APPELLATE CIVIL

Before Mr. Justice Das and Mr. Justice Brown.

A.M.K.C.T. MUTHUKARUPPAN CHETTIAR AND OTHERS
v.
ANNAMALAI AND OTHERS.*

1933
Mar. 13.

Limitation—Application for restitution—Civil Procedure Code (Act V of 1908), s. 144—Limitation Act (IX of 1908), Sch. 1, Art. 182.

An application for restitution under s. 144 of the Civil Procedure Code is an application for execution of a decree, and for the purposes of limitation the Article applicable is Art. 182 of the Limitation Act.

On the 4th of May 1926 the District Court of Thatôn dismissed the appellants suit for an account, and ordered them to pay Rs. 1,351 as costs to the respondents. On the 18th of May 1927 the High Court on appeal reversed the decision of the District Court. During the pendency of the appeal the appellants paid the costs into Court, which the respondents withdrew. The case was carried on appeal to the Privy Council. On the 14th of October 1930 the Privy Council affirmed the decree of the High Court. On the 19th of October 1931 the appellants applied for restitution of Rs. 1,351 with interest. *Held*, that the application was within time.

Kurgodigonda v. *Ningangonda*, I.L.R. 41 Bom. 625; *Prag Narain* v. *Kamakhia Singh*, 36 I.A. 197; *Rambujhawan* v. *Thakur*, I.L.R. 7 Pat. 794; *Sant Sahai* v. *Chhutai Kurmi*, I.L.R. 1 Luck. 40; *Sayed Hamidalli* v. *Ahmedalli*, I.L.R. 45 Bom. 1137; *Somasundaram Pillai* v. *Chokkalingam*, I.L.R 40 Mad. 780—*referred to.*

Balmakund v. *Basanta Kumari*, I.L.R. 3 Pat. 371; *Hari Mohan* v. *Shau*, I.L.R. 56 Cal. 61; *Jiva Ram* v. *Nand Ram*, I.L.R. 44 All. 407—*dissented from.*

Hay (with him *Venkatram*) for the appellants.

The question in this appeal whether Art. 181 or 182 of the Limitation Act applies to an application for restitution involves the determination of the question whether such an application is a proceeding in execution. It was so held under the old Code. *Prag Narain* v. *Thakur Kamakhia Singh* (1), *Nand Ram* v. *Sita Ram* (2),

* Civil First Appeal No. 15 of 1932 from the order of the District Court of Thatôn is Civil Miscellaneous Case No. 52 of 1931.

(1) 36 I.A. 197; I.L.R. 31 All. 555. (2) I.L.R. 8 All. 545.

1933

A.M.K.C.T. MUTHUKARUPPAN CHETTIAR v. ANNAMALAI.

Venkayya v. *Ragavacharlu* (1), *Gangadhar Marwari* v. *Letchman Singh* (2). It is equally so under the present Code. *Somasundaram Pillai* v. *Chokkalingam Pillai* (3), *Unnamalai Ammal* v. *Mathan* (4), *Kurgodigonda* v. *Ningangonda* (5), *Sayad Hamidalli* v. *Ahmedalli* (6), *Sant Sahai* v. *Chhuttai Kurmi* (7) and *Basanta Kumari Dasi* v. *Balmakund Marwari* (8). The opinion of the majority of the Court in *Balmakund Marwari* v. *Basanta Kumari Dasi* (9), which overruled the last cited case, is erroneous. The decisions of the Calcutta High Court there relied on are of no authoritative value. See the dissenting judgment of Ross J. *Harish Chandra Shaha* v. *Chandra Mohan Dass* (10) was a case under the old Code. The decision of the Judicial Committee in the later case of *Munshi Prag Narain* v. *Thakur Kamakhia Singh* (11) is to the contrary effect. Parker J. did not adhere to his *obiter dictum* in *Kurupam Zamindar* v. *Sadasiva* (12), referred to in *Harish Chandra's* case, when the question arose for determination. See *Venkayya* v. *Ragavacharlu* (1). The case of *Maung Hla Maung* v. *Ma Hnin Dauk* (13) was wrongly decided.

Assuming that Art. 181 applies time will run from the date of the final decree, and not from the date of the first decree which entitled the applicant to apply for restitution. The Full Bench decision of the Calcutta High Court in *Hari Mohan Dalal* v. *Parmeshwa Shau* (14) is not in accordance with the

(1) I.L.R. 20 Mad. 448.
(2) 11 C.L.J. 541.
(3) I.L.R. 40 Mad. 780.
(4) 33 M.L.J. 413.
(5) I.L.R. 41 Bom. 625.
(6 I.L.R. 45 Bom. 1137.
(7) I.L.R. 1 Luck. 40.
(8) I.L.R. 2 Pat. 277.
(9) I.L.R. 3 Pat. 371 (F.B.).
(10) I.L.R. 28 Cal. 113.
(11) 36 I.A. 197 ; I.L.R 31 All. 551.
(12) I.L.R 10 Mad. 66.
(13) I.L.R. 8 Ran. 271.
(14) I.L.R. 56 Cal. 61 (F.B.).

decision of the Privy Council in *Jawad Hussain* v. *Gendan Singh* (1), which affirmed the decision of the Patna High Court in *Sayed Jawad Hussain* v. *Gendan Singh* (2). This last case does not appear to have been mentioned either in the argument or in the judgment of the Calcutta Full Bench case. No doubt, in *Sayad Jawad's* case the Court was concerned with an application for a final mortgage decree, but it was a decision on Art. 181, and is equally applicable to restitution applications. *Rambujhawan Thakur* v. *Bankey Thakur* (3).

J. K. Munshi for the respondents. *Jawad Hussain's* case (1) is distinguishable. The law is correctly laid down in *Hari Mohan Dalal* v. *Parmeshwar Shau* (4) *Balmakund Marwari* v. *Basanta Kumari Dasi* (5), *Maung Hla Maung* v. *Ma Hnin Dauk* (6) and *Asha Bi Bi* v. *Nuruddin* (7).

BROWN, J.—In Civil Regular No. 15 of 1923 of the District Court of Thatôn, the respondents obtained a decree against the appellants for the payment to them of a sum of Rs. 1,351 as costs. An appeal against the decree was preferred to this Court. During the pendency of that appeal the sum awarded by the decree appealed from was paid into the Court of Thatôn by the appellants and withdrawn by the respondents. On the 18th of May 1927 the appeal in this Court was decided in favour of the appellants the order for the payment of costs by them being set aside. The case was taken in further appeal to the Privy Council and the Privy Council on the 14th

(1) 53 I A. 197 ; I.L.R. 6 Pat. 24.
(2) I.L.R. 1 Pat. 444.
(3) I.L.R. 7 Pat. 794.
(4) I.L.R. 56 Cal. 61.
(5) I.L.R. 3 Pat. 371.
(6) I.L.R. 8 Ran. 271.
(7) 8 L.B.R. 262.

1933

A.M.K.C.T. MUTHUKARUPPAN CHETTIAR v. ANNAMALAI.

BROWN, J.

of October 1930 dismissed the appeal and confirmed the appellate decree of this Court.

The appellants then applied for restitution under the provisions of s. 144, Code of Civil Procedure. They claimed that they were entitled to the sum of Rs. 1,351 with interest at 9 per cent per annum from the date of payment. Their application was dismissed by the District Court on the ground that it was barred by limitation and it is against this order of dismissal that the present appeal has been filed.

The trial Judge was of opinion that the Article of the Limitation Act applicable was Art. 181, that under that Article the right to apply for restitution accrued on the 18th of May 1927 when this Court reversed the trial Court's order in appeal and that as more than three years had elapsed from that date when the application for restitution was made it was barred by limitation.

The application for restitution was made on the 19th of October 1931. If therefore the starting point for the purposes of limitation is the date of the passing of the order by the Privy Council the application was within time. If the starting point be the date on which the orders were passed in appeal by this Court then the application is barred by limitation.

It is contended on behalf of the appellants that Art. 181 is not the Article applicable in this case but that either Art. 182 or Art. 183 applies. If either of these Articles applies then the application was clearly within time. Under Art. 182 in the case of an application for execution of a decree or order, time for the purposes of limitation begins to run, when there has been an appeal, from the date of the final decree or order of the appellate Court. The trial Judge followed the

decision in the case of *Hari Mohan Dalal* v. *Parmeshwar Shau* (1). That case was decided by a Full Bench of the High Court of Calcutta. The point for decision in that case was the same as in the present case, namely from what date should time be reckoned in an application for restitution under s. 144 of the Code of Civil Procedure, 1908, for the purposes of limitation. There were previous decisions of the same Court to the effect that the Article applicable in such a case was Art. 181 and this point did not come within the scope of the reference made to the Full Bench. The decision of the Full Bench was to the effect that assuming that Art. 181 applied then limitation began to run from the date of the original appellate decree which gave the right to restitution and not from the decision of the second appellate Court on appeal from that decree. If Art. 181 was the Article applicable and the decision in *Hari Mohan Dalal* v. *Parmeshwar Shau* (1) is correct, then undoubtedly the application in the present case was barred by limitation when it was made. But the view taken by the Full Bench of the High Court of Calcutta is not the view taken by all the High Courts.

In the case of *Rambujhawan Thakur* v. *Bankey Thakur* (2) the plaintiff in the trial Court obtained a decree for possession of certain land. The defendant appealed against the decree and during the pendency of the appeal, the plaintiff obtained possession in execution. The defendant was successful in his appeal and the subsequent second appeal to the High Court was dismissed. It had been previously settled so far as the Patna High Court is concerned that the Article of the Limitation Act applicable in such a

(1) (1928) I.L.R. 56 Cal. 61. (2) (1928) I.L.R. 7 Pat. 794.

1933

A.M.K.C.T. MUTHU-KARUPPAN CHETTIAR v. ANNAMALAI.

BROWN, J.

case is Art. 181; but the Bench which decided *Rambujhawan Thakur's* (1) case held that limitation ran not from the date of the order passed by the first Court of appeal but from the date of the order passed by the High Court in second appeal.

Direct authorities on this point cannot be found in Bombay or Madras, because in those Courts it has been held that not Art. 181 but Art. 182 is applicable in a case such as the present.

The question now raised was dealt with at considerable length by the Chief Justice of the Calcutta High Court in *Hari Mohan Dalal's* case (2). He was of opinion that in the ordinary and natural meaning of the words, the right of the appellants to restitution accrued immediately the District Judge reversed the decision of the trial Court.

There is a long series of decisions to the effect that when an appeal is allowed against a decree and the appeal is heard and decided, then the final and operative decree is the final decree of the final appellate Court, notwithstanding the fact that the final appellate Court may have confirmed the decree of the Court below. For our present purposes I think it will be sufficient on this point to refer to the case of *Jawad Hussain* v. *Gendan Singh* (3). That was a decision by the Privy Council which does not seem to have been considered by the Full Bench of the High Court of Calcutta in *Hari Mohan Dalal's* case (2). A suit was brought on a mortgage bond and decreed by the trial Court. The mortgagees were not satisfied with the amount decreed in their favour and appealed. Their appeal was dismissed. An application was then made for a final decree. It was admitted that for the purposes of limitation the

(1) (1928) I.L.R. 7 Pat. 794. (2) (1928) I.L.R. 56 Cal. 61.
(3) (1926) 53 I.A. 197; I.L.R. 6 Pat. 24.

1933

A.M.K.C.T. MUTHU-KARUPPAN CHETTIAR v. ANNAMALAI.

BROWN, J.

application fell within the provisions of Art. 181 of the Limitation Act. It was held by their Lordships of the Privy Council that limitation for the purposes of that Article began to run not from the date of the original decree but from the date of the decree of the appellate Court. The learned Judges who decided *Rambujhawan Thakur's* case (1) followed this decision and held that the principle underlying that decision must be held applicable to the case of an application for restitution. Their Lordships of the Privy Council quoted with approval what was said by Banerji J. in the case of *Gajadhar Singh* v. *Kishan Jiwan Lal and others* (2)

"It seems to me that this rule, *i.e.* the rule regulating an application for final decree in mortgage actions, contemplates the passing of only one final decree in a suit for sale upon a mortgage. The essential condition to the 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 to be enforced."

I find it very difficult to differentiate between the cases where the application is for a final decree in a mortgage suit and where the application is for restitution under s. 144 of the Code of Civil Procedure. Unless action has been stayed by the appellate Court the holder of a preliminary decree of the trial Court in a mortgage suit is entitled to apply for a final decree, when the time specified in the preliminary decree by the trial Court has expired. His right to a final decree therefore clearly accrues from the date on which the original Court passes its order. Nevertheless it was held that when orders were passed in appeal from the trial Court decree,

(1) (1928) I.L.R. 7 Pat. 794. (2) (1917) I.L.R. 39 All. 641.

1933

A.M.K.C.T. MUTHU-KARUPPAN CHETTIAR v. ANNAMALAI.

BROWN, J.

the applicant would then have three years from the date of the decree on appeal within which to apply for a final decree. The finding seems to me to have been based on the general principle that the decree of the trial Court or the lower appellate Court always becomes merged in any subsequent decree passed on appeal by an appellate Court. The appellants in the present case certainly had a right to apply for restitution from the date of the original decree passed on appeal by this Court. But when the Privy Council passed orders in second appeal affirming the decree of this Court the decree of this Court became merged in that decree and it was only by virtue of that decree that the appellants could obtain restitution.

With all respect to the learned Judges who decided *Hari Mohan Dalal's* case (1) the principles underlying the two cases appear to me to be the same. I am of opinion therefore that if the Article of the Limitation Act applicable to the present case be held to be Art. 181 of the Limitation Act then the decision of the Patna High Court to the effect that limitation begins to run from the date of the decree of the final Court of appeal is correct.

It further appears to me that though the matter is not free from difficulty and is the subject of many conflicting decisions an application for restitution must be treated as an application for execution of a decree and that the Article applicable is therefore Art. 182. There is certainly no unanimity amongst the High Courts on this point. The High Courts of Bombay and Madras have taken the view that such an application is an application in execution. The same view has been taken by the Chief Court of Oudh. The majority of the Full Bench of the High Court of Patna has however taken the contrary

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

view and so has the High Court of Allahabad. Such cases as appear in the reports of Calcutta also seem to be to the same effect although there does not seem to be a case reported in the official reports of Calcutta which directly decides the point.

In the case of *Prag Narain* v. *Kamakhia Singh and others* (1) their Lordships of the Privy Council held that questions in connection with restitution were questions to be determined in execution proceedings under the old Civil Procedure Code of 1882. S. 583 of that Code runs as follows :

"When a party entitled to any benefit (by way of restitution or otherwise) under a decree passed in an appeal under this Chapter desires to obtain execution of the same, he shall apply to the Court which passed the decree against which the appeal was preferred ; and such Court shall proceed to execute the decree passed in appeal, according to the rules hereinbefore prescribed for the execution of decrees in suits."

That section seems clearly to regard an application for restitution as an application in execution. It has, however, been contended that the law in this matter has been altered by the introduction of the Civil Procedure Code of 1908. The place of s. 583 is now taken by s. 144 which runs as follows :

"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."

(1) (1909) I.L.R. 31 All. 551 ; 36 I.A. 197.

1933

A.M.K.C.T. MUTHU-KARUPPAN CHETTIAR v. ANNAMALAI.

BROWN, J.

This section does not refer expressedly to an application in restitution as being an application in execution; nor is there any reference to restitution matters in Order XXI of the Code of 1908 which deals with execution of decrees and orders. It does not seem to me that that is conclusive of the matter. The powers of a Court in restitution are very much more fully specified in the Code of 1908 than they were in the Code of 1882 but I see no reason for supposing that it was the intention of the Legislature to alter the general principle of law on the subject or the general procedure by means of which the right of restitution could be enforced.

In *Balmakund Marwari* v. *Basanta Kumari Dasi* (1) the argument in favour of the view that restitution proceedings are not execution proceedings is set forth at great length in the judgment of Das J. His view was that the right of restitution is not a right to execute a decree but a right to obtain the assistance of the Court in the exercise of its inherent powers to restore what has been lost under an order held to be wrong. He pointed out that in a restitution application the Court has often to decide questions as to the amount of interest payable which would not be directly covered by the decree. That is no doubt correct. But I do not think that the fact that the Court allowing an application in restitution has to consider matters not directly dealt with in the decree which gave rise to the right of restitution necessarily prevents the application for restitution from being looked upon as an application for execution of a decree. As pointed out by Ross J. in his judgment at page 390, the words of s. 144 "The Court shall cause restitution to be made" import execution.

(1) (1924) I.L.R. 3 Pat. 371.

It is true that according to the definition in s. 2 of the Code of Civil Procedure a decree includes the determination of any question under s. 144. But I cannot see how that indicates in any way that an application under s. 144 cannot be an application in execution ; because the same definition says that a decree includes the determination of any question within s. 47 and the determination of such a question is certainly the determination of a question in execution proceedings. The definition rather indicates that the Legislature looked upon proceedings under s. 47 and under s. 144 as proceedings of the same nature.

In *Kurgodigonda* v. *Ningangonda* (1) and *Sayed Hamdalli Walad Kadamalli and others* v. *Ahmedalli Walad Mhibuballi and others* (2) the High Court of Bombay held that proceedings in restitution must be treated as proceedings in execution. In the words of the judgment in the latter case

"it is the decree of the appellate Court which entitles the successful appellant to get back something which he had been deprived of by the decree of the lower Court, under which the then successful party had actually received possession. In order, therefore, to get back what he has lost, the successful appellant must apply for execution of the order which entitles him to get back that possession."

The same view was taken by the High Court of Madras in the case of *Somasundaram Pillai* v. *Chokkalingam Pillai* (3). Referring to the changes introduced by the Code of 1908 the learned Judges in that case remarked

"Mr. Muthiah Mudaliyar contended that an application for restitution is not in execution. He pointed to the change of language between s. 583 of the previous Code of Civil Procedure

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

1933

A.M.K.C.T. MUTHU-KARUPPAN CHETTIAR v. ANNAMALAI.

BROWN, J.

and s. 144 of the present Code. We are unable to see the difference. S. 144 of the present Code has been so framed as to enable the successful party in the appellate Court to be placed in *statu quo ante*. The language of s. 583 of the old Code was not wide enough to cover all cases of benefits arising from the reversal of a decree being fully realised by the successful party. Apart from this charge, we see no ground for holding that the Legislature intended to make any departure in the procedure by which restitution is to be obtained. Under the old Code, restitution was by way of execution. The same rule applies to similar applications made under the new Code."

The same view was taken by the Chief Court of Oudh in the case of *Sant Sahai* v. *Chhutai Kurmi and another* (1). The contrary view was taken by the High Court of Allahabad in the case of *Jiwa Ram* v. *Nand Ram* (2). But the balance of authorities would appear to be in favour of the view that applications by way of restitution are applications in execution of a decree. There can be no doubt that the right to apply for restitution is dependent on a decree of the appellate Court to the same extent as the right to apply in execution is dependent on that decree.

It is apparently admitted that under the provisions of the Code of 1882 an application for restitution was an application for execution and was governed for the purposes of limitation by Art. 179 of the old Limitation Act which corresponds to Art. 182 of the present Act. The changes made in the Code of 1908 do not seem to me to indicate that the Legislature had any intention of altering the law then prevailing on this point. If that had been their intention one would have certainly expected them to carry that intention out

(1) (1925) I.L.R. 1 Luck. 40. (2) (1922) I.L.R. 44 All. 407.

1933

A.M.K.C.T. MUTHU-KARUPPAN CHETTIAR v. ANNAMALAI.

BROWN, J.

in a more clear and unmistakable manner. In my view it must be held that the law on this matter is the same as it was under the Code of 1882 and applications by way of restitution must be treated as applications in execution. That being so, the application in the present case was clearly within time.

For these reasons I am of opinion that this appeal must succeed. I would set aside the order of the District Court and direct that the application for restitution be re-admitted by the trial Court and dealt with on the merits. The respondents should pay the costs of the appellants in this appeal

DAS, J.—I agree.

FULL BENCH (CIVIL).

Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Das and Mr. Justice Sen.

1933

May 15.

JAING BIR SINGH AND OTHERS

v.

THE OFFICIAL RECEIVER.*

Insolvency—Annulment of adjudication—Effect on application to set aside transfer of property—Provincial Insolvency Act (V of 1920), ss. 37, 43, 53, 54—Vesting order under s. 37—Conditions that can be imposed—Conditions affecting property of another person—Compositions and schemes under ss. 38 to 40—S. 43, whether mandatory.

On an order of annulment being passed under s. 43 of the Provincial Insolvency Act the Court ceases to have jurisdiction to entertain, hear, or determine an application by the receiver to have a transfer of property set aside under s. 53 or s. 54 of the Act, whether such application was presented before or after the order of annulment.

In making a vesting order under s. 37 the Court may impose conditions relating to the property of the debtor, but not of any other person. In vesting the property of the debtor in any appointee, the Court cannot order that he should continue the liquidation of the debtor's assets on the same terms and

---

* Civil Reference No. 8 of 1932 arising out of Civil Miscellaneous Appeal No. 18 of 1932 at Mandalay.