

## APPELLATE CIVIL.

*Before Addison and Abdul Rashid JJ.*

THE PUNJAB NATIONAL BANK, LIMITED,  
DELHI (DECREE-HOLDER) Appellant,

1938

March 7.

*versus*

NANHE MAL-JANKI DAS AND OTHERS  
Respondents.

**Execution First Appeal No. 363 of 1937.**

*Indian Limitation Act (IX of 1908) Arts. 181, 182 —  
Civil Procedure Code (Act V of 1908), S. 144, O. XXI —  
application for restitution — whether governed by Art. 181 or  
182 — Terminus a quo — Right to apply — accrual of.*

The plaintiff's suit against the Bank was decreed by the first Court. The Bank's appeal to the High Court was accepted on 15th March, 1933, the plaintiff's suit having been dismissed with costs throughout. The plaintiff's appeal to the Privy Council was also dismissed. The Bank realized the amount due to it as a result of the acceptance of its appeal by the High Court with the exception of Rs.500 odd and on 13th June, 1936, presented an application for the recovery of that amount. The question for determination in the case was whether the application was governed by Art. 181 or 182 of the first Schedule to the Indian Limitation Act and when did the right to apply accrue to the Bank.

*Held*, that applications for restitution under s. 144 of the Code of Civil Procedure as well as all applications for restitution under the inherent powers of the Court are governed by Art. 181 of the Indian Limitation Act and not by Art. 182 as they cannot be regarded as applications in execution of a decree.

*Held also*, that the right to apply for restitution in the present case accrued to the Bank on 15th March, 1933, within the meaning of Art. 181 of the Limitation Act as soon as the appeal of the Bank was accepted by the High Court and an unsuccessful attempt by the other party to get the decree of the High Court reversed by the Privy Council could not give a fresh start to the Bank for the purposes of Limitation.

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*Ram Singh v. Sham Parshad (1), Chanda Singh v. Bishan Singh (2), and Gujar Mal v. Narayan Singh (3), followed.*

Other case law reviewed.

*First appeal from the order of Sayad Shaukat Hussain, Senior Subordinate Judge, Delhi, dated 14th August, 1937, dismissing the application for restitution under section 144, Civil Procedure Code.*

HAR GOPAL, for Appellant.

BISHAN NARAIN, for Respondents.

The Judgment of the Division Bench was delivered by—

ABDUL RASHID J.—Messrs. Nanhe Mal-Janki Das instituted a suit against the Punjab National Bank, Delhi, for recovery of Rs.1,15,875. The Bank admitted liability to the extent of Rs.1,03,000 and paid the amount. Liability was, however, disputed for the rest of the plaintiff's claim. The plaintiff was awarded a decree on the 21st of August, 1929, for Rs.12,875 and costs amounting to Rs.3,411. The Bank preferred an appeal to the High Court which was accepted on the 15th of March, 1933. The decree of the Senior Subordinate Judge dated the 21st of August, 1929, was set aside and the plaintiff's suit was dismissed with costs throughout. An appeal preferred by the plaintiff to the Privy Council was also dismissed. As a result of the acceptance of the appeal by the High Court, in addition to costs, the Punjab National Bank became entitled to the recovery of Rs.12,875 and Rs.3,411 from the plaintiff along with interest from the date of payment till the date of realization. Out of this sum the Bank realized the entire amount with the exception of Rs.557-4-0. On the 13th of June,

(1) 67 P. R. 1918. (2) 1924 A. I. R. (Lah.) 166.

(3) 1931 A. I. R. (Lah.) 504.

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1936, the Bank presented an application for recovery of Rs.557-4-0. The firm Nanhe Mal-Janki Das filed written objections to this application, stating that the present application for restitution was governed by Article 181 of the Indian Limitation Act, and as it was made more than three years after the date of the order of the High Court, it was barred by limitation. The learned Senior Subordinate Judge of Delhi has held that the application preferred by the Bank was governed by Article 181 of the Indian Limitation Act, and as it was made after the lapse of three years from the date of the judgment of the High Court dated the 15th of March, 1933, it was barred by limitation. Against this decision the Bank has preferred an appeal to this Court.

It was contended by the learned counsel for the appellant that the application for restitution made by the Bank on the 13th of June, 1936, was an application in execution of a decree and was governed by Article 182 of the Indian Limitation Act. There is a divergence of opinion among the various High Courts in India whether an application for restitution is an application in execution and is governed by Article 182 of the Limitation Act, or whether it is a miscellaneous application which falls within the purview of Article 181. The Bombay, Madras, Patna and Rangoon High Courts are of the opinion that Article 182 of the Indian Limitation Act is applicable to such applications, while the High Courts of Calcutta, Allahabad and Lahore hold that applications for restitution are governed by Article 181 of the Indian Limitation Act. The learned counsel for the appellant relied principally on a ruling of their Lordships of the Privy Council reported as *Prag Narain v. Kamakhia Singh* (1). In

(1) I. L. R. (1909) 31 All. 551 (P. C.),

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that case a mortgage decree was obtained by the appellant against the respondents. Under the mortgage decree the mortgaged property was put to sale in default of payment and purchased by the decree-holder who had obtained leave to bid in February, 1901. The purchase money was not paid but was set off by the appellant against the amount due under the decree, which gave no future interest. Possession was given to the appellant in December, 1901. In September, 1903, the sale was set aside for irregularity, and in March, 1904, the respondents paid to the appellant the amount due under the decree and possession of the property was restored to them. In these circumstances it was held by their Lordships that the respondents were entitled by sections 583 and 244 of the Code of Civil Procedure, 1882, to recover mesne profits and interest thereon in the execution proceedings, and were not obliged to have recourse to a separate suit for the purpose, the delay and expense of which their Lordships would not at this stage of the proceedings have been disposed to permit. In my opinion this ruling is not of much assistance to the appellant. Their Lordships were dealing with section 583 of the old Code of Civil Procedure. Section 583 of the old Code dealt with applications for restitution and referred to them as applications to obtain execution. The phraseology of section 144 of the new Code is entirely different. Applications for restitution are no longer referred to as applications to obtain execution. In the old Code of 1882, the section relating to restitution occurred in the chapter relating to appeals and it provided for execution of the decree of the appellate Court and restitution was treated therein on the same footing as execution of a decree. It is clear, therefore, that in the old Code there was an express provision that the

procedure as regards restitution was the same as the procedure as regards execution. Moreover the question for decision before their Lordships of the Judicial Committee was, whether an application for the ascertainment of mesne profits could be entertained in execution proceedings or by way of a regular suit and it was held that it could be done in execution. No question of limitation arose in the Privy Council case. In the present Code the provision as regards restitution has been included in Part XI of the Code, which deals with miscellaneous matters. The present section 144 says nothing about execution of decrees which is provided for in Part 2 and Order 21 of the Code. It was held in *Somasundaram Pillai v. Sitalakshmi Achi* (1), that an application for restitution is an application in execution under the new Code of Civil Procedure as under the old Code. This ruling does not contain any independent reasoning, but merely follows the Privy Council case reported as *Prag Narain v. Kamakhia Singh* (2). In *Hamidalli Kadamalli v. Ahmedalli Mheebulli* (3) it was laid down that an application for restitution, under section 144 of the Civil Procedure Code, 1908, is an application for execution of decree, and is governed by Article 182 of the Indian Limitation Act. The question was not discussed at any great length in this ruling and reliance was placed on a previous ruling of the Bombay High Court reported as *Kurgodigouda v. Ningangouda* (4). The Judges who were responsible for *Kurgodigouda v. Ningangouda* (4) were not, however, very sure of their ground as they held that the application for restitution was not barred as it was *virtually* an application for execution of the High Court decree amending the

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(1) I. L. R. (1917) 40 Mad. 780. (3) I. L. R. (1921) 45 Bom. 1137.  
(2) I. L. R. (1909) 31 All. 551. (4) I. L. R. (1917) 41 Bom. 625.

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decree of the trial Court. To the same effect is *A. M. K. C. T. Muthukarappan Chettyar v. Annamalai Chettyar* (1).

The whole case law bearing on the question was discussed in a Full Bench ruling given by five Judges of the Patna High Court in *Pathak Bhaunath Singh v. Thakur Kedar Nath Singh* (2). Three of the Judges were of the opinion that an application for restitution must be regarded as an application in execution, and that such an application was governed by Article 182, and not Article 181, of the Indian Limitation Act. Mr. Justice Kulwant Sahay and Mr. Justice Fazl Ali, however, dissented from this view and held that Article 181 of the Indian Limitation Act applies to applications for restitution contemplated in section 144 of the Code of Civil Procedure. They pointed out that there are a number of restitution applications which do not fall within the purview of section 144 of the Civil Procedure Code, but are given effect to by means of the inherent power of the Court under section 151 of the Code of Civil Procedure, and that it would be most anomalous to hold that section 182 governs some applications for restitution, while other applications for restitution fall under section 181 of the Limitation Act. In *Balmokund Marwari v. Basanta Kumari Dasi* (3), a Full Bench of the Patna High Court had held by majority that Article 181 applies to an application under section 144 of the Civil Procedure Code. This ruling was overruled by *Pathak Bhaunath Singh v. Thakur Kedar Nath Singh* (2), where again two of the Judges dissented from the opinion of the majority.

The question whether Article 182 or Article 181 is applicable to applications for restitution under sec-

(1) I. L. R. (1933) 11 Rang. 275. (2) I. L. R. (1934) 13 Pat. 411 (F. B.).

(3) I. L. R. (1924) 3 Pat. 371 (F. B.).

tion 144 of the Civil Procedure Code has been exhaustively discussed in a Full Bench ruling of the Allahabad High Court reported as *Parmeshar Singh v. Sitladin Dube* (1). It was held by the learned Chief Justice and Mr. Justice King that an application for restitution under section 144 is not an application for the execution of a decree within the meaning of Article 182 of the Indian Limitation Act and that Article does not apply to it. It is an application not specifically provided for and is governed by Article 181 of the Limitation Act. Their Lordships observed that there was an essential difference between an application for execution of a decree and an application for restitution under section 144. Proceedings in execution merely carry out the terms of the decree as they are and do not involve any further investigation for ascertaining the liability of the judgment-debtor. In the case of restitution, there is no decree for the relief claimed by the applicant; the appellate Court's decree, which merely reversed the first Court's decree, does not itself direct the restitution of some property or the award of compensation or interest or mesne profits. Thus the proceeding relating to restitution entails an elaborate inquiry and an investigation into the facts. The powers exercisable by the Court differ widely in the two cases. In this case Mukerji J. gave a dissenting judgment. The latest ruling of the Calcutta High Court on this question is reported as *Tarak Nath Ray v. Pancha Nan Banerji* (2). The entire case law bearing on the question was considered in this ruling and it was held, that it cannot be said that the Court granting restitution is executing a decree. An application for restitution under section 144, of the Civil Procedure Code cannot therefore, be an application

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(1) I. L. R. (1934) 57 All. 26 (F. B.). (2) I. L. R. [1937] 1, Cal. 637.

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for execution under section 47 of the Code of Civil Procedure. The Punjab Chief Court and the Lahore High Court have consistently taken the view that applications for restitution are governed by Article 181 of the Indian Limitation Act, and cannot be regarded as applications for execution of a decree. In *Ram Singh v. Shum Parshad* (1), it was observed that—  
“an application under section 144 of the new Code of 1908 for restitution, unless such is expressly ordered by the appellate decree, is not an application for execution but a miscellaneous application in the nature of an execution application to which article 181 of the Limitation Act applies and not article 182.”

*Chanda Singh v. Bishan Singh* (2) lays down, that—

“an application under section 144 of the Civil Procedure Code for mesne profits is not one for execution, and as soon as the decree is reversed a right to apply for mesne profits accrues.”

In a Division Bench ruling reported as *Gujar Mal v. Narayan Singh* (3) it was held that,

“Where an *ex parte* decree has been set aside subsequent to the confirmation of sale in execution of that decree, the proper article governing the application for restitution of property sold under the decree is Article 181, and the time begins to run from the date of the order setting aside the *ex parte* decree, and the subsequent dismissal of suit would not operate to give a fresh start.”

We are of the opinion that as execution is provided for in the present Code in Part II and Order 21, while applications for restitution are dealt with in Part XI

(1) 67 P. R. 1918.

(2) 1924 A. I. R. (Lah.) 166.

(3) 1931 A. I. R. (Lah.) 504.



of the Civil Procedure Code, that as Order 21 of the present Code is headed, " Execution of decrees and Orders " and as Article 182 of the Indian Limitation Act provides for the execution of a decree or order of any Civil Court using exactly the same words as are used in the Civil Procedure Code, it was clearly intended that Article 182 should apply to applications that fall within Order 21 of the Code and that Article 181 will apply to all other applications. There is provision for consecutive applications for execution and a fresh start is provided for in Article 182 from the date of the final order passed on a previous application for execution. In Article 181 there is only one period of limitation and the starting point is the date on which the right to apply accrues. Article 181, therefore, applies not only to restitutions under section 144 of the Code of Civil Procedure, but also to all applications for restitution under the inherent powers of the Court. The Legislature has laid down a shorter period of limitation in the case of such applications which are called miscellaneous applications and not applications for execution of decrees. We, therefore, see no reason to differ from the view consistently taken by this Court ever since the year 1918 to the effect that Article 181 is applicable to applications for restitution.

The learned counsel for the appellant contended that the present application for restitution was within time, even under Article 181 of the Indian Limitation Act, owing to the fact that the other party had appealed to His Majesty in Council and the right to apply accrued to the appellant on the date when the appeal was dismissed by the Judicial Committee. It was urged that as the decree of the final appellate Court is the principal decree in the case it is only that decree

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which can be executed. Reliance was placed in this connection on *Ramhu Jhawan Thakur v. Bankey Thakur* (1) and *A. M. K. C. T. Muthukarappan Chettyar v. Annamalai Chettyar* (2). We are of the opinion that this contention is without force. The law allows a successful party to execute the decree as soon as it has been obtained in the Court of first instance. Similarly the party who has succeeded in the first appellate Court is entitled to apply for restitution without waiting for the decision of any second appeal that may be preferred by the other party. The Bank succeeded in the High Court. It was not obliged to wait for the decision of the appeal preferred by the other party to His Majesty in Council. The right to apply accrued to the Bank as soon as the appeal was accepted by this Court on the 15th of March, 1933. In *Ramhu Jhawan Thakar v. Bankey Thakur* (1) reliance is placed on the fact that where an appeal has been preferred it is the decree of the appellate Court, which is the final decree in the case. This ruling, however, does not deal with the question as to when the right to apply first accrued. *Muthukarappan Chettyar v. Annamalai Chettyar* (2) is not of much assistance as it was held in that case that applications for restitution are governed by Article 182 of the Indian Limitation Act. The question as to when the right to apply first accrued did not, therefore, arise.

On the other hand it has been held by the Calcutta High Court in *Hari Mohan Dalal v. Parmeshwar Shan* (3), that "In an application for restitution under section 144 of the Code of Civil Procedure, 1908, the time to be reckoned under Article 181 of the

(1) I. L. R. (1928) 7 Pat. 794. (2) I. L. R. (1933) 11 Rang. 275.

(3) I. L. R. (1929) 56 Cal. 61.

Limitation Act, 1908, should be counted from the decree of the lower Appellate Court and the applicant is not entitled to get deduction of the period occupied by the appeals to the High Court." The same proposition was affirmed in a later Calcutta ruling reported as *Saraj Bhusan Ghosh v. Debendra Nath Ghosh* (1). In our opinion an unsuccessful attempt by the other party to get the decree of the High Court reversed cannot give a fresh start for the purposes of limitation so far as the Bank is concerned. This was the view taken by the majority of the Judges in the Full Bench ruling reported as *Parmeshar Singh v. Sitladin Dube* (2). In *Chanda Singh v. Bishan Singh* (3) it was laid down that as soon as a decree is reversed a right to apply for mesne profits accrues. The same proposition was affirmed by a Division Bench of this Court in *Gujar Mal v. Narayan Singh* (4).

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We are, accordingly, of the opinion that the right to apply for restitution accrued to the Bank on the 15th of March, 1933, when the appeal of the Bank was accepted by this Court. The present application having been preferred on the 13th of June, 1936, was, therefore, barred by limitation under Article 181 of the Indian Limitation Act.

For the reasons given above we dismiss this appeal with costs.

A. K. C.

*Appeal dismissed.*

(1) I. L. R. (1932) 59 Cal. 337. (3) 1924 A. I. R. (Lah.) 166.  
(2) I. L. R. (1934) 57 All. 26 (F.B.). (4) 1931 A. I. R. (Lah.) 504.