

be sent to obtain an order of partition from the revenue court. It might be necessary to do so in their own interests later on, but a decree for joint possession, even if it is not what the plaintiffs specifically ask for in their plaint, can, on the authority of the Judicial Commissioner's court, to which I have referred, be properly granted. Nor is there any difficulty as to granting a decree for mesne profits or damages, whichever it may be considered to be, as this is in no way the same as a suit for profits between co-sharers contemplated in the Oudh Rent Act. In my opinion, therefore, the decision of the court below is correct and I dismiss the appeal with costs.

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Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Gokaran Nath Misra and Mr. Justice
A. G. P. Pullan.

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ABDUL RAHMAN AND OTHERS (OBJECTORS-RESPONDENTS).*

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2.

Civil Procedure Code (Act V of 1908), sections 39, 41 and 47—Decree transferred to another court for execution—Decree returned by executing court to the court which transferred the decree with certificate under section 41 that the decree was only partly satisfied—Jurisdiction of court to which decree was transferred to decide objections about things done by that court in the course of execution—Limitation Act (IX of 1908), articles 165 and 181—Decree-holder wrongly obtaining possession of property about which his suit was dismissed—Objection under section 47, limitation applicable to.

The proper court to which an application for execution should be made is the court to which a decree is transferred

*Execution of Decree Appeal No. 39 of 1928, against the order of M. Zia-ud-din Ahmad, Subordinate Judge of Gonda, dated the 2nd of May, 1928.

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for execution under section 39 of the Code of Civil Procedure until the court to which the decree is transferred issues a certificate under section 41 of the code and returns the copy of the decree to the original court. After the issue of such certificate the court to which the decree is transferred ceases to have jurisdiction for the purpose of issuing a fresh process for execution, but that cannot mean that the said court also ceases to have jurisdiction to decide an objection lodged before it in respect of anything done in the course of the execution proceedings taken by it. In fact that would be the only proper court to decide the objection in regard to such a matter.

Where a suit brought against a transferor and a transferee is decreed against the transferor but is dismissed against the transferee and in execution of the decree the decree-holder obtains possession also of the property in regard to which the suit is dismissed, *held*, that the objection filed under section 47 of the Code of Civil Procedure is governed for the purposes of limitation not by article 165 but by article 181, and the period of limitation for filing such an objection is three years from the date when the possession is wrongly delivered to the decree-holder. *Jagan Nath v. Datta* (1), and *Raja Ram v. Rani Itraj Kuar* (2), overruled. *Abdul Karim v. Islamunnissa* (3), *Vachali Rohini v. Pathalathum Kandi Kombi Aliassan* (4), *Rasul v. Amina* (5), and *Sharfu v. Mir Khan* (6), followed. *Taluqdar Khan v. Musammat Khaironnissa* (7), *Shiam Lal v. Koerpal* (8), *Ratnam Ayyar v. Krishna Doss Vital Doss* (9), and *Har Din Singh v. Lachman Singh* (10), referred to.

Mr. S. N. *Srivastava*, for the appellant.

Mr. *Radha Krishna*, for the respondents.

MISRA and PULLAN, JJ. :—These two sets of appeals arise out of execution proceedings in one and the same case. The first four appeals, namely, appeals

(1) (1903) 6 O.C., 44.

(2) (1914) 17 O.C., 94.

(3) (1916) I.L.R., 38 All., 339.

(4) (1919) I.L.R., 42 Mad., 753.

(5) (1922) I. L. R., 46 Bom., 1031.

(6) (1919) 1 Lah. L. J., 230.

(7) (1927) 4 O.W.N., 1045.

(8) (1924) 22 A.L.J., 1039.

(9) (1898) I.L.R., 21 Mad., 494.

(10) (1903) I.L.R., 25 All., 343.

Nos. 40, 41, 44 and 45 arise out of four applications filed by the objectors-respondents under section 47 of the Code of Civil Procedure and disposed of by the learned Subordinate Judge of Gonda by his order dated the 2nd of March, 1928. The second four appeals, namely, appeals Nos. 39, 42, 43 and 46 arise out of a similar set of four objections filed by the objectors-respondents under sections 47 and 144 of the Code of Civil Procedure and disposed of by the same learned Judge by his order dated the 2nd of May, 1928.

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It is admitted by the parties that our decision in the first four appeals will govern the decision of the second set of four appeals.

The facts are that one Bismillah Khan owned certain properties some of which were situate in the district of Gonda in Oudh and others in the district of Basti in the province of Agra. He died leaving one son Mohamad Khan and four daughters. After the death of Bismillah Khan his son Mohammad Khan entered into possession of the entire property to the exclusion of the other heirs. On the 16th of February, 1915, he mortgaged some of the properties to the respondents or their ancestors. This was a mortgage with possession. The objectors-respondents are the mortgagees in possession under the said mortgage.

On the 13th of July, 1915, the three daughters of Bismillah Khan and the heirs of the fourth daughter who had died in the meanwhile brought four separate suits in the court of the Additional Subordinate Judge of Basti against Mohammad Khan for recovery of their share in the property left by Bismillah Khan, and the respondents to whom some of the property had been mortgaged under the deed of the 16th of February, 1925. Mohammad Khan confessed judgment in that case and a compromise was arrived at between the plaintiffs in that case and one of the transferees. The suits were,

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however, dismissed as against the other transferees on the ground that the plaintiffs were excluded from inheritance.

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On the 11th of July, 1925, possession was obtained in execution proceedings in respect of the properties decreed to plaintiffs of the four suits against Mohammad Khan. So far there is no dispute. The plaintiffs also, however, obtained in execution proceedings possession over the properties which had been transferred by Mohammad Khan and in respect of which the suit of the four plaintiffs had been dismissed against the transferees. The transferees then instituted four different suits in the court of the Munsif of Utraula, district Gonda, for recovery of possession of the properties of which the appellants had taken possession unlawfully. The suits were dismissed by the learned Munsif on the 12th of August, 1926, on the ground that they were not maintainable in view of the provisions of section 47 of the Code of Civil Procedure, 1908. This decision was affirmed in appeal by the learned Additional Subordinate Judge of Gonda on the 28th of March, 1927. The matter was carried further in appeal to this Court and the decision of this Court will be found to be reported in *Taluqdar Khan v. Musammatt Khairunnissa* (1). This Court agreed with the decision of the courts below that separate suits filed by the respondents in the court of the Munsif of Utraula were not maintainable, but it held that the suits should not have been dismissed but treated as objections under section 47 of the Code of Civil Procedure and directed that the plaints in those suits should be treated as proceedings under section 47 of the Code of Civil Procedure and as such they directed that the objections should be filed in the court of the Subordinate Judge of Gonda to whose court the decrees had been transferred for execution by the court at Basti.

(1) (1927) 4 O.W.N., 1045.

The four suits have now been treated by the learned Subordinate Judge of Gonda as applications under section 47 of the Code of Civil Procedure and have been disposed of as such.

Two objections were taken by the appellants in the court below regarding the said objections, they being to the effect that the court of the Subordinate Judge of Gonda had no jurisdiction to entertain objections under section 47 of the Code of Civil Procedure and that the objections were barred by limitation. The Subordinate Judge of Gonda overruled both the contentions of the appellants and has allowed the objections of the respondents and the present appeals are against the said order.

We might also state that besides the four objections which have been decided by the learned Subordinate Judge of Gonda by his order, dated the 2nd of March, 1928, and which related to the property situate in village Baondihar, parganna Utraula, district Gonda, four other objections were filed under sections 47 and 144 of the Code of Civil Procedure relating to the property situate in village Sikhoia Kalan, pargana Utraula, district Gonda. These objections have also been allowed by the learned Subordinate Judge of Gonda by his order, dated the 2nd of May, 1928, which has given rise to the four appeals Nos. 39, 42, 43 and 46.

In both sets of appeals the same contentions have again now been urged on behalf of the appellants.

We now proceed to deal with each of those contentions.

The first contention as stated above relates to the question of jurisdiction. The contention put forward on behalf of the appellants is to the effect that the Gonda court had no jurisdiction to deal with these objections since the said court had sent back the execution file to the court at Basti after certifying under section 41 of the Code of Civil Procedure that the decree had been

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completely executed. The argument was that the Gonda court must be deemed to have been left with no jurisdiction in the execution matter after it had sent back the decree to the court at Basti. In support of this contention reliance was placed on a ruling of the Allahabad High Court reported in *Shiam Lal v. Koerpal* (1). In our opinion this contention has no force. Although the court at Gonda has ceased to have jurisdiction to further execute the decree it had not ceased to have jurisdiction to decide an objection relating to the execution proceedings taken in that court. In the Allahabad case quoted above the point decided was that the proper court to which an application for execution should be made is the court to which a decree is transferred for execution under section 39 of the Code of Civil Procedure until the court to which the decree is transferred issues a certificate under section 41 of the Code and returns the copy of the decree to the original court, and that after the issue of a certificate the court to which the decree was transferred ceases to have jurisdiction. We are in entire agreement with the proposition enunciated in the said ruling. In our opinion, however, the case cannot be considered to be an authority for the proposition which is now for decision before us. The court at Gonda may have ceased to have jurisdiction for the purpose of issuing a fresh process for execution, but that cannot mean that the said court has also ceased to have jurisdiction to decide an objection lodged before it in respect of anything done in the course of the execution proceedings taken by it. Indeed we have no hesitation in holding that that would be the only proper court to decide the objection in regard to such a matter. We, therefore, hold that the court of the Subordinate Judge of Gonda has got jurisdiction to decide the two sets of objections lodged by the respondents in that court.

(1) (1924) 22 A.L.J., 1039.

The second contention is to the effect that these two sets of objections are barred by time. It is admitted that possession was wrongly delivered to the appellants on the 11th of July, 1925, and one set of objections was filed on the 7th of November, 1927, and the other set of objections was filed on the 3rd of December, 1927. The contention raised on behalf of the appellants is to the effect that article 165 of schedule 1 of the Limitation Act, 1908, applies to both these sets of objections and they are time-barred having been filed after one month of the date of the delivery of possession. The reply on behalf of the respondents is to the effect that article 165 does not apply to the present sets of objections and that the article applicable is article 181 under which three years' period is allowed. The sole point, therefore, for decision is whether article 165 is applicable or article 181.

On behalf of the appellants reliance is placed on two rulings of the late court of the Judicial Commissioner of Oudh, one reported in *Jagan Nath v. Datta* (1) and the other in *Raja Ram v. Rani Itraj Kunwar* (2).

On behalf of the respondents reliance is placed upon the decisions reported in *Abdul Karim v. Islamunnissa* (3); *Vachali Rohini v. Pathlatham Kandi Kombi Alias-san* (4); *Rasul v. Amina* (5) and *Sharfu v. Mir Khan* (6).

We have heard the Counsel of the parties at great length on this question and have come to the conclusion that in view of the recent decisions of the various High Courts in India, the view of law taken by the late court of the Judicial Commissioner of Oudh in the two cases quoted above must be deemed as incorrect.

(1) (1903) 6 O.C., 44.

(2) (1914) 17 O.C., 94.

(3) (1916) I.L.R., 38 All., 339.

(4) (1919) I.L.R., 42 Mad., 753.

(5) (1922) I.L.R., 46 Bom., 1031.

(6) (1919) 1 Lab. L. J., 230.

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Article 165 runs as follows :—

| MUSAMMAT JILAI v. ABDUL RAHMAN. | Description of application. | Period of limitation. | Time from which period begins to run. |
|---|---|-----------------------|---------------------------------------|
| <i>Misra and Pullan, JJ.</i> | Under the Code of Civil Procedure, 1908, by a person dispossessed of immoveable property, and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession. | Thirty days .. | The date of the dis- possession. |

From the wordings of the said article it is clear that it is only applicable to the case of an application which is filed under the Code of Civil Procedure, 1908, by a person dispossessed of immoveable property and disputing the right of the decree-holder to be put into possession thereof. Turning back to the Code of Civil Procedure we find that provision is only made in the Code for such an application under order XXI, rule 100. It is admitted that an application under that rule is to be made by a person other than the judgment-debtor as is clear from the wordings of the rule itself. If, therefore, the application contemplated by article 165 is the one mentioned in order XXI, rule 100 it is clear that the application must be by one other than the judgment-debtor. If the judgment-debtor wishes to file an objection, his remedy is clearly to apply under section 47 of the Code of Civil Procedure and the limitation applicable in such a case would be one provided for by article 181 of the Limitation Act. This is the view taken by their Lordships of the Allahabad High Court in *Abdul Karim v. Islamunnissa* (1), and we are in full agreement with the following observation of their Lordships in the said case to be found at pages 344 and 345 :—

“Now that is a precise and compendious description of the right given, and the application allowed to ‘a person other than the

(1) (1916) I.L.R., 33 All., 339.

judgment-debtor' by order XXI, rules 100 and 101. It certainly applies to such an application and there is no other provision in the Code which in the terms it employs at all corresponds to it. We think it quite certain that when the Legislature enacted article 165, it had the provisions now contained in order XXI, rules 100 and 101 in mind. That is to say, it intended article 165 to apply to such an application.

The argument for the view adopted in the reported cases, and followed by the District Judge in the case, is that the words are wide enough to include a judgment-debtor. Separated from their context this is true. A judgment-debtor is a 'person' in such a case as this. Moreover, the judgment-debtor in his application under section 47 is complaining of the same sort of act as an applicant under order XXI, rule 100, would have to complain of. But the moment it is realized that what the schedule to the Limitation Act consists of is an enumeration of suits, appeals, and applications of various kinds, and that the language of article 165 is merely a definition or description, all difficulty as to the use of the word 'person' disappears. In our opinion the word 'person' in that context, although wide enough to include a debtor, was never used in any other sense than that of a person who is authorized by order XXI, rule 100, to make an application of that description.

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To hold otherwise would result in this, that if a judgment-debtor applied to the court under order XXI, rule 100, and adopted the language of article 165, his application would have to be dismissed because he is precluded from making an application of that description, and yet if he postpones applying under section 47 for more than thirty days the language of the article is to be applied to him.

If anything were required, outside the context in which the article is used, to assist us to an interpretation of it, we should be entitled, indeed in our opinion we should be bound, to recognize, that to hold as has been held by the District Judge in this case involves depriving the judgment-debtors for ever of all title to a considerable portion of immoveable property, because they did not make a summary application with regard to its seizure within thirty days. Such a result in the case of a person already in straitened circumstances appears to us to be something which it is safe to assume that the Legislature never intended and which it certainly never enacted in direct term."

The view taken in the Allahabad case has also been adopted by a Full Bench of the Madras High Court in the decision reported in *Vachali Rohini v. Pathalathum Kandi Kombi Aliassan* (1) and by their Lordships of the Bombay High Court in *Rasul v. Amina* (2) and by

(1) (1919) I.L.R., 42 Mad., 753. (2) (1922) I.L.R., 46 Bom., 1031.

their Lordships of the Lahore High Court in *Sharfu v. Mir Khan* (1). We are in entire agreement with the view of law taken in those cases.

It is not necessary for us to criticise in detail the view taken in the two decisions of the late court of the Judicial Commissioner of Oudh which we have quoted above. The case reported in *Raja Ram v. Rani Itraj Kunwar* (2) was considered in the case reported in *Abdul Karim v. Islamunnissa* (3). The view followed in the former case was based upon two decisions one of the Madras High Court reported in *Ratnam Ayyar v. Krishna Doss Vital Doss* (4), and the other reported in *Har Din Singh v. Lachman Singh* (5). The former case has been overruled in *Vachali Rohini v. Pathalathum Kandi Komb Aliassan* (6) quoted above and the latter case has been dissented from in *Abdul Karim v. Islamunnissa* (3).

We are, therefore, of opinion that the limitation provided in article 165 of the Limitation Act does not govern the cases of those applications which were filed by the parties to the suit as objections to the execution proceedings under section 47 of the Code of Civil Procedure. It has already been decided by this Court that the appellants being parties to the suit were not competent to bring fresh suits and that the suits brought by them must be treated as objections filed under section 47 of the Code of Civil Procedure. In these circumstances article 165 cannot be held to be applicable in their case and the only article which could be applied is article 181. That article prescribes a period of three years for an application from the date when the right to apply accrues. It is clear that the right to apply must be

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(1) (1919) 1 *Lah. L. J.*, 230.(3) (1916) *I.L.R.*, 38 *All.*, 339.(5) (1903) *I.L.R.*, 25 *All.*, 343.(2) (1914) 17 *O.C.*, 94.(4) (1898) *I.L.R.*, 21 *Mad.*, 494.(6) (1919) *I.L.R.*, 42 *Mad.*, 753.

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deemed to have accrued to the respondents in the present case on the 11th of July, 1925, when possession was wrongfully delivered to the appellants. The present objections were filed in 1927 and are therefore amply within limitation. We are, therefore, of opinion that the contention raised by the appellants as to limitation must also be overruled.

Having decided the two contentions against the appellants, the order of the learned Subordinate Judge in both sets of objections must be affirmed.

The appeals, therefore, fail and are dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge and Mr.
Justice Wazir Hasan.*

MOOL CHAND AND OTHERS (PLAINTIFFS-APPELLANTS) v.
S. ILTIKAT HUSAIN AND OTHERS (DEFENDANTS-
RESPONDENTS).*

1928
November,
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Civil Procedure Code (Act V of 1908), section 11—Ex-proprietary rights—Jurisdiction of civil and revenue courts—Land Record Officer has exclusive jurisdiction to determine ex-proprietary rights—Res judicata, applicability of principle of.

Where the Land Record Officer in a dispute between the mortgagor and the mortgagee-with-possession decided that certain land should be recorded as an ex-proprietary tenancy of the motgagor and the mortgagee then instituted the pre-

*Second Civil Appeal No. 200 of 1928, against the decree of Pandit Shyam Manohar Nath Shargha, Additional Subordinate Judge of Sitapur, dated the 21st of April, 1928, reversing the decree of Bhagwati Pershad, Munsif of Biswan, dated the 23rd of December, 1927, decreeing the plaintiff's suit.