APPELLATE CIVIL.

Before Mr. Justice Baguley, and Mr. Justice Mosely.

MA HTWE AND OTHERS *v.* U TOKE.*

1938

Feb. 25.

Court fee—Appeal against order of restitution of property—Ad valorem *court fee—Financial Department Notification No. 41 d. 19th Sep. 1921—Civil Procedure Code, ss. 47, 144.*

An appeal from an order of restitution passed under s. 144 of the Civil Procedure Code does not come within the exemption given by Financial Department Notification No. 41 d. 19th September 1921, and must be stamped *ad valorem*. S. 144 is quite distinct from s. 47 of the Civil Procedure Code.

Maung Hla Maung v. *Ma Hnin Dauk*, I.L.R. 8 Ran. 271, approved.

Baijnath Das v. *Balmakund*, I.L.R. 47 All. 98, followed.

A.M.K.C.T. Chettiar v. *Annamalai*, I.L.R. 11 Ran. 275, distinguished.

A.V.P.L.N. Firm v. *Daw Min Baw*, Civil 2nd Appeal No. 316 of 1935 (order) ; *Madan Mohan Dey* v. *Nogendra Nath Dey*, 21 C.W.N. 544 : *Sital Prasad* v. *Jagdeo*, I.L.R 4 Pat. 294, dissented from.

K. C. Sanyal for the appellants.

A. N. Basu for the respondent.

BAGULEY, J.—This is an appeal against an order passed by the District Judge of Mandalay in Civil Execution No. 3 of 1934. The order was passed on an application filed by the appellants. The prayer of the application is :

"Wherefore pray that order for restitution by delivery of 888 baskets and 6 *pyis* of paddy or by payment of Rs. 1,066 being the equivalent money value thereof to the petitioners may be made"

and the petition itself in paragraph 13 states :

"That in the circumstances the applicants are under the provisions of section 144 of the Code of Civil Procedure entitled to be placed in the position they would have occupied but for the order of this Honourable Court."

* Civil First Appeal No. 155 of 1937 from the order of the District Court of Mandalay in Civil Execution Case No. 3 of 1934.

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The appeal was filed with a two rupee Court fee stamp and a preliminary objection has been raised that the memorandum of appeal must be stamped *ad valorem*. This would be a rather serious matter because the appeal is valued for jurisdiction at Rs. 12,000. The valuation, however, is placed at that figure merely because the decree under execution is said to be for Rs. 12,000, although according to the application for execution it was only for Rs. 8,950.

The question for consideration now, therefore, is, can an appeal of this nature be filed on a two rupee Court fee stamp?

There is a published ruling of this Court on the point, *Maung Hla Maung* v. *Ma Hnin Dauk* (1). This was a reference from the Taxing Master to Ormiston J. and he held that an *ad valorem* Court fee was payable on this appeal. His reasoning was shortly that all appeals have to be stamped *ad valorem* unless some specific exemption can be found, that Financial Department Notification No. 41, dated the 19th September, 1921, reduces the fee chargeable on appeals from orders under section 47 of the Code of Civil Procedure, 1908, if the appeals filed are permissible, that this exemption says nothing about appeals under section 144 of the Code Civil Procedure, and that therefore, as they are not exempted, they must be stamped *ad valorem*.

There is, however, a subseqent unpublished ruling of Leach J. in *A.V.P.L.N. Chettyar Firm* v. *Daw Min Baw* (2), in which he took a contrary view and held that a memorandum of appeal against an order passed under section 144 of the Code of Civil Procedure was correctly stamped with a two rupee stamp. He differed from Ormiston J. on this point and held that he

(1) (1930) I.L.R. 8 Ran. 271. (2) Civ. 2nd App. No. 316 of 1935, H.C. Ran.

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was bound by a Bench decision of this Court published in *A.M.K.C.T. Muthukaruppan Chettiar* v. *Annamalai* (1). If this case is examined it will be found that the ruling says nothing at all about Court fees. What it does hold is that for purposes of limitation Article 182 of the Limitation Act applies to an application for restitution under section 144. The question of whether the application comes under the exempting provision of Notification No. 41 was not considered. The headnote however says :

"An application for restitution under section 144 of the Civil Procedure Code is an application for execution of a decree."

In the body of the judgment, however, Brown J. appears to use a somewhat different expression. On page 283 after quoting the old section 583 he says :

"That section seems clearly to regard an application for restitution as an application *in execution*,"

and he goes on to say that he sees no reason for supposing that in passing the present Code of Civil Procedure the Legislature intended to alter the general principle of law. Further on, on page 285, he quotes the cases of the Bombay High Court, in which he says that that Court held that proceedings in restitution must be treated as proceedings *in execution*, and on page 286 he goes on saying :

"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,"

and he winds up on page 287 :

"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."

(1) (1933) I.L.R. 11 Ran. 275.

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It is for that reason that he held that Article 182 of the Limitation Act applied.

Now the Code of Civil Procedure appears to regard sections 47 and 144 as quite distinct. In section 2 (2) of the Code of Civil Procedure there is a definition of the word "decree", in which it is said :

> "It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144."

If every question arising under section 144 were also included in section 47 the double reference would be redundant. Clearly it is quite possible that an application for restitution may involve directly an application to execute a decree for the decree of the appellate Court may directly reverse the decree appealed against and embody in itself the actual order of restitution. There are, however, other cases in which as in the present case the mere execution of the decree of the appellate Court will not in itself involve restitution and it is when restitution has to be sought outside the four corners of the decree of the appellate Court that section 144 has to be invoked.

With respect I am unable to agree with Leach J. when he says that because of what was laid down in *A.M.K.C.T. Muthukaruppan Chettiar* v. *Annamalai* (1) he was bound to differ from what was laid down by Ormiston J. in *Maung Hla Maung* v. *Ma Hnin Dauk* (2). In *Muthukaruppan Chettiar*'s case the Judges were not considering the question of whether an appeal under section 144 was or was not exempted from payment of full Court fees. They were only concerned with the question of what article of the Limitation Act applied and from what starting point limitation ran.

(1) (1933) I.L.R. 11 Ran. 275. (2) (1930) I.L.R. 8 Ran. 271.

In addition to the ruling in *Maung Hla Maung* v. *Ma Hnin Dauk* (1) there is a ruling of the Taxing Judge in *Baijnath Das* v. *Balmakund* (2). In this case the learned Judge came to the same conclusion as was come to by Ormiston J. in the Rangoon case. In the judgment occurs the passage :

"An application under section 144 is no doubt one which carries out the intention of the appellate Court's decree, but it does not directly execute that decree. What it does is to undo an execution wrongly granted by the Court below."

This passage appears to me, if I may say so, to express the matter in a nut-shell. It is not executing the existing decree : it is un-executing a decree which had ceased to exist.

There are, I know, other decisions to the contrary. In *Madan Mohan Dey* v. *Nogendra Nath Dey* (3) N. R. Chatterjea J. held that an appeal from an order under section 144 was properly stamped with a Court fee of two rupees ; but with respect I am unable to follow his ruling. In the judgment there is a passage :

"The Court in making restitution has to execute the decree of reversal (which necessarily carries with it the right to restitution even though the decree may be silent as to such restitution) in order to give effect to the reversal of the decree."

I find myself unable to understand how carrying out an intention about which the decree is silent can be executing the decree. A decree is supposed to bear on its face everything it is necessary for the Court which is executing it to know. If the decree is silent about any matter, an executing Court cannot execute that about which it is silent : so enforcing the spirit of the decree is not executing it. If such a thing has to

(1) (1930) I L.R. 8 Ran. 271. (2) (1924) I.L.R. 47 All. 98.
(3) 21 C.W.N. 544.

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be done, it must be under a different section, namely section 144.

A similar point was dealt with by Jwala Prasad J. in *Sital Prasad Singh* v. *Jagdeo Singh* (1). In this case after dealing with the matter at length the learned Judge really concludes by saying :

> " I, as a Taxing Judge, am not prepared to go against the view of my predecessor-in-office "

so he merely repeats what his predecessor in 1917 had said. The note of his predecessor is :

> " I accept the view taken in *Madan Mohan Dey* v. *Nogendra Nath Dey* (2) " :

so these decisions of the Patna High Court do not help us very greatly. In my opinion the view taken by Ormiston J. in *Maung Hla Maung* v. *Ma Hnin Dauk* (3) and Daniels J. in *Baijnath Das* v. *Balmakund* (4) is correct, and appeals filed under section 144 do not come within the exemption given by Notification No. 41.

It is admitted, however, that the valuation given for purposes of jurisdiction was merely put in as a matter of routine without any great consideration. Mr. K. C. Sanyal asked to be allowed to file an amended memorandum of appeal in which he will put the value on the appeal which is really the value of the subject matter in dispute in this appeal, and for this purpose we will allow him time.

MOSELY, J.—I agree.

(1) (1924) I.L.R. 4 Pat. 294.
(2) 21 C.W.N. 544.
(3) (1930) I.L.R. 8 Ran 271.
(4) (1924) I.L.R. 47 All. 98.