising powers of Subordinate Judge) for execution. Exception was taken to the execution, but the Subordinate Judge rejected the objections of the appellant and ordered the execution to proceed. The judgement-debtor appealed to the High Court.

Dr. *Kailas Nath Katju*, Babu *Piari Lal Banerji* and Munshi *Harnandan Prasad*, for the appellant.

Munshi *Kamla Kant Varma* and Pandit *Brajmohan Lal Dave*, for the respondents.

The judgement of MUKERJI, J., after setting out the facts as above, thus continued :—

In this Court two points have been taken. The first point is that so far as the application was for restitution of costs recovered by Sohan Bibi, the application was covered by article 181 of the Limitation Act and the application before the District Judge, having been made more than three years after the order of His Majesty in Council, was barred by limitation. The second point is that the court which had jurisdiction to execute the order in Council of His Majesty was the court of the District Judge of Benares, and that court, not having been authorized by this Court, in its order, dated the 10th of January, 1918, could not entertain the application and could not transfer it to the Subordinate Judge.

In my opinion, none of these pleas ought to prevail. So far as the application for restitution goes, the application, in my opinion, is one "to enforce an order of His Majesty in Council" within the meaning of article 183 of the first schedule to the Limitation Act, and 12 years' rule would apply. It has been much debated whether an application for restitution, within the meaning of section 144 of the Code of Civil Procedure is an application for execution of the decree or not. In my opinion the same answer cannot be given to this

1928

SOHAN BIBI v. BAIJNATH DAS.

Mukerji, J.

question under all circumstances. For example, for purposes of court fee in an appeal, an application for restitution may not be treated as one for execution—Vide *Baijnath Das* v. *Balmakund* (1). I do not express any opinion whatsoever as to the correctness or otherwise of this case. All that I want to point out is this. The same answer may not be given when the question has to be looked at from different points of view. In this case, the question is whether article 183 should apply or article 181 of the Indian Limitation Act, 1908. Article 181 applies when there is no other article which may be applied. Article 182 applies to the "execution" of a decree. Article 183 applies where the applicant wants "to enforce" an order of His Majesty in Council. It appears to me that the legislature did not mean to express the same idea by the use of different words. (See Craies on Statute Law, third edition, 1923, pp. 87 and 88.) The word "enforce" ought to have a much larger meaning than the word "execution." It is not necessary to inquire why, for the execution of a Privy Council judgement, the period of 12 years has been allowed, whereas for the execution of a judgment passed in this country the much smaller period of three years has been allowed. But, whatever may be the reason, the reason which induced the legislature to give a longer period in the case of execution of Privy Council judgements is likely to have induced them to give the same long period in the case of restitution. Section 144 of the Code of Civil Procedure is not a rule of substantive law. The right to refund, or restitution, would exist in spite of the said section. It lays down merely the procedure. I need not therefore decide whether, generally, an application for restitution is an application for execution of the decree passed by the

(1) (1924) I. L. R., 47 All., 98.

court of appeal. It is enough for my purposes to hold and I do hold that, where an application is made to obtain restitution as the necessary result of the order of His Majesty in Council, that application is to be taken as one to "enforce" an order in Council and must be governed by article 183 and not by the general and omnibus article 181. The same view was taken in the case of *Brij Lal* v. *Damodar Das* (1) by RYVES, J.

Mukerji, J.

Coming to the second point, the matter stands thus. The respondents in their application said that their application with a copy of the order of His Majesty in Council should be transmitted to "the court of first instance." This Court said that the papers should be transmitted for execution "in accordance with law." It was not necessary for this Court to indicate by name the court to which the papers were to be sent. The words "Judge of Small Cause Court exercising the powers of a Subordinate Judge" were entirely unnecessary and were used merely because of the misapprehension that the court which decided the case originally was that court. I have already stated that the suit was actually instituted in the court of the officer aforesaid. The mistake in the judgement of this Court was therefore in the nature of a mere slip. It is a fact that in spite of all search made, no trace of the papers which were ordered to be sent down by this Court was found in the court of the learned Subordinate Judge. We must take it that the papers were in order and were sent down. As they were not found in the court of the Subordinate Judge, they were probably sent to the District Judge. Owing to the lapse of time, the papers may have been weeded out. In any case, we find that the application to this Court was in order. The application to the court of the District Judge was to the right court.

(1) (1922) I. L. R., 44 All., 555.

1928

SOHAN BIBI v. BALNATH DAS.

Then we find that this Court did make an order transmitting the order of His Majesty in Council to be executed "in accordance with law." There is nothing to indicate that this Court had any particular object in view in sending the case to a court different from the trial court. In the circumstances, the misdescription of the court which was to execute the decree was merely in the nature of a slip and did not, in my opinion, affect the jurisdiction of the District Judge to execute the decree.

A third point was taken that the respondents were not entitled to any interest; but they are not claiming any interest in pursuance of any order of His Majesty in Council. They are claiming interest on the money which was realized from them, by the unsuccessful appellant, while the decree stood in her favour. To this interest they are clearly entitled under section 144 of the Code of Civil Procedure.

In the result, I would dismiss the appeal with costs.

SEN, J., [after re-stating the facts in full] :—

I am in entire agreement with my learned brother that this Court intended to transmit the papers to the original court, viz., the court of the District Judge of Benares, along with the certified copy of the decree which accompanied the application dated the 9th of May, 1917, and it was a mere slip that the "Small Causes Court of Benares" was mentioned in the said order, whereas the Court indubitably intended to mean "the court of the learned District Judge of Benares." Where a misdescription of this character has by a mere slip or accidental error crept its way into the order of the Court, this does not amount to an illegality calculated either to vitiate the proceedings or to deprive the court to which the papers were intended to be sent down, of the jurisdiction to proceed with the execution of the decree of the Privy Council. I hold, therefore, that the application

dated the 22nd of February, 1926, made to the learned District Judge of Benares was an application in accordance with the provisions of order XLV, rule 15, of the Code and the said application having been made within 12 years from the date of the order of His Majesty in Council, dated the 14th of May, 1914, is an application within time and that article 183 of the Limitation Act governs the application for the execution of the decree for costs passed by His Magesty in Council.

It appears that on the 2nd of February, 1912, the appellants realized from the respondents the sum of Rs. 2,710-11-4 in execution of the decree which then subsisted in their favour. In the present application they claim the recovery of that amount together with interest at 6 per cent. from the 2nd of February, 1912. The court below has allowed the decree to be executed as regards these two sums. It is contended before me that the application for restitution is a substantive application under section 144 of the Code of Civil Procedure. That section provides :—

"Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; and, for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal."

The order of the Privy Council did not contain any directions for the restitution of the sums of money recovered by the judgement-debtors appellants in the previous execution proceedings or for the payment of the said sum with interest at certain rate. It is not controverted,

1926

SOHAN BIBI v. BAIJNATH DAS.

Sen, J.

and indeed it cannot be disputed, that the right of restitution is a right which logically follows from the right accruing to a party in whose favour a decree has been passed by the Privy Council reversing the decree of the High Court, and the said right is one which is consequential upon the reversal of the decree of the High Court. The question which arises in the case is, which is the article of the Limitation Act which should be applicable to an application for restitution under section 144 of the Code of Civil Procedure? Is it article 181 or article 183? Article 183 of the Limitation Act provides that the period of limitation is 12 years to enforce an order of His Majesty in Council, from the date when the right to enforce the order accrues to some person capable of realizing the right, whereas the right to restitution springs from and is the logical consequence of the order of the Privy Council reversing the decree of the High Court. The application for restitution cannot be treated as an application to enforce the order of the Privy Council. The word "enforce" does not mean any thing more or any thing less than the right to compel the observance of a certain order. Even assuming that the word "enforce" is more comprehensive than the word "execute", what is sought to be enforced is the order and we have got to look to the order to see as to whether that order itself is comprehensive enough to include restitution. I consider that article 183 of the Limitation Act is not applicable to an application for restitution under section 144, and if article 183 does not govern the application, article 181 being the omnibus or the residuary article is applicable to the case, and if article 181 applies, the claim for the restitution of Rs. 2,710-11-4 together with interest is barred by time. Whatever my individual views on the point may be, I am bound by the ruling of this Court reported in *Brij Lal* v. *Damodar Das* (1), decided by

(1) (1922) I. L. R., 44 All., 555.

Mr. Justice WALSH and Mr. Justice RYVES, who, dealing with this question, observed as follows :—

"Mr. Justice STUART, in a previous matter which came before him by way of first appeal in May of last year (the case in *Madhusudan Das* v. *Brij Lal*, 61 I. C., 806), 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. *Brij Lal*."

As I have said above, it may be questionable as to whether the canons of logic could always be safely imported in construing the plain language of any rule or section of a statute. In its plain reading, the article 183 or order XLV, rule 15, does not seem to present any difficulties. A substantive right is capable of being enforced in a particular way. Section 144 of the Code of Civil Procedure points out the forum in which the right has got to be enforced and it prescribes a particular line of procedure. That section appears to be independent of the provisions of order XLV, rule 15, and cannot be said to be a resultant of section 144 of the Code, but, as I have indicated above, I am bound by the ruling of a Divisional Bench of this Court in *Brij Lal* v. *Damodar* Das (1), and from that standpoint it must be held that article 183 is the article applicable to the present case and consequently the claim as to the restitution of the deposited sum of money is not time-barred.

(1) (1922) I. L. R., 44 All., 555.

1928

SOHAN BIBI v. BAIJNATH DAS.

Although the decree of the Privy Council does not allow any interest at the rate of 6 per cent. on the amount of costs allowed, there can be no doubt that the defendants appellants had the use of the money which legitimately belongs to the respondents, for a long series of years. The respondents, therefore, were entitled to claim interest by way of damages and the appellants therefore are in equity bound to pay the same. A case of this description has been actually provided for in section 144, which clearly prescribes that in an application under the said section, damages consequential on the reversal of a decree or order may well be granted to the successful party. The result of it is that the respondents succeeded all along the line and I would dismiss this appeal with costs.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Mukerji.

1928 *March*, 9.

INSPECTOR SINGH AND ANOTHER (PLAINTIFFS) *v.* KHARAK SINGH AND OTHERS (DEFENDANTS).*

Hindu law—Mitakshara—*Joint family including minors*—Karta—*New business started by borrowing money on the security of family property*—"*Benefit to the estate*"—*Admitting minor to benefit of partnership*—*Act No. IX of* 1872 (*Indian Contract Act*), *section* 247.

It is not competent to the manager of a joint Hindu family comprising minor members to raise money on the security of the family property in order to start a new business, even if such business may reasonably be supposed likely to be a profitable one. The "benefit to the estate" contemplated by their Lordships of the Privy Council in *Hunoo-*

*First Appeal No. 553 of 1924, from a decree of Govind Sarup Mathur, First Subordinate Judge of Saharanpur, dated the 17th of November, 1924.