

CALCUTTA HIGH COURT

Saraj Bhusan Ghosh

Vs

Debendra Nath Ghosh

(Rankin ,C.J.)

20.05.1931

JUDGMENT

Rankin, C.J.

1. In this case, there was a suit for redemption and the suit was in July 1922 decreed and an order made for redemption and restoration of possession. Possession was delivered through Court to the plaintiffs; but, on an appeal being brought, the decree was set aside on 9th July 1924. An appeal was brought to the High Court which was dismissed and a further appeal was brought under the Letters Patent which was also dismissed on 7th February 1928. On 27th June 1929, the present appellants made an application for restitution under Section 144, Civil P.C. The first Court gave effect to the claim and ordered restitution. The second Court has dismissed their application as being time barred under Article 181 of the schedule to the Limitation Act, 1908.

2. Mr. Roy Choudhuri who appears for the appellants in this case has given us a most careful and interesting argument and he asks us, in effect, to deal with two points. First of all, he asks us to say that an application under Section 144 is an application in execution and that, in the present case, the article which governs it is Article 182. There being certain rulings of this Court against him on this point, his argument before us is really directed to persuade us to differ from those rulings and to refer the matter to a Full Bench. The second question upon which Mr. Roy Choudhuri has given us a careful argument is this: On the assumption that an application under Section 144, Civil P. C, is not an application in execution, he still contends that in the present case the time from which the period of limitation starts is 7th February 1928-- the dismissal of the Letters Patent appeal and not the date in July 1924 when the decree in the redemption suit dismissed the claim for redemption. On that matter also there is authority against the contention put forward by Mr. Roy Choudhuri and there again the purpose of his argument is that we should refer that question to a Full Bench.

3. We have been taken through all the cases and the short effect of them, in my judgment, is this: since the Code of 1908 has altered the language of Section 144 and placed the section in a different part from the previous Section 583, there has been one ruling, *Madan Mohan v. Nogenra Nath*¹ by a Judge sitting singly as a taxing Judge, namely Chatterjee, J., in favour of the view that an application under Section 144 is an application in execution. Otherwise, the Calcutta cases come to this whether the matter has been reasoned out or whether the matter has

been dealt with obiter or otherwise the cases do show an opinion that an application under Section 144 is not an application in execution. On each of the cases cited, there is some room for comment. There is, first of all, the case of *Harish Chandra v. Chandra Mohan*² where the opinion of Stevens and Pratt, JJ., was expressed tentatively and obiter. There is also the case of *Gangadhar Marwari v. Luchman Singh*³ which appears to have been directly concerned with the old Code and which while it takes the view that Article 181 is applicable has also in it certain observations which tend in an opposite direction. There is the case of *Ashutosh Goswami v. Upendra Prasad*⁴

4. In that case, it may be noted that besides relying upon the decision in the case of *Harish Chandra v. Chandra Mohan*⁵ and the decision in the case of *Kurupan v. Sadasiva*⁶ the learned Judges appear to have relied upon the decision in *Nand Ram v. Sita Ram* [1886] 8 All. 545 which upon being carefully read appears to be an authority the other way. There was a decision in 1912 by Sharfuddin and Cox, JJ., where they followed the decision in *Harish's* case [1901] 28 Cal. 113 but this, too, was an obiter dictum. Then there comes, a recent case to the decision of which I was a party where a Division Bench holding that Article 181 was applicable to an application under Section 144 referred the question whether, in the circumstances, it was to be applied as on the date of the appellate Court's decree or on the date of the decree which first reversed the decree which had to be executed. Before the Division Bench, both the learned Judges on a re-view of the cases came to the conclusion that an application under Section 144 was governed by Article 181, and, when the Special Bench came to hear the reference made by those learned Judges, it is to be noticed that they thought it their duty under the Code to accept that finding and to determine the question referred to them not quarrelling with the assumption which underlay the question.

5. The decision however of the Division Bench was a decision in the same sense as the previous decisions, that is, to the effect that Article 181 is the article applicable to an application under Section 144. I think it may be said on the Calcutta decision that in no one of the cases cited has the question been discussed very elaborately or reasoned very closely. But, if we look at the matter broadly, there has for a number of years been a settled opinion in this High Court to the effect that Article 182 is not to be applied to an application under Section 144. Now, it is quite true that the Bombay High Court in the case of *Kurgodigouda v. Ningangouda*⁷ and in the case of *Hamidalli v. Ahmadalli*⁸ has come to a contrary opinion and its view is that 'execution' is a phrase which covers all applications provided for by Section 144. A similar view was taken in 1916 in the case of *Somasundaram v. Chokalingam*⁹ On the other hand, in recent years, no less than three High Courts have considered the matter and come to a different conclusion. It is quite clear that the rulings of the Lahore High Court, the Allahabad High Court and the Patna High Court are in the same sense as the decisions of the Calcutta High Court. The case in which the Allahabad High Court came to the conclusion that an application under Section 144 was not an application in execution is the case of *Jiwa Ram v. Nand Ram* A.I.R. 1922 All. 223 in which the learned Judges disagreed with the view taken under the old Code. This was followed by another Division Bench in the case of *Brij Lal v. Damodar Das*¹⁰ and again by a single Judge in the case of *Baijnath Das v. Balmukund*¹¹

6. The matter was very elaborately discussed before a Full Bench of the Patna High Court in the case of *Balmukund Manwari v. Basanta Kumari Dasi*¹² where the decision of Dawson-Miller, C.J., in the case of *Basanta Kumari Dasi v. Balmukund Marwari*¹³ was differed from. The result

is that there is a good deal of authority in the recent decisions of other High Courts supporting the view that has been generally taken by this High Court upon the question and before we are justified in sending this question to a Full Bench, we have to say that we are prepared to disagree with the Calcutta decisions which are against the contention of the present appellants. The matter is a difficult one; but I am not prepared to say that I disagree with those decisions.

7. There are a good many matters to be canvassed; but it does seem to me that, having regard to the fact that execution proceedings are not within Section 141 having regard to the fact that large claims for damages may have to be entertained under* Section 144 and that Section 144 has not been put in that part of the Code which deals with execution but in the chapter of the Code which deals with miscellaneous matters, it is by no means clear that the contention that an application for restitution is an application in execution ought to be accepted. I realize however that, in view of the language of Section 47 and in view of the fact that it constantly happens that questions of execution become entangled with questions of restitution where the decree of an appellate Court has varied the decree of a Court below affirming it on some points and overruling it on others, there is much to be said as a question of convenience for the view that applications for restitution should be dealt with as execution matters. On the whole however I am not prepared to say that I disagree with the decisions which in this Court stand against the appellants and, while it might be convenient to refer the matter to a Full Bench merely for the purpose of preventing the question being argued over and over again, I am not in a position to say that a reference should be made. Some day no doubt the matter will come before some other Bench which may disagree with this view and, in that case, it may be referred to a 'Full Bench.

8. As regards the second point, Mr. Roy Choudhuri has pointed out that the question dealt with by the judgment in *Hari Mohan Dalai v. Parmeswar* was whether assuming that an application under Section 144, Civil P. C., was not an application for execution, the time for such an application ought nevertheless to be calculated from the decree of the last appeal and not from the decree which for the first time gave the applicant the right to restitution. This matter was dealt with in the judgment which I gave on that occasion; and, with regard to that Mr. Roy Choudhuri desires to point out that, in the case of *Jowad Hossain v. Gendan Singh*¹⁴ and again in the case of *Fitzholmes v. Bank of Upper India Lid.* the Privy Council have affirmed the proposition that the time for applying for final decree runs from the date when the appeal was decided on the question of the preliminary decree. The passage in particular in the former of these cases is pointed out to us where their Lordships agreed with what was said by that very learned Judge Mr. Promoda Charan Banerji, in the case of *Gajadhar Singh v. Krishan Jiwan Lal*¹⁵ There the learned Judge said: It seems to me that this rule 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 in the cause.

9. In the case of *Hari Mohan Dalai v. Parmeswar* the principle in the case of *Uma Charan v. Nibaran Chandra*¹⁶ and in the decision of the Full Bench of Allahabad was recognized and affirmed The question however is whether, for the purposes of applying Article 181 on the footing that an application under Section 144 is not an application in execution it is necessary to disregard altogether the decree which for the first time gave a right of restitution to the applicant. I cannot say that a consideration of the cases to which our attention has been drawn by Mr. Roy

Choudhuri has converted me to a different opinion from that which I expressed in Hari Mohan Dalal's case . That being so, I do not think that that point either should be referred by this Court to a Full Bench.

10. In the circumstances, the appeal fails and must be dismissed with costs hearing fee, three gold mohurs.

Pearson, J.

11. I agree.

Cases Referred.

1[1917] 39 I.C. 640

2[1901] 28 Cal. 113

3[1910] 6 I.C. 125

4[19151] 38 I.C. 17

5[1901] 28 Cal. 113

6[1887] 10 Mad. 66

7[1917] 41 Bom. 625

8A.I.R. 1921 Bom. 67

9[1917] 40 Mad. 780

10A.I.R. 1922 All. 238

11A.I.R. 1925 All. 137

12A.I.R. 1925 Pat. 1

13A.I.R. 1923 Pat. 371

14A.I.R. 1926 P.C. 93

15[1917] 39 All. 641

16A.I.R. 1923 Cal. 389