1918

SUNDAR KUNWAR v. RAM GHULAM.

mahal, and lastly to a stranger. If the share of any co-sharer be mortgaged or sold conditionally to a stranger and he be unable to redeem, then any of the co-sharers in his *patti* may *if the term of the mortgaged share is about to expire*, pay up the money and take possession, and when the mortgagor or his heirhas paid the money in accordance with the condition of the deed between the original mortgagor and the co-sharer with title he may enter into possession."

We were also referred to a decision of their Lordships of the Privy Council in which, under circumstances very like the present, the pre-emptor got a decree for pre-emption. The only question, however, which was argued before their Lordships of the Privy Council was one of limitation, namely the article of the Limitation Act which was applicable to the circumstances of the case, and they simply held that article 120 governed that case because physical possession was an impossiblity. Finding, as we do, in accordance with the court of first instance, that no custom was proved entitling the plaintiff under the circumstances of the present case to get the property by pre-emption, we think that the decree of the court below was quite correct. In our opinion the deed of 1895, made as it was after the passing of the Transfer of Property Act, was a "mortgage" and the plaintiff's right arose in 1895 to step into the shoes of the mortgagee.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Henry Richards, Knight, Chief Justice, Justice Sir George Knox, and Justice Sir Pramada Charan Banerji.

1918
May, 10.

KALKA BAKHSH SINGH AND OTHERS (JUDGMENT-DEBTORS) *v.* RAM CHARAN AND OTHERS (DECREE-HOLDERS).*

Act No. IX of 1908 (*Indian Limitation Act*) *schedule* 1, *article* 182 (6) *and section* 7—*Execution of decree*—"*Date of issue of notice*"—*Minority*—*Supervention of a minority after limitation has commenced to run.*

Held, on a construction of article 182 (6) of the first schedule to the Indian Limitation Act, 1908, that the expression "the date of issue of notice" must be taken as the date on which the order of the court directing that n ice be issued to the judgment-debtor is passed.

He. l also, that when the decree-holders are all of full age at the time of the passing of the decree execution of which is sought and limitation has

* First Appeal No. 285 of 1917, from a decree of Kunwar Sen, Subordinate Judge of Allahabad, dated the 24th of April, 1917.

already commenced to run, the subsequent intervention of a minority does not entitle the decree-holders to the benefit of section 7 of the Indian Limitation Act, 1908. *Bhagat Bihari Lal* v. *Ram Nath* (1) referred to. *Zamir Hasan* v. *Sundar* (2) distinguished.

THE facts of this case were as follows :—

A decree under order XXXIV, rule 6, of the Code of Civil Procedure having been passed on the 4th of March, 1911, the decree-holders applied for execution of the decree on the 3rd of March, 1914, and on the same date the court ordered notices under order XXI, rule 22, to issue to the judgment-debtors. The notices were actually drawn up and signed on the 4th of March, 1914, which was the date they bore. The application for execution was eventually struck off on the 24th of March, 1914. The next application for execution was made on the 5th of March, 1917, by one of the original decree-holders and the heirs, among whom there were some minors, of the other two decree-holders who had died in the meantime. The 4th of March, 1917, was a Sunday. The judgment-debtors objected that the application was beyond time. The court held that it was within time. The judgment-debtors appealed to the High Court.

Munshi *Panna Lal* (with him Munshi *Balmakund*), for the appellants :—

Under clause (6) of article 182 of the first schedule to the Limitation Act the decree-holder is entitled to 3 years from the date of issue of the notice referred to therein, that is, the notice under order XXI, rule 22, of the Code of Civil Procedure. The question is, what is the exact date signified by the phrase "date of issue of notice?" That date is the date on which the court orders notice to issue, and not any subsequent date on which the office may choose to prepare and send out the notice. The Legislature must have intended to refer to a judicial act as giving a starting point for the period of 3 years, and not to a merely ministerial act. According to this construction, the period of 3 years furnished by clause (6) of article 182, started on the 3rd of March, 1914, and expired on the 3rd of March, 1917, and the present application for execution is beyond time.

Under the corresponding provision of Act IX of 1871, namely clause (5) of article 167, it was held by the Allahabad

(1) (1905) I. L. R., 27 All., 704 (2) (1899) I. L. R., 22 All., 199.

1918

KALKA BAKHSH SINGH v. RAM CHARAN.

High Court that the "date of issuing notice" meant the date on which the court passed an order directing notice to issue; *Udit Narain* v. *Rampartab* (1). That view has consistently been followed in this Court, under the corresponding article 179, clause (5), of Act XV of 1877; *Baldeo* v. *Harrison* (2), *Jumai Kanjar* v. *Abdul Karim Khan* (3). The same view has been taken by the Bombay High Court; *Damodar Shaligram* v. *Sonaji* (4), *Govind* v. *Dada* (5). In Calcutta, there seem to have been inconsistent decisions. The cases of *Kadaressur Sen* v. *Mohim Chandra* (6) and *Ratan Chand* v. *Deb Nath* (7) have adopted the interpretation that the date of *actual issue* of the notice is the date from which the period of 3 years is to be reckoned. But in the case of *Jugol Kishore* v. *Chintamoni* (8) the Calcutta Court took the same view as this Court. The Madras High Court has taken the opposite view; *Cheruvath Thalangal Babu* v. *Nerath Thalangan Kanaram* (9). In the present Act, article 182, clause (6), there has been a slight alteration in the language; in the older Acts the words were "date of issuing notice," and in the present Act they are, "date of issue of notice." There is really no significance in this alteration, but if it indicates anything, it goes to strengthen the view of the Allahabad High Court. Of the two words, "issuing" and "issue," the former is, if at all, the more suggestive of the actual operation of issuing the notice than the latter; and so the change favours the Allahabad view.

Since the passing of the present Act there has been a decision of the Patna High Court, in the case of *Ram Kumar Lal* v. *Kesho Prasad Singh* (10), in which on a review of the various former decisions the view held by the Allahabad Court was approved. The case reported in 24 I. C., 80, already cited, was also a decision under the present Act. In the case of *Maharaja of Jaipur* v. *Lalji Sahai* (11) a single Judge of this Court was inclined to the

(1) Weekly Notes, 1881, p. 120.
(2) Weekly Notes, 1890, p. 244.
(3) (1908) I. L. R., 30 All., 536.
(4) (1903) I. L. R., 27 Bom., 622.
(5) (1904) I. L. R., 28 Bom., 416.
(6) (1902) 6 C. W. N., 656.
(7) (1906) 10 C. W. N., 303.
(8) (1914) 24 Indian Cases, 80; 20 C. L. J., 15.
(9) (1906) I. L. R., 30 Mad., 20.
(10) (1916) 36 Indian Cases, 999.
(11) (1914) 12 A. L. J., 1006.

view that the change in the language indicated that the date which the notice bore on it ought to be the date from which time was to be reckoned. This view, however, was merely an *obiter dictum*, as it was unnecessary for the decision of the case, which was actually decided on another ground. Having regard to the long and well-established course of decisions of this Court, the view adopted by it should be maintained unless and until there is an express enactment, or at least a clear indication of intention, of the Legislature to the contrary. The alteration in the language falls far short of either.

Babu *Piari Lal Banerji* (with him Babu *Saila Nath Mukerji*), for the respondents :—

It is submitted that the view taken by this Court on the wording of the older Acts was erroneous, and the Legislature has now indicated by the use of the words "date of issue of notice" that the interpretation put by this Court on the corresponding words of the older Acts was wrong. There are several reasons for holding that the Legislature could not have contemplated giving a fresh starting point from the date of the order directing notice to issue. The date of application for execution gives a fresh starting point under clause (5), and by clause (6) the intention was to give another starting point which would make a substantial difference. Ordinarily, the order directing notice to issue is passed on the very day the application for execution is filed; in some cases it is made the day following. It would not be reasonable to suppose that the Legislature would enact a separate clause giving a fresh starting point if the difference between the two starting points was only a day or so. Again, after the order is made, the decree-holder can pay in the process fee and ask that the notice be sent. This act of his would be an application to take a step in aid of execution, as has been indicated in the cases of *Thakur Ram* v. *Katwaru Ram* (1) and *Sheo Prasad* v. *Indar Bahadur* (2), and would give him a fresh starting point under clause (5). The Legislature having already given the decree-holder a fresh starting point from the later date of the payment of process fee, could not reasonably have intended to give him another starting point from

(1) (1900) I. L. R., 22 All., 358. (2) (1908) I. L. R., 30 All., 179.

1918

KALKA BAKHSH SINGH v. RAM CHARAN.

the earlier date of the order directing notice to issue, as it would be of no use to him and would never be required to be availed of. It is, therefore, submitted that the view adopted by the Calcutta and Madras High Courts is the correct view. I rely on *Cheruvath Thalangal Bapu* v. *Nerath Thalangan Kanaran* (1), *Kadaressur Sen* v. *Mohim Chandra* (2) and *Ratan Chand* v. *Dev Nath* (3). This view was accepted by PIGGOTT, J., in *Maharaja of Jaipur* v. *Lalji Sahai* (4). It was also accepted by the Patna High Court in the latest case—*Khoda Bukhsh* v. *Bahadur Ali* (5) in which the earlier Patna case, cited by the appellants was considered. The earlier Allahabad cases give no adequate reasons for the view taken; and the Bombay High Court view is untenable. The latter Court has held that clause (6) can only apply when notice has actually been sent, and not where only an order for the issue thereof has been made; *Hari Ganesh* v. *Yamunabai* (6). It, therefore, expressly holds that the mere ordering of notice to issue is not issuing the notice, yet it goes on to hold, following the Allahabad cases, that the date of ordering is the "date of issuing" the notice. It gives two different meanings to the same word "issue" occurring in two places in the same sentence. The words "date of issue" of notice mean the date which the notice bears, just as date of issue of a currency note means the date which the note bears. There is another reason why the application for execution is within time. Some of the decree-holders applicants are minors, and consequently the bar of limitation does not arise. Reference was made to *Zamir Hasan* v. *Sundar* (7) and *Sri Ram* v. *Het Ram* (8).

Munshi *Panna Lal*, in reply :—

The fact that some among the present appellants, whose right to apply for execution accrued after the date of the first application for execution are minors, would not suspend limitation, as time had already commenced to run from the 3rd of March, 1914, and no subsequent disability could stop it—subsequent disability is to be distinguished from a case of initial

(1) (1906) I. L. R., 30 Mad., 90.
(2) (1902) 6 C. W. N., 656.
(3) (1906) 10 C. W. N., 303.
(4) (1914) 12 A. L. J., 1006.
(5) (1918) 45 Indian Cases, 203.
(6) (1897) I. L. R., 23 Bom., 35.
(7) (1899) I. L. R., 22 All., 199.
(8) (1907) I. L. R., 29 All., 279.

disability. Reference was made to *Bhagat Bihari Lal* v. *Ram Nath* (1), *Jivraj* v. *Babaji* (2) and *Bhagwant Ramchandra* v. *Kaji Mahamad Abas* (3).

RICHARDS, C. J., and KNOX and BANERJI, JJ. :—This appeal arises out of an application for execution of a decree. Originally there was a decree in a mortgage suit. The mortgaged property having all been sold and found insufficient to satisfy the debt, a decree under order XXXIV, rule 6, was granted on the 4th of March, 1911. An application was made for execution of this decree and on the 3rd of March, 1910 the court ordered that notice should go to the judgment-debtors. The application in execution was subsequently struck off. It appears that notice did go from the court, but nevertheless the application was struck off. On the 5th of March, 1917, the present application for execution was made. It was met with the objection on behalf of the judgment-debtors that it was barred by time. The notice which went from the court in consequence of the court's order, dated the 3rd of March, 1914, was dated the 4th of March. The 4th of March, 1917 was a Sunday. Accordingly, if the period of limitation is to be reckoned from the 4th of March, 1914, it is just within time; if, on the other hand, it is to be reckoned from the 3rd of March, 1914, it is just too late. The article which is applicable is article 182 (clause 6). That clause is as follows :—

"(Where the notice next hereinafter mentioned has been issued) the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him, when the issue of such a notice is required by the Code of Civil Procedure of 1908."

Notice was required by the Code of Civil Procedure in the present case, because the decree was more than a year old. The question in the case is as to the meaning of the expression "date of issue of notice." Under the previous Limitation Act the words were identical, except that instead of the expression "date of issue of notice" the expression is "date of issuing a notice." Under the previous Act the practice had been uniform in this Court since the year 1881, that the "date of issuing a notice" meant the date of the order of the court directing that notice should

(1) (1905) I. L. R., 27 All., 704. (2) (1904) I. L. R., 29 Bom., 68.

(3) (1912) I. L. R., 36 Bom., 498.

1918

KALKA BAKHSH SINGH v. RAM CHARAN.

go. The Bombay High Court seems to have followed a similar practice, whilst the High Courts of Madras and Calcutta have taken a different view. The expression "issuing of a notice" or "issue of notice" is somewhat ambiguous. What happens in the court is that an application is made for execution. The court orders that notice should go to the party against whom execution is sought. That notice is prepared in the office and is signed either by the Judge or some person whom he deputes to sign for him. In the present case the notice is signed by the Munsarim. After the notice is prepared and signed and sealed it is given to the Nazir, who in turn selects a peon, who is to serve it on the party to whom it is directed. It is extremely difficult to say when a notice of this kind can be said to have been "issued." The "issue" is certainly not complete when the court makes its order directing that notice is to go. It is still incomplete when it is prepared and signed by the Munsarim. In fact the "issuing" is not fully complete until it has actually left the hands of the Nazir and has been given into the hands of the peon (or process server). If this question which we have had discussed before us in the present case was *res integra* we would find it extremely difficult to say what was the date of the "issue" of the notice within the meaning of the article. The "issue" of a notice seems to be a proceeding which begins with the order of the court and ends with delivery of a notice to a process server for service. Possibly a convenient date might be the one which has been suggested in the course of the argument, namely, the date which the notice itself bears. We, however, think that we ought to adhere to the practice which has been in force for a very great number of years in these provinces, unless we come to the conclusion that there was a deliberate alteration in the present Limitation Act. What is required in the interest of justice is a settled rule and a date that is certain. The date of handing over to the peon for service would be a very inconvenient date. We find it impossible to see that there is any difference between the expression "date of issuing of a notice" and the expression "date of issue of notice." That being so, we think the established practice should prevail and that the order below was wrong.

1918

KALKA BAKHSH SINGH v. RAM CHARAN.

A second point was mentioned in the course of the argument, namely, that some of the decree-holders are minors and that they are entitled to the benefit of section 7 of the Limitation Act. It appears in the present case that at the time the decree was made the decree-holders were all of full age, that also at the time of the application of 1914 the decree-holders were of full age, and that it was after the date on which the application was struck off that the minority ensued. Under these circumstances the decree-holders are not entitled to the benefit of section 7. See *Bhagat Bihari Lal* v. *Ram Nath* (1). We were referred to the Full Bench decision in I. L. R., 22 All., 199. In that case there had been an application on behalf of minor decree-holders which gave a fresh starting point, and accordingly the decree-holders were within the express provisions of section 7.

We allow the appeal, set aside the order of the court below and dismiss the application for execution with costs in both courts.

Appeal decreed.

APPELLATE CIVIL

1918
May, 11.

Before Mr. Justice Tudball and Mr. Justice Abdul Raoof.

NARAIN DAS (PLAINTIFF) v. HET SINGH AND OTHERS (DEFENDANTS).*

Act No. I of 1877 (*Specific Relief Act*), *section* 9.—*Suit for recovery of possession of immovable property—Construction of plaint—Suit framed as a suit on title, but also referring to section* 9 *of the Specific Relief Act—Practice.*

In a suit for recovery of possession of immovable property, from which the plaintiff alleged that his sub-tenants had been ejected by the defendants, the plaintiff claimed (1) a declaration of his title to, and possession of, the land in suit, (2) damages for dispossession, and (3) costs. In the body of the plaint it was mentioned that the suit was under section 9 of the Specific Relief Act, 1877, and therefore the full court fees had not been paid.

At the hearing the plaint was amended by striking out the claim for a declaration of title; but the claim for damages was retained.

* Second Appeal No. 1022 of 1916, from a decree of W. T. M. Wright, District Judge of Budaun, dated the 3rd of May, 1916, reversing a decree of Madan Mohan Seth, Munsif of Bisauli, dated the 13th of December, 1915.

(1) (1905) I. L. R., 27 All., 704.