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device was adopted in the present case. At page 403 he quotes a Hanafi lawyer as laying down that a gift of a moiety of a house can validly be effected by the donor selling it first at a fixed price and then absolving the debtor of the debt which was the price. This was exactly what the plaintiff's father did, and on this ground also the doctrine of *musha* will not apply.

For these reasons we decree the appeal and declare the share of the plaintiff to be that which she claimed in her plaint. This is a preliminary decree for partition and this declaration will be sufficient. The plaintiff shall receive her costs of all courts.

Appeal allowed.

Before Mr. Justice Dalal and Mr. Justice Pullan.

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January,
21.

BADAL SINGH AND OTHERS (PLAINTIFFS) v. DEBI SARAN
DHAR DUBE (DEFENDANT).*

Civil Procedure Code, order XXXIV, rule 6—Mortgage—Decree for sale—Sale proceedings and mortgage subsequently declared void—Refund of money to auction purchaser—Application for personal decree against mortgagor—Limitation.

A plaintiff mortgagee obtained a decree for sale, in execution of which his claim was satisfied. The mortgagor's grandson, however, thereafter obtained a decree declaring that both the mortgage and the decree and consequent sale were void as against him. The result was that the auction-purchaser applied for and obtained the return of his purchase-money. The mortgagee then applied under order XXXIV, rule 6, of the Code of Civil Procedure, for a personal decree against his mortgagor.

Held, (1) that it was competent to the mortgagee to apply under order XXXIV, rule 6, and (2) that time began to run not from the date of the decree setting aside the

* Second Appeal No. 1431 of 1924, from a decree of Radha Kishan, Subordinate Judge of Basti, dated the 21st of August, 1924, reversing a decree of Jagannath Singh, Munsif of Bansi, dated the 7th of March, 1924.

auction-sale, but from the time when the auction-purchaser recovered his money.

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v.

Pirbhu Narain Singh v. Baldeo Misra (1), distinguished. *Kedar Nath v. Chandu Mal* (2), *Ram Raghbir v. Imami Begam* (3) and *Sheo Din v. Bhawani Bakhsh* (4), referred to.

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DEAR DUBE.

THE facts of this case are sufficiently apparent from the judgement of the Court.

Babu *Piari Lal Banerji*, for the appellants.

Mr. *Sankar Saran*, for the respondent.

DALAL and PULLAN, JJ. :—The plaintiff in this suit is a mortgagee who obtained a decree on a mortgage executed by one Debi Saran in the year 1913 and in execution of that decree put the mortgaged property to sale and obtained full satisfaction on the 22nd of April, 1919. At this point the mortgagor's grandson came forward and obtained a decree to the effect that the whole proceedings, including the mortgage and the sale, were void against him. As a result of that decree the auction-purchaser of the property demanded the return of his money and obtained the return on the 22nd of February, 1923. This application has been made under rule 6, order XXXIV, of the Code of Civil Procedure for a personal decree against the mortgagor. The application was allowed by the court of first instance but disallowed on appeal by the Subordinate Judge on two grounds. In the first place, he holds that rule 6, order XXXIV, has no application to this case, and, secondly, that even if such an application could be made, it is barred by the three years rule of limitation provided by article 181 of the Limitation Act. Rule 6, order XXXIV, provides for a case in which the net proceeds of sale are insufficient to pay the amount due to the plaintiff. Now in the present case the net proceeds of the sale

(1) (1906) I.L.R., 29 All., 260.

(2) (1908) I.L.R., 26 All., 25.

(3) (1909) 9 Indian Cases, 403

(4) (1911) 14 Oudh Cases, 62.

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were sufficient to pay the amount due. But when in consequence of an order of the court the plaintiff was compelled to refund to a third party the whole amount received by the sale, it must be held that the net proceeds of the sale were nil and therefore insufficient to pay the amount due. The lower court has followed the authority of *Pirbhu Narain Singh v. Baldeo Misra* (1). In that case there had been no sale and it was on this account that the learned Judge of this Court distinguished an earlier ruling in *Kedar Nath v. Chandu Mal* (2). In our opinion the ruling in *Kedar Nath* is more in point than the ruling in *Pirbhu Narain Singh*, and we refer in particular to the passage of the judgement of Mr. Justice AIKMAN on page 27, where he says: "It appears to me that on this state of facts it would be in the highest degree inequitable to refuse him a decree by which alone he can recover from the judgement-debtors the unpaid balance of money which they owed him."

We would also remark that the Oudh Court at least has not followed the ruling in *Pirbhu Narain Singh v. Baldeo Misra* even in cases which were exactly parallel; see the judgement of Mr. SUNDAR LAL in the case of *Ram Raghubir v. Imami Begam* (3) and that of Mr. EVANS in the case of *Sheo Din v. Bhawani Bakhsh* (4). Thus, in our opinion, rule 6, order XXXIV, does apply to this case.

The second point to decide is that of limitation. The period of limitation under article 181 of the Limitation Act begins to run from the date when the right to apply accrues. The lower court finds that the right to apply accrued from the 14th of August, 1919, when the decree for setting aside the auction-sale was passed. But that decree did not in itself

(1) (1906) I.L.R., 29 All., 260.

(2) (1903) I.L.R., 26 All., 25.

(3) (1909) 9 Indian Cases, 403.

(4) (1911) 14 Oudh Cases, 62.

take away from the present applicant the purchase-money which he still continued to hold in execution of his decree, and we consider that his right to apply only accrued from the 22nd of February, 1923, when the auction-purchaser recovered the money. On this finding the present application is within time. We, therefore, allow this appeal with costs and restore the order of the court of first instance.

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Appeal allowed.

FULL BENCH.

Before Sir Cecil Walsh, Acting Chief Justice, Mr. Justice Lindsay, Mr. Justice Dalal, Mr. Justice Mukerji, Mr. Justice Ashworth, Mr. Justice Kendall and Mr. Justice Pullan.

BAIJ NATH AND ANOTHER (DECREE-HOLDERS) v. RAM BHAROS (OBJECTOR).*

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January,
24.

Civil Procedure Code, section 48—Execution of decree—Limitation—Application for revival of execution proceedings—“ Fresh application.”

The holders of a decree for sale, which was made final on September 28, 1912, applied for execution (the second application) on December 22, 1915. Pending this application, the parties came to a compromise and agreed that the decree should be payable by instalments. Three instalments were paid, and then the judgement-debtors made default. A third application for execution was made, but without result. The fourth application was made on October 22, 1923, and execution of the decree was transferred to the Collector. Meanwhile the original judgment-debtors' interest in the property had been sold in execution of a simple money decree and one RB became the purchaser. He paid Rs. 1,000 to the decree-holders and asked for a year's time to enable him to pay the balance. The Collector gave three months' time and finding it unnecessary to

* First Appeal No. 68 of 1926, from a decree of Vishnu Ram Mehta, First Subordinate Judge of Cawnpore, dated the 7th of November, 1925.