PATNA HIGH COURT

Pathak Bhaunath Singh

Vs

Thakur Kedar Nath Singh

(Courtney Terrell, C.J. Wort, K Sahay and Macpherson, JJ. F Ali, J.)

08.02.1934

JUDGMENT

Courtney Terrell, C.J.

1. (August 28, 1933). These two appeals are preferred from a decision of the lower Appellate Court which dealt with two orders of the Munsif of Palamau, dated respectively February 17 and March 18, 1930, giving contrary decisions on the question of limitation arising in two separate applications of the defendants for mesne profits preferred under Section 144 of the Code of Civil Procedure, which the plaintiff contended were barred by limitation.

2. In both appeals the officiating Judicial Commissioner decided in favour of the applicants under Section 144.

3. The appellants brought a suit and obtained decree on May 15, 1924, and delivery of possession of the property in suit on July 1, following. On March 23, 1926, the Judicial Commissioner allowed the appeal of the defendants and his decision was affirmed by the High Court in second appeal on July 25, 1928.

4. In the first case the proceedings under Section 144 were started on July 29, 1929 and the successful defendants secured redelivery of possession on November 22, 1929. In this case the Munsif relying upon the decision in Krupasindhu Roy v. Mahanta Balbhadra Das 47 Ind. Cas. 47 : 3 P.L.J. 367, held that the application under Section 141 was barred by limitation.

5. The second application under Section 144, was made on January 29,1930, thus differing from the first in being made after the redelivery of possession. Here the Munsif distinguishing the ruling on the strength of which hi h,d decided the earlier case relying upon *Fazlar Rahman v. Abdul Samad*[1]*, and Jawad Hussain v. Gevdan Singh*[2] held that limitation commenced from the date of the decision of the High Court in second appeal.

6. In the appeals it was pressed upon the Judicial Commissioner that in *Hari Mohan Dalai v.*

tarmeshwar Sahu[3]*, a* Full Bench of the Calcutta High Court had held that limitation commenced from the date of the reversal by the lower Appellate Court so that both applications were barred but he rightly followed the decision of this Court in *Rambujhaivan Thakur v. Bankey Thakur* [3]as being direct authority binding upon him and held that both applications under Section 144, were within time as made within three years of the date when the High Court dismissed the second appeal.

7. In both the Courts it was undisputed that Article 181 of the Indian Limitation Act applied to the case. It has been contended before us that the right to make the application under Section 144 accrued on March 23, 1926, when the lower Appellate Court reversed the decree of the Munsif under which the present appellants took possession and that accordingly the applications made so late as July 29, 1929 and January 29, 1930, respectively are barred under Article 181, of the Indian Limitation Act. Reliance is placed upon the Full Bench decision of the Calcutta High Court. On the other hand, the respondents rely upon the decision of this Court in *Rambujhawaa Thakur v. Bankey Thakur*[4]. Article 181 provides for applications for which no period of limitation is provided elsewhere, a period of limitation of three years from the date when the right to apply accrues. Article 182 provides for the execution of a decree or order of a Civil Court (with some exceptions which are not material) a similar period of limitation from the date of the decree or order or where there has been an appeal from the date of the final decree or order of the Appellate Court, or withdrawal of an appeal etc.

8. In *Krupasindhu Roy v. Mahanta Balbhadra Das*[5] which was cited in the Court below it was admitted that Article 181 was applicable but the point was immaterial there since the application under Section 144 was made within three years from the date of the reversal of the decree.

9. In the decision of the Special Bench of this Court in *Balmukunda Marwari v. Basanta Kumari Dasi*[6] the facts were somewhat similar to those in the present case. The ex parte decree of January 10, 1917, was set aside on June 18, 1917 and the appeal of the plaintiff against the dismissal on March 7, 1918, of his suit at the re-trial was dismissed by the District Judge on July 13, 1918. The application under Section 144 was made on June 29, 1931, that is to say, more than three years after the date when the ex parte decree was set aside but less than three years after the date when the decision at the re-trial was confirmed on appeal. The Bench of this Court before which the matter came in second appeal, remanded the case holding that Article 182 of Schedule I of the Indian Limitation Act was applicable and that if the applicant proved that she presented an application for recovery of possession on June 1, 1918 and that the proceedings on her application were stayed by the District Judge from June 1, till July 13, 1918, the application was within the period allowed by Article 182. The Subordinate Judge so held on remand. He farther held that she had applied for restitution on June 11, 1919 and that her application was within time even without making any deduction for the period of the stay of proceedings. The

Bench before which the second appeal then came, doubted whether Article 182 applied and referred to a Full Bench the question.Whether Article 182, of Schedule I of the Indian Limitation Act is applicable to an application for the exercise of the power of restitution conferred either by Section 144, or by Section 151 of the Code of Civil Procedure and if neither of the above articles is applicable then is there any other article applicable to the case?

10. The matter came before Das, Ross and Kulwant Sahay, JJ. Two Judges decided that the question whether Article 182 applied was not res judicata and one was of the contrary opinion. On the question whether Article 181 or Article 182, applied Das and Kulwant Sahay, JJ., held that the former applied and Boss, J., held, that Article 182 was applicable.

11. In Rambujhawan Thakur v. Bankey Thakur 114 Ind. Cas. 476 : 10 P.L.T. 49 : A.I.R. 1928 Pat. 598 : 7 Pat. 749, heard by Kulwant Sahay and Macpherson, JJ., the former was of opinion that when an Appellate Court has ordered restitution under Section 144 of the Code of Civil Procedure to a person who has been dispossessed under a decree and. an appeal against that order has been dismissed by the High Court, the period of limitation under Article 181 of the Limitation Act for an application for assessment of mesne profits by way of restitution, begins to run from the date of the order of the High Court. The learned Judge following the decision in Balmukunda Marwari v. Basanta f umari Dassi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1, held that Article 181 was applicable. Reference was also made to the decision in Gajadhar Singh v. Kishan Jiwan Lal 42 Ind. Cas. 93 : 39 A. 641 : 15 A.L.J. 734, which was approved by the Privy Council in Jawad Hussain v. Gendan Singh 98 Ind. Cas. 499 : 7 P.L.T. 575 : 24 A.L.J. 765 : A.I.R. 1926 P.C. 93 : (1926) M.W.N. 591 : 44 C.L.J. 63 : 3 C.W.N. 690 : 24 L.W. 394 : 31 C.W.N. 58 : 51 M.L.J. 781 : 28 Bom. L.R. 1395 : 53 I.A.R. 197 : 6 Pat. 24 (P.C.), that when an appeal has been preferred, it is the decree of the Appellate Court which is the final decree in the case. The learned Judge set out a further ground in the fact that the right to apply for ascertainment of mesne profits did not accrue until after the delivery of possession to the defendant, since the period for which mesne profits would have to be ascertained, could only be determined after delivery of possession. His colleague agreed to the dismissal of the appeal but appeared to doubt whether Article 181, really was applicable.

12. Upon a conflict of opinion between the Judges of a Division Bench the matter was referred to a Full Bench of the Calcutta High Court in Hari Mohan Dalai v. Par-meahwar Sahu 117 Ind. Cas. 543 : 32 C.W.N. 971 : A.I.R. 1928 Cal. 646 1 I.L.T. 40 Cal. 178 : 56 C. 61. The learned Chief Justice appears to regret that the learned Judges, thinking it to be well-settled that Article 181 and not 182 was applicable, so far as the Calcutta High Court was concerned, did not state the "point of law upon which they differed as broadly as they might have done, that is to say, by making a reference on the question whether the applications under Section 144 were barred by limitation, rather than in a limited form and upon the basis that the article applicable was Article 181. The

plaintiff had obtained his decrees on July 31, 1919 and realised in execution the whole of his decretal amount. Thereafter on August 14, 1920, the lower Appellate Court allowed the appeals in part and reduced the amounts for which the plaintiff could get decrees and on August 8, 1923, the plaintiff's appeal was dismissed by the High Court. In May and June, 1924, the tenants made applications under Section 144 for restitution of the amounts which had been paid by them in the execution proceedings in excess of the amounts ultimately decreed to be due. The plaintiff's plea of limitation under Article 181 was rejected in the Courts below. The decision of the Full Bench was that, on the assumption that Article 181 applies, the right to apply under Section 144 accrued from the date of the decree of the lower Appellate Court and the applicant was not entitled to get deduction of the period occupied by the appeal in the High Court, that is to say, the applications under Section 144 were barred by limitation.

13. This Bench is bound by the decision in Rambujhawan Thakur v. Bankey Thakur 114 Ind. Cas. 476 : 10 P.L.T. 49 : A.I.R. 1928 Pat. 598 : 7 Pat. 794, which has been followed by the lower Appellate Court. But we are of opinion that the matter requires further examination.

14. There would seem to be good reason for doubting whether the decision in Bal-makunda Marwari v. Basanta Kumari Dassi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1, is correct and further for doubts ing whether if it is correct, the decision in Rambujhawan Thakur v. Bankey Thakur 114 Ind. Cas. 476 : 10 P.L.T. 49 : A.I.R. 1928 Pat. 598 : 7 Pat. 794, based upon the view that Article 181 is applicable, can be supported as regards the - date from which the right to apply accrues. No doubt only money was in contest in Hari Mohan Dalai v.Parmeshwar Sahu 117 Ind. Cas. 543 : 325 C.W.N. 971 : A.I.R. 1928 Cal. 646 : 1 L.T. 40 Cal. 178 : 56 C. 61 whereas in the present instances and in Rambujhawan Thakur v. Bankey Thakur 114 Ind. Cas. 476 : 10 P.L.T. 49 : A.I.R. 1928 Pat. 598 : 7 Pat. 794, the question of restitution of possession of land arose as well as the question of the money value of mesne profits. It seems doubtful however whether the difference is material and also whether the right to apply for ascertainment of mesne profits must necessarily be postponed until after the delivery of possession as suggested in the last mentioned decision. In the present appeals the proceedings started in one case some months before and in the other case some months after the delivery of possession. We are inclined to the view that Article 182 is applicable and substantially on the grounds set out by Ross, J. in Balmakunda Marwari v. Basanta Kumari Dassi 78 Ind. CAS. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1 The result in the present in stance would be the same, namely the dismissal of the appeals but the grounds on which the result would be reached, would be different and against the majority decision of the Full Bench of three Judges.

15. It may be mentioned that in Sital Prasad Singh v. Jagdeo Singh. 92 Ind. Cas. 474 : 7 P.L.T. 415 : at P. 420 : 4 Pat 294 : A.I.R. 1925 Pat. 577 the Taxing Judge following an earlier decision

of Roe, J., held that the determination of a question arising under Section 144 relates to the execution, discharge or satisfaction of the decree either of the first Court or of the Appellate Court and that an appeal from the decision of that question is chargeable with the court fee payable on an appeal from an order under Section 47.

16. We would recommend that it be referred to a Full Bench of five Judges to determine whether the applications under Section 144 of the Code of Civil Procedure made on July 29, 1929, and January 29, 1930, were barred by limitation as having been made on the basis of the reversing decree of March 23, 1926, which was affirmed on second appeal on July 25, 1928 and incidentally to determine whether Balmakunda Marwari v. Basanta Kumari Dassi 78 Ind. Cas. 200 : 5 p.l.t. 445 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1 and liambujhawan Thakur v. Bankey Thakur 114 Ind. Cas. 476 : 10 P.L.T. 49 : A.I.R. 1928 Pat. 598 : 7 Pat. 794, were correctly decided. Let the matter be placed before the Hon'ble the Chief Justice.

17. Messrs. B.P. Sinha and K. Dayal, for the Appellants.

18. Messrs. R.S. Lal and Thakur A.D. Sinha for the Respondents.

Courtney-Terrell,C. J.

19. The facts which have given rise to these two Miscellaneous Appeals are as follows and are similar in all material respects. The plaintiff in each case sued in ejectment in the Court of the Munsif of Palamau. The suits were decreed in the trial Court on May 15, 1924 and on July 1, of the same year the plaintiff got delivery of possession. The defendants appealed to the Court of the Judicial Commissioner of Chota Nagpur and the appeals were allowed on March 3, 1926. These decisions were affirmed by the High Court in second appeal on July 25, 1928 and the defendants on September 6 and September 21, 1929, respectively obtained redelivery of possession. On July 29, 1939, and on January 29, 1930 the defendants respectively made application under Section 144 of the Civil Procedure Code for restitution. The Munsif in both cases held that Article 181 of the Limitation Act applied but in the two decisions there was the difference that in the one the starting point was held to be the date of the first decree, i. e. that of the lower Appellate Court and was out of time, whereas in the second case the Munsif held that the starting point was the date of the decision of the High Court in second appeal and was in time.

20. Both cases went on appeal to the Judicial Commissioner who agreed with the view of the Munsif that Section 181 of the Limitation Act applied but that the date of the decision of the High Court in second appeal was the starting point and therefore that both applications were in time. From this decision the judgment-debtors in both cases have appealed.

21. The real question for our decision is whether Article 181 or 182 of the Limitation Act applies.. Article 181 is as follows:

Applications for which no period of limitation is provided elsewhere in this Schedule or by Section 48 of the Code of Civil Procedure, 1908.

and a period of three years from the accrual of the right is prescribed.

22. Article 182 runs thus:

For the execution of a decree or order, of any civil Court not provided for by Article 183 or by Section 48 of the Code of Civil Procedure 1903.

and a period of six years from the date of the decree or order is prescribed where (as in this case) a certified copy of the decree or order has been registered. Therefore the real point for decision is as to whether an application under Section 144 is properly to be considered as an application "for the execution of a decree or order of any civil Court." I am concerned to find myself at variance with the views of my brothers Kuhvant Sahay and Fazl Aii, J J., whose opinion to the contrary has caused me to hesitate, but with all respect to them I feel myself constrained on principle to hold that an application for restitution is an application for execution for the reason that the success of the defendants on the main issues entitled them as a matter of right to restitution. It is perfectly true that applications for restitution are not dealt with in that part of the Civil Procedure Code comprised in Order XXI which is entitled "Execution of Decrees and Orders" and that they are dealt with under the heading "Miscellaneous" in art XI It is true that the procedure for dealing with them differs in some respects from the procedure for carrying out other decrees of the Court notably in the fact that such applications must be made in the Court of first instance. But such matters are not in my opinion the criteria of the nature of the remedy for juridical classification any more than geographical habitat or nomenclature are criteria, of zoological genus. Under Section 144 the Court is bound, as a matter of law, to order restitution though the form of the restitution may vary and it is by lessons of the fact that the Court of first instance only is familiar with the circumstances of the case that as a matter of machinery it alone is given discretion to determine the form which the restitution may take. This fact does not, in my opinion, militate against the view that an application for restitution is an application in execution. The observation of Mr. Justice Mullick in Krupasindhu Roy v. Mahanta Balbhadra Das 47 lnd. Cas. 47 : 3 P.L.J. 367 to the effect that it was conceded that Article 181 applied and the fact that that case did not turn upon the point deprives the remark of authority. The authorities are not set forth in the Full Bench decision of this Court in the case of Balmukunda Mar-wari v. Basanta Kumari Dassi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1 and I feel myself in entire agreement with the dissentient judgment of Mr. Justice Ross, supported as it was by the

opinion earlier expressed in the same case by Chief Justice Sir Dawson Miller. Section 144 of the new Code is no more than an amplification of Article 583 of the old Code under which application for restitution was made in execution. The re-arrangement in the new Code has, in my opinion, not affected the essential nature of the remedy which remains as before a remedy in execution though subject to a special procedure. It is clear that if Article 182 applies both applications are in time as held by the Judicial Commissioner. While disagreeing with his view that Article 181 applies I would hold that the effective decision remains unaffected. I would, therefore, dismiss these appeals with costs and direct that the applications for restitution be allowed to proceed.

Wort, J.

23. The substantial question which we have to decide in this case is whether the Full Bench decision in Balmukunda Marwariv. Basanta Kumari Dassi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1 was rightly decided. As the question is one of limitation, in the event of deciding that the case mentioned was rightly decided, it would be necessary also to determine from what date limitation ran under Article 181 of the Limitation Act. Having regard to the view that I take of the matter, however, it becomes unnecessary to decide this latter question. This decision governs both appeals.

24.The matter has arisen by reason of the fact that the learned Munsif in the Court below in the cases which were the subject-matter of his decision has come to contrary conclusions on the point. On appeal to the learned Judicial Commissioner of Chota Nagpur, however, it was held that Article 181 of the Limitation Act applied, being governed by the decision which I have named.

25. In coming to the question of the time from which limitation ran, the learned Judge has held, being governed by the case of Rambujhawan Thakur v. Bankey Thakur 114 Ind. Cas. 476 : 10 P.L.T. 49 : A.I.R. 1928 Pat. 598 : 7 Pat. 794 that limitation ran from the date of the decision of the High Court dismissing the appeal. The facts were as follows.

26. The plaintiff-appellant brought an action for possession of certain villages. The suit was decreed on May 15, 1924. The defendants preferred an appeal which was allowed on March 23, 1926. A second appeal was preferred to the High Court by the plaintiff which was dismissed on July 25,1928. In the meantime the plaintiffs had been in possession since about July, 1921. As a result of the dismissal of the appeal ii favour of the de fendants, re-delivery of possession was obtained by them on September 6, 1929. One application for mesne profits was made by one set of defendants on July 29, 1929 and one by another set of defendants on January 29, 1930. The question arose in each case as to whether the application for mesne profits under Section 144 of

the Civil. Procedure Code was barred by limitation. In the one case in which the application had been made on January 29, 1930, the learned Munsif held that the application was not barred by limitation. In the case in which the application had been made on July 29,1929, he held that it was barred by limitation. These decisions were based not upon the date of the application for mesne profits but on the question whether time ran from the date of the decision of the High Court or from the date at which the defendants were entitled to possession, namely, the date of the decision of the Appellate Court. It was in those circumstances that the question arose.

27. The learned Judge in the Court below, as I have already stated, has decided that he is bound by the decision in Rambujhawan Thakur v. Bankey Thakur 114 Ind. Cas. 476 : 10 P.L.T. 49 : A.I.R. 1928 Pat. 598 : 7 Pat 794 which decided that the date from which limitation ran was from the date of the High Court judgment and therefore the applications in this case were not barred by limitation although made more than three years after the date on which the two appeals were allowed. Apparently it was ag eed in the Courts below that Article 181 applied.

28. It is contended by the appellant that the application for mesne profits was not an application relating to execution, therefore, not governed by Article 182 of the Limitation Act but by Article 181, being the residuary article. On the other hand, by the respondent the contention is that an application under Section 144 of the Code of Civil Procedure is an application in execution and therefore governed by Article 182.

29. The argument of the appellant in support of the view expressed in the Full Bench decision in Balmakunda Marwari v. Basanta Kumari Dasi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 (1924) Pat. 33 : A.I.R. 1925 Pat. 1 is that had the matter been one relating to execution it would have, been unnecessary to have enacted s, 144, as well as Section 47 of the Code. Reliance is also placed on the provisions of Order XX, Rule 12. By way of analogy it is said that an application for mesne profits under that Order and rule is a part or continuation of the order for mesne profits made in the suit, and in this sense, the present Code differs from the old, inasmuch as, under the old Code the ascertainment of mesne profits was in the executing Court. It is not disputed that the application referred to in Order XX, Rule 12 is an application governed by Article 181 of the Limitation Act and it is, therefore, said that if that be so, there seems to be no reason for holding that an application of a similar character under Section 144 should not be governed by the same article. In my judgment this does not necessarily follow. An analysis of the matter seems to me to disclose a radical difference Order XX, Rule 12 provides for a decree for mesne profits and also provides the machinery by which these mesne profits are to be ascertained. Whatever maybe said of an application under Section 144, the nature of the application made under Order XX, Rule 12 does not seem to be altered by the method of ascertainment, which the law provides. It is true that Section 244 of the Code of 1877 provided that the matter of amount of any mesne profits to which the decree had directed an enquiry, should be ascertained in the execution Court, and

although in that sense it became a part of the execution proceedings and therefore governed by the article regulating the period of limitation applicable to an application in execution, it does not seem, to me that that part of the application relating to the ascertainment of mesne profits is necessarily a proceeding in execution. I state this because the argument of Mr. Sinha on this point seems to depend upon the suggestion that although an application under Order XX, Rule 12 may be considered a matter of execution, yet admittedly it is governed by Article 181. of the Limitation Act and that being so any other application for mesne profits must be governed by the same article also.

30. To the first part of the argument Mr. Sinha could not subscribe on the main question because, as I have already stated, it is not his case that an application for mesne profits has anything to do with execution. A further development of the argument is this, that it cannot be execution because until an order for mesne profits is made there is nothing to execute. The other side of the case is that the order for restitution and therefore the application for mesne profits arising there from is a necessary result of the decree reversing the decree for possession in other words it is nothing more than an application to enforce the decree of the Court which in effect awards possession of the property to the successful party.

31. An argument has been addressed to us based on the arrangement of the present Code as compared with that of 1877. Admittedly under the old Code an application of this kind was an application in execution: see Prag Narain v. Thakur Kamakhia Singh 3 Ind. Cas. 798 : 36 I.A. 197 : 10 C.L.J. 257 : 11 Bom. L.R. 1200 : 6 M.L.T. 3003 : 14 C.W.N. 55 : 19 M.L.J. 599 : 31 A. 551 : 13 O.C. 180 (P.C.), a decision to which reference is made by Ross, J. in the Full Bench case of Balmakunda Marwari v. Ba~ santa Kumari Dasi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1. The J udicial Committee of the Privy Council in that case had stated that Sections 583 and 244 of the Code of Civil Procedure, 1877, were sufficient to entitle the party seeking mesne profits to apply in execution and was not bound to bring a separate suit. It is suggested that as the application would have been an application in execution under the old Code, unless the law is changed by the new Code, the same rule applies. At this stage it is said that the position is entirely changed under the new Code, but the only basis of that argument is the reference to Order XX, Rule 12. It is an argument which, in my opinion receives no support from the Code itself. Order XX, Rule 12, as I have already indicated, is a provision relating not to an application for mesne profits but merely provides that machinery by which, those mesne profits were to be ascertained. It can be of no assistance even by way of analogy to those w ho contend that an application for restitution and mesne profits, which necessarily result from a decree passed by the Court is anything but an application in execution of that decree. As a part of this branch of the argument it is said that guidance can be got from the arrangement of the present Code. It is said that Section 144 finds a place in a Chapter entitled "Miscellaneous" that

execution is dealt with in another part, Part II of the Code. A perusal of the Act itself will disclose that there is no such scientific arrangement and that no support can be got for this argument from the divisions of the Code.

32. It is true that Section 47 finds a place in Part II which is entitled "Execution". There are several forms of executions which are set out in Section 51 of the Code which is in the same Part as Section 47:

(a) delivery of properly specifically decreed.

(b) attachment and sale or sale of property.

(c) arrest.

(d) appointment of a receiver (known in England as equitable execution).

(e) such manner as the nature of the relief granted may require.

33. In the Chapter or Part headed "Miscellaneous" in which Section 144 finds a place and which commences with Section 132, the first section, Sub-section(2), deals with execution by arrest Section 135 likewise, 135-A also, 136 also Section 145 provides for execution against a surety.

34. It will be seen that there are many matters relating to execution which are dealt with in some of their aspects in the same part of the Code as that in which Section 44 is found. Indeed if any argument gains support from an analysis of the arrangements of the Code it is the argument that an application under Section 114 is an application relating to execution.

35. Having regard to the importance of this matter, it is surprising to Realise that apart from the discussion in Balmakunda Marwari's case 78 Ind. Cas. 200 : 5 P.L.T.. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1 (the full Bench decision of this Court) there has been practically no detailed discussion in the Courts in India. The matter was referred to in the Full Bench decision of the Calcutta High Court in Hari Mohan Dalai v. Parmeshwar Sahu 117 Ind. Cas. 543 : 32 c.w.n. 971 : A.I.R. 1928 Cal. 646 : 1 L.R. 40 Cal. 178 : 56 C. 61. Rankin, C. J., however, expressly stated that by reason of the terms of the reference the question of whether Article 182 or Article 181 applied to an application of this kind was not open to discussion, and stated that the Judges of the Court referring the matter thought the question to be well settled, so far as "the Calcutta High Court was concerned. But as I have already indicated and as Ross, J., points out in the Full Bench decision, the matter was never seriously discussed in the Calcutta High Court. The case of Harish ChandraShaha v. Chandra Mohan Dass 28 C. 113 although it mentions the Madras case upon which the learned Judges of the Calcutta High Court relied, it became unnecessary to decide the question as in any event the application was within the period of

limitation.

36. In A&utosh Goswami v. Upendra Prasad Mitra 38 Ind. Cas. 17 : 24 C.L.J. 476 : 21 C.W.N. 564 no discussion took place as it was held that no question of limitation arose, but there was a statement at the end of the judgment in which it was said that the only article applicable was Article 18J. In the Allahabad High Court in the case of Jiwa Ram v. Nand Ram 66 Ind. Cas. 144 : 44 A. 407 : 20 A.L.J. 226 : A.I.R. 1922 All. 223 the question arose and it was decided that Article 181 applied as the application under Section 144 was not an application in execution. Reliance was placed on what appeared to the learned Judges in that case was the distinction between the Code of 1877 and the present one. On the. other hand, in the case of Somasundaram Pidai v. Chokkalingam Pillai 38 Ind Cas. 806 : 40 M. 780 : 5 L.W. 276, in a short judgment the learned Judge in meeting the argument on the change in the language of the Code stated that no support could be got from that for the contention that it was not an application in execution and made tbisf statement:

Section 144 of the present Code has been so framed as to enable the successful party in the Appellate Court to be placed in status quo ante. The language of Section 83 of the old Code was not wide enough to cover all cases of benefits arising from the reversal of a decree being fully realized by the successful party, Apart from this change, we see no ground for holding that the legislature intended to make any departure in the procedure by which restitution is to be obtained.

37. and then reference is made to the case of Prag Narain v. Thakur Kamakhia Singh 3 Ind. Cas. 798 : 36 I.A. 197 : 10 C.L.J. 257 : 11 Bom. L.R. 1200 : 6 M.L.T. 303 : 14 C.W.N. 55 : 19 M.L.J. 599 : 31 A. 551 : 13 O.C. 180 (P.C.). In connection with this statement of the learned Judge an argument was put forward based upon the decision which was referred to by Das, J, in the Full Bench case. That was the case of Rodger v. Comptoir D Escompte deParis (1871) 3 P.C. 465 : 40 L.J.P.C. 1 : 24 L.T. 111 : 19 W.R. 449 : 7 Moo. P.C. (N.S.) 314 : 17 E.R. 120 in which Lord Cairns had stated that it was the duty of the tribunal to take care that no act of the Court does an injury to suitors of the Court, and said :

It is contended on the part of the respondents here that the principal sum being restored to the present petitioners, they have no right to recover from them any interest.... They will by reason of an act of the Court have paid a sum which it is now ascertained was ordered to be paid by mistake wrongfully. They will recover that sum after the lapse of a considerable time, but they will recover it without ordinary fruits which are derived from the enjoyment of money. On the other hand, that fruits will have been enjoyed or may have been enjoyed by the person who by mistake and by wrong obtained possession of the money under a judgment which has been reversed. So far, therefore, as the principle is concerned, their Lordships have no doubt or

hesitation in saying that injustice will be done to the petitioners, and that the perfect judicial determination which it must be the object of all Courts to arrive at, will not have been arrived at unless the persons who have had their money improperly taken from them have the money restored to them, with interest during the time that the money has been withheld.

38. The effect of this, it is contended, and undoubtedly it is, that apart from the provisions of the Code a successful party where a decree has been reversed is as a matter of principle entitled to be restored to his former position: in other language, the right to be restored existed apart from Section 144. This seems to me to be an argument against the party contending that an application of this character is not an application in execution. If as a matter of law a person is entitled to be restored to his former position as a result of the judgment of reversal, it seems to follow by necessary implication that such an application is an application in execution of that decree or "relating theieto.

39. The most recent case of the Bombay High Court is the case of Hamidalli Eadam-alli v. Ahmedalli 62 Ind. Cas. 233 : 45 B. 1137 : 23 Bom. L.R. 480, in which, it was held that Article 182 applied, reliance being placed upon a decision of the same Court in Kurgodigauda v. Ningangouda 41 Ind. Cas. 238 : 41 B. 625 : 19 Bom. L.R. 638, by which the Chief Justice and Shah, J., considered, they were bound. Reference was made to the decisions of some of the - other High Courts including the decision in 1 he case of Krupasindhu Roy v. Mahanta Balbadhra Dass 47 Ind. Cas. 47 : 3 P.L.J. 367 in which this observation was made:

With all due respect to the learned Judges of those Courts it appears to me that the decision I have referred to is correct, and that an application for restitution cannot be treated as anything else than an application for execution of the decree of the Appellate Court. 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 applicant must apply for execution of the order which entitles him to get back that possession.

39. At this stage I must mention that in the argument it was agreed that there was no distinction between an application for restitution from which re-delivery resulted in this case in 1929, and a subsequent application for mesne profits arising out of the re-delivery of possession. On the whole although the matter is not without difficulty in my judgment an application for restitution and for mesne profits is an application in execution and therefore governed by Article 182. The further point which would have arisen had my decision been otherwise, namely, whether under Article 181 limitation would date from the decree reversing the decision of the trial Court or from the date of the decree of the High Court confirming the decision of the Appellate Court, does not arise.

40. In my opinion the decision in the case of Balmakunda Marwari v. Basanta Kumari Dasi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 A.I.R. 1925 Pat. 1 in the Pull Bench of this Court was wrongly decided. The result therefore is that this appeal should be dismissed with costs.

Kulwant Sahay, J.

41. Two substantial questions arise for determination upon this reference: (1) whether applications for restitution under Section 144 of the Code of Civil Procedure are governed by Article 181 or by Article 182 of the First Schedule to the Indian Limitation Act and whether the decision in Balmakundi Marwari v.Basanta Kumari Dasi. 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 A.I.R. 1925 Pat. 1 was rightly arrived at by the majority of the Judges composing the Full Bench; and if Article 181 applies.x when did the right to apply accrue, in the present case, viz, whether on the date of the decree of the lower Appellate Court which reversed the decree of the trial Court, or on the date of the decree in the second appeal which affirmed the decision of the lower Appellate Court?

42. As regards the first question, I was a party to the majority decision of the Fall Bench in Balmukunda MarwarVs case 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 A.I.R. 1925 Pat. 1. I have given my most anxious consideration to the question upon the present reference and I find no reason to alter the view taken by me in that case. The reason for the view that Article 181 applies are given in the decision of Das, J. and in my own decision in Balmakunda MarwarVs case 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 A.I.R. 1925 Pat. 1 and it is not necessary for me to discuss the matter at any great detail again. I desire simply to say that as was pointed out by Jwala Prasad, J., in the Full Bench decision of this Court in Tribeni Prasad Singh v. Ramasray Prasad 133 Ind. Cas. 337 : 12 P.L.T. 423 : A.I.R. 1931 Pat. 241 : Ind. Rul. (1931) Pat. 337 : 10 Pat. 670 (F.B.).

the law of limitation is a law relating to procedure and so is the Civil Procedure Code. They are in pari materia, and according to the dictum of Lord Mansfield in Rex v Loxdale (1758) 1 Bur. 445 they are to be taken and construed together as one system as explanatory of each other.

in order to determine whether it was intended by the legislature to draw a distinction between an application for execution and an application for restitution. In the old Code of 1882 the section relating to restitution was Section 583 which occurred in the Chapter of appeals, and it provided for execution of the decrees of the Appellate Court and restitution was treated therein on the same footing as execution of a decree. There was thus an express provision that the procedure as regards restitution was the same as the procedure as regards execution at the present Code the provision as regards restitution has been removed from the Chapter of Appeals and has been

included in Part XI with the heading Miscellaneous. The present Section 144 amplifies the old Section 583 and says nothing about execution of the decree. Execution is provided for in the present Code in Part II and in Order XXI. It deals, among other matters, of Courts by which the decree may be executed, and provides that it may be executed either by the Court which passed it or by the Court to which it is sent for execution. A decree may even be sent for execution to a Court in a different province, An application for restitution under Section 144 must be. made 133 Ind. Cas. 337 : 12 P.L.T. 423 : A.I.R. 1931 Pat. 241 : Ind. Rul. (1931) Pat. 337 : 10 Pat. 670 (F.B.) to the Court of first instance alone and to no other Court. Order XXI of the present Code is headed 'Execution of Decrees and Orders; Article 182 of the Indian Limitation Act provides for the execution of a decree or of an order of any civil Court, using exactly the same words as are used in the Civil Procedure Code. The legislature has given different nomenclature to different sorts of applications. It has treated certain applications as in execution of decrees and certain others, although analogous to execution, it has termed as applications for restitution and as miscellaneous proceedings. The legislature deliberately made different provisions in the Limitation Ace (which was passed at about the same time as the present Civil Procedure Code) as regards the starting point of the period of limitation under Articles 181 and 182. Under the latter article the period is three years, or where a certified copy of the decree or order has been registered, six years; and there are different points of time from which this period starts to operate. There is provision for consecutive applications for execution and a fresh start is provided for from the date of the final order passed on a previous application for execution In Article 181 there is only one period of limitation, viz., three years, and the starting point is only one, viz., the date when the right to apply accrues. In my opinion Article 181 applies not only to restitutions contemplated in Section 144 but also to all applications for restitution under the inherent power of the Court and the legislature has deliberately laid down a shorter period of limitation in the case of such applications which it calls miscellaneous applications and not applications for execution of decrees. The procedure in both cases may be the same, and the method of granting restitution may be similar to the method of execution of decrees; but the legislature has deliberately chosen to give, different names to these applications and has made different provisions in the Indian Limitation at as regards the period of limitation. It is possible that as a matter of "policy the legislature did not intend that applications for restitution should be made at any period beyond three years of the date of the as crual of the right which would be the case if such applications are treated as applications for execution and Article 182 applied. The terms used in the Indian Limitation Act ought to be given the same significance as in the Code of Civil Procedure, and when Article 182 speaks of execution of decrees and orders, to my mind, it clearly refers to executions of decrees and orders provided for in O XXI of the Code.

43. There have been divergent views on this point not only in the different Courts but also amongst different Judges in the same Court. The view that Article 181 applies to such

applications had prevailed in the Calcutta High Court for a number of years. Indeed in some of the cases no discussion was made and it was taken as granted that Article 181 applied. Ever since the establishment of this Court this, view has been adopted by this Court. In Krupa-sindhu Roy v. Mahanta Balbhadar Das 47 Ind. Cas. 47 : 3 P.L.J. 367 which was decided in December, 1917, about a year and a half after the establishment of this Court, it was taken for granted that Article 181 applied. Sir Dawson Miller, C.J. took a different view and held that, Article 182 applied in the case of Bal-mukunda Marwari v. Basanta Kumari Dasi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1. The same case came on an appeal afier remand before Mullick and Bucknill, J J., and they were of opinion that Article 181 applied and referred the case to the Full Bench which was composed of Mr. Justice Das, Mr. Justice Roes and myself: vide Balmukunda Marwari v. Basanta Kumari Dasi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1 and the majority of the Judges then held that Article 1 applied. Since before the establishment of this Court it has been settled law in this Province that Article 181 applies to applications for restitution and even if that view be open to doubt, this Court should be slow to overrule its decisions unless they are manifestly erroneous and mischievous as was observed in the Full Bench decision of this Court in Tribeni Prasad Singh v. Ramasray Prasad 133 Ind. Cas. 337 : 12 P.L.J. 423 : A.I.R. 1931 Pat. 241 : Ind. Rul. (1931) Pat. 337 : 10 Pat. 670 (F.B.) referred to above.

44. I would, therefore, answer the first question by saying that Article 181 applies to applications for restitution.

45. The second question was not discussed, at the Bar as intimation was given that the majority of the Judges were of opinion that Article 182 applied. Therefore it is not necessary for me to express any opinion thereon.

Macpherson, J.

46. In my judgment the application under Section 144 of the Code of Civil Procedure made on July 29, 1929 and January 29, 1920, were not barred by limitation under Article 181 of the Indian Limitation Act, 1908, or otherwise, as having been made on the basis of the reversing decree of March 23, 1926, inasmuch as the period of limitation applicable is that which is provided in Article 182 of that Act, so that limitation began to run from the date when the reversing decree was affirmed on second appeal on July 25,1928 and the presentation of the applications was within the period of three years from the date provided by that article. Accordingly I also hold that the view of the majority of the Full Bench which decided Balmakunda Marwari v. Basanta Kumari Dasi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1 was incorrect and that the view of Ross, J., was correct.

47. My reasons are set out in the order of reference to the Full Bench to which I was a party. Nothing has been said at the present hearing which would lead me to alter the views there expressed.

48. The decision in Rambujhawan Thakur v. Bankey Thakur 114 Ind. Cas. 476 : 10 P.L.T. 49 : A.I.R. 1928 Pat. 598 : 7 Pat. 794 was correct on the view that Art, 182 applied, but is so far as it was held that Article 181 applied the reasoning which led to the decision was not correct, The question has not been discussed before us whether the application would have been barred if Article 181 applied-and 1 need only say that in determining this point the considerations set out in Hari Mohan Dalai v. Parmeshwar Sahu 117 Ind. Cas. 543 : 32 C.W.N. 971 A.I.R. 1928 Cal. 646 : 1 L.T. 40 Cal. 178 : 56 C. 61 could not in my opinion be lightly disregarded.

Fazl Ali, J.

49. There are two questions of law which arise for determination in these appeals: (1) Whether Article 181 or 182 of the Limitation Act is applicable to an application for restitution under Section 144 of the Civil Procedure Code and (2 if Article 181 is applicable to such an application, whether the period of limitation will begin to run from the date when the decree of the Court of first instance was reversed in appeal or from the date when such decree of the lower Appellate Court was confirmed in second appeal. Neither of these questions is free from difficulty but the first question is a particularly difficult one as is apparent from the fact that there is a sharp divergence of opinion at out it among the various High Courts in India and even in the same High Court different Judges have at times expressed different views. So far as this High Court and the Calcutta High Court are concerned, the view which has prevailed so far is that an application under Section 144 of the Civil Procedure Code, is governed by Article 181. That view has been set out with great lucidity in the judgments of Das and Killwant Sahay, JJ., in Balmakunda Marwari v. Basanta Kumari Dasi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1 and in fact all that can be said in support of it is to be found in these judgments. On reading these judgments along with those decisions wherein the opposite view has been propounded, the conclusion which I have arrived at in my mind is that if I were asked -what should be the law. I would perhaps say that Article 182 should apply to an application under Section 144; but if the question which I have to answer is what is the present law on the subject? I would feel constrained to say that under the provisions of law as they stand, Article 181 of the Limitation Act, is the only article which is applicable to an application under Section 144 of the Civil Procedure Code. If the matter was governed by Article 182, there could be no possible controversy as to what would be the starting point for the period of limitation. Under Article 182, limitation begins to run from the date of the final decree which would in every case be a certain and precise date. If the matter, however, is governed by Article 181 time begins to run from the date "when the right to apply accrues." That would in certain cases give

rise to another controversial question which actually arose in the case of Hari Mohan Dalai v. Parmeshwar Sahu 117 Ind. Cas. 543 : 32 C.W.N. 971 : A.I.R. 1928 Cal. 646 : 1 L.T. 40 Cal. 178 : 56 C. 61. There the decree of the Court of first instance having been reversed by the lower Appellate Court and the decree of the lower Appellate Court having been confirmed in second appeal the question arose as to whether the right to apply under Section 144 accrued on the date of the decree of the lower Appellate Court reversing the decree of the first Court or on the date of the decree in second appeal dismissing the appeal from the decree of the lower Appellate Court. It w is held by three Judges of the Calcutta High Court that time began to run from the date of the decree of the lower Appellate Court and that the particular application under Section 144 with which their Lordships were called upon to deal in that case was barred by limitation. If this view is correct, it will obviously lead to much hardship and it will mean that as soon as the decree of the Court of first instance is reversed in appeal, the successful party should apply for restitution at once without waiting for the result of the second appeal. That is why I think it would perhaps be desirable, if the law of limitation was so amended as to provide a separate article for an application under Section 144 of the Code of Civil Procedure, and failing that to provide expressly that Article 182 would be applicable to such an application. In the existing state of law, however, I find it difficult to hold that Article 182 was intended to apply to an application under Section 141. My first ground for saying so is based on certain expression used in Article 182 of the Limitation Act which I presume must have been used in the same sense in which they have been used in the Civil Procedure Code. It is true that we must look to the essence and not mere labels, but as the scheme of the Indian Limitation Act is closely interwoven with the provisions of the Civil Procedure Code, it appears to me that, the "labels" or the common expressions used in the two statutes cannot be altogether overlooked in determining what article of the Limitation Act was intended by the framers of the Limitation Act to apply to what class of cases. In this connection it will not be out of place to quote the following observations of Mr. Justice Das in Balrnakunda Marwari v. Basanta Ku'mari Dasi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1:

The Code of Civil Procedure and the Indian Limitation Act are the two great procedural Codes in India and they were amended in the same year and were to come into operation on the same day They are statutes in pari materia and are to be taken together as forming one system, and as interpreting and enforcing each other See Palmer's case (19) Now, Article 182 applies in terms to applications for execution of decrees or orders, Applications for execution, of decrees or orders are dealt with in Order XXI of the Code In my opinion, Art 182 applies to such applications for execution as are contemplated by the Code and are provided for in Order XXI of the Code. It is not disputed that an application for restitution is not an application provided for in Order XXI of the Code.

50. Thus the question which one has to; ask oneself is. It a mere coincidence that the identical words "application for execution of decrees or orders" which occur as the headline of Order XXI of the Civil Procedure Code, have also been used in Article 182 of the Limitation Act, or did the framers of the Limitation Act deliberately adopt them to indicate to what class of cases Article 182 was to be applied? I feel some difficulty in holding that the framers of the Limitation Act intended to apply Article 182 to matters which are not dealt with under Order XXI of the Code.

51. Passing now from the matter of "labels" to that of substance it appears to me again that although an application for restitution may in a loose sense be described as an application for the execution of a decree, it is not strictly speaking such an application. Execution of a decree means ordinarily the enforcement of the reliefs granted by the decree. An application under Section 114, however, may in certain cases relate to matters which are not provided for in the decree itself. This matter has, I think, been very clearly illustrated by Mr. Justice Kulwant Sahay in the case of Balmakunda Marwari v. Basanta Kumarh Dasi 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1, in these words:

Where for instance in a suit for possession of property the plaintiff succeeds in the Court of first instance, and in execution of that decree possession is delivered to him, but on appeal the decree is subsequently reversed, the final decree of the Court of Appeal merely declares that the plaintiff is not entitled to any relief and does not provide for delivery of possession to a successful defendant, the defendant in such a case cannot properly apply to execute the decree of the Court of appeal in order to be restored to possession because there is no such direction in the decree A decree....can be executed only in so far as it grants any relief; so far as the successful defendant is concerned it merely dismissed the claim of the plaintiff, there is no relief either positive or negative granted to the defendant and there is no direction in the decree which is capable of execution.

52. The principle underlying Section 144 has been described by Lord Cairns in Rodger v. Comptoir d' Escompte de Paris (1871) 3 P.C. 465 : 40 L.J.P.C. 1 : 24 L.T. 111 : 19 W.R. 449 : 7 Moo. P.C. (N.S.) 314 : 17 E.R. 120 in these words:

One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression the act of the Court is used it does not mean merely the act of the primary Court or of any intermediate Court of Appeal, but the act of the Court as a whole from the last Court which, enjoys jurisdiction over the matter up to the highest Court which finally disposes of the case.1

53. Thus the power of the Court to grant restitution is not derived from or in consequence of any mandate issued by the Court passing a decree but to use the words by the Judicial Committee of

the Privy Council in Jai Berhma v. Kedar Nath Marwari 69 Ind. Cas. 278 : 4 P.L.T. 61 : A.I.R. 1922 P.C. 269 : 32 M.L.T. 10 : 37 C.L.J. 351 : 27 C.W.N. 582 : 44 M.L.J. 735 : 21 A.L.J. 490 : 25 Bom. L.R. 643 : (1923) M.W.N. 368 : 2 Pat. 10 : 18 L.W. 802 : 49 I.A. 351 (P.C.):

is inherent in the general jurisdiction of Court to act rightly and fairly according to the circumstances towards all parties involved.

54. In fact Section 144 of the Civil Procedure Code, merely gives statutory recognition to a well-known principle based on plain and natural justice and it is now well settled that Section 114 is not quite exhaustive and in certain cases the Court may grant restitution even apart from the provisions of that section. Is it then correct to say that an application for restitution is merely an application for the execution of the decree? I think, it would be more correct to say that the Court ordering restitution on the variation or reversal of a decree is not executing that decree but passing a supplementary decree which may be executed in the same manner as the decree in the suit and without which the decree of reversal passed by an Appellate Court will in many cases be ineffectual. The original decree relates to reliefs for injuries done to a suitor before the suit was brought which made it necessary for him to bring the suit. The order for restitution on the other hand relates to reliefs to which a party becomes entitled since the suit was brought in consequence of a wrong decision or order of the Court and which the Court passing the decree in the suit cannot ordinarily take cognizance of. Ordinarily, when a cause of action has arisen after the institution of a suit, a fresh suit will be necessary, but as here a party complains of having suffered injury owing to an "act of the Court", Section 144 makes a cheap and expeditious remedy available to him without the necessity of his bringing afresh suit.

55. Then again when a decree has to be executed the Executing Court has, as it were, to carry out implicitly the orders of the Court which passed the decree. Under Section 144, however, there is a clear provision that the Court ordering restitution may "make any orders including orders for the refund of costs and for payment of interest, damages, compensation and mesne profits which are properly consequential on such variation or reversal.

56. Thus a Court will in many cases have to take evidence in order to assess damages and compensation and ascertain mesne profits and has been vested with a discretion as to the rate of interest to be allowed and under Section 2 of the Code the orders passed by the Court upon an application for restitution will have the force of a decree and will themselves have to be executed as decree. It will be remembered that Section 583 of the old Code to which Section 144 of the present Code corresponds occurred in Chap. XLI, and related to appeals from original decrees and under that Code proceedings for restitution had to be commenced by an application for the execution of the appellate decree. Most of the decisions wherein it has been held that a proceeding for restitution is a proceeding in execution are based upon this provision. The present

Code, however, has given a more logical place to Section 144 by placing it in Part XI which relates to miscellaneous matters and there is nothing in the new section to suggest that restitution is mere execution of a decree.

57. In my opinion we cannot overlook the fact as to how the power of restitution has been treated in the new Civil Procedure Code and here again I would quote the following passage from the judgment of Kulwant Sahay, J., in Balmakunda Marwari's case 78 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1:

If an application for restitution be treated as an application for execution, then I fail to see any necessity for enacting Section 144 at all because such matters had already been provided for in Section 47 of the Code. If an application for restitution in an application for execution, then it relates to a question arising between the parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree. Furthermore, it is provided in Section 47 that questions relating to execution, discharge or satisfaction, of a decree shall be determined by the Court executing that decree and not by separate suit. Section 144 also provides that no suit shall be instituted for the purpose of obtaining any restitution or any other reliefs which could be obtained by application under Sub-section (1) of the section. To my mind, Section 47 deals with questions relating to the execution of decrees which properly may be treated as an application in execution, while Section 144 deals with questions which did not come strictly within the meaning of execution of a decree but which are analogous to it, namely application for relief consequent upon a decree being set aside.

57. I have already stated that it is now well settled that the power of a Court to grant restitution is not confined to the cases covered by the provisions of Section 144 and that in certain cases a Court may grant restitution under its inherent power. On this point all the High Courts in this country are unanimous, but if there could still be any doubt entertained on the point, it should be dispelled by the following pronouncement made by the Privy Council:

It is the duty of the Court under Section 144 of the Civil Procedure Code to place the parties in the position which they would have occupied but for such decree or such part thereof has been varied or reversed. Nor indeed does this duty or jurisdiction arise merely under the said section It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved.

58. What article of the Limitation Act will then be applicable to those cases where restitution is ordered apart from Section 144 and under Section 151 of the Code? It will neither be logical nor desirable that Article 182 should be held to apply to one class of cases where restitution is ordered and Article 181 to another class of cases requiring restitution.

59. My last reason for adhering to the view which has already been expressed in a Full Bench decision of this Court is that that view has prevailed here ever since the creation of this High Court and is in accord with the view, which has always prevailed in the Calcutta High Court and it has been again and again pointed out by us that this Court should not without very good reason depart from a long course of decisions of the Calcutta High Court. For these reasons my answer to the question whether Article 181 or 182 of the Limitation Act applies to an application under Section 144 is that the former article applies.

60. There remains only one other point to be dealt with and that is, whether in case it was held that Article 181 applied, the period of limitation would begin to run from the date of the decree of the first Appellate Court or the date of the decree of the second Appellate Court. This point becomes more academic now as I find that the majority of my colleagues including my Lord the Chief Justice are inclined to hold that Article 182 is the article applicable to an application under Section 144. I am also somewhat embarrassed by the fact that the latest pronouncement of three eminent Judges of the Calcutta High Court, is that the period of limitation will in such a case begin to run from the date of the decree of the first Appellate Court--See Hari Mohan Dalai v. Parmeshwar Sahu 47 Ind. Cas. 47 : 3 P.L.J. 367. If the matter, however, was open for decision, I would have felt great hesitation in holding that although the decree of the first Appellate Court merges in and is in a sense superseded by the decree of the second Appellate Court which confirms it, yet the latter decree does not confer upon the successful party the right to claim restitution under Section 144 though the former does and in computing the period of limitation we are to proceed as if the second decree did not exist.

Cases Referred.

192 lnd. Cas. 960 92 Ind. Cas. 960 : A.I.R. 1926 Cal 981
298 Ind. Cas. 499 : 7 P.L.T. 575 : 24 A.L.J. 765 : A.I.R. 1926 P.C. 93 : (1926) M.W.N. 591 : 44 C.L.J. 63 : 3 C.W.N. 690 : 24 L.W. 394 : 31 C.W.N. 58 : 51 M.L.J. 781 : 28 Bom. L.R. 1395 : 53 I.A.R. 197 : 6 Pat. 24 (P.C.)
3114 lnd. Cas. 476 : 10 P.L.T. 49 : A.I.R. 1928 Pat 598 : 7 Pat. 794
4114 lnd. Cas. 476 : 10 P.L.T. 49 : A.I.R. 1928 Pat 598 : 7 Pat. 794
547 Ind. Cas. 47 : 3 P.L.J. 367
678 Ind. Cas. 200 : 5 P.L.T. 145 : 3 Pat. 371 : (1924) Pat. 33 : A.I.R. 1925 Pat. 1