1928.

FAKHRUL ISLAM v. RANI BHUBANESHWARI KUER.

necessary and the notice issued before the sale of the 26th July, 1926, was sufficient in order to give the Court jurisdiction to hold the sale, especially when the judgment-debtors had appeared and taken all the objections that they could take to the execution proceedings.

KULWANT SAHAY, J.

The learned Advocate for the appellants has argued that the District Judge was wrong in holding that the failure to record reasons for not issuing a notice under Order XXI, rule 22, as prescribed by sub-rule (2), amounted to an illegality and not an irregularity and therefore the sale ought to be set aside. In my opinion the question as to whether the notice was dispensed with under sub-rule (2) does not arise in the present case, because a notice had actually been issued and although not served, yet the judgment-debtors had notice of the execution and appeared in Court. There was no dispensing with the issue of the notice under sub-rule (2) of rule 22.

Under the circumstances I am of opinion that the order of the learned District Judge is correct and these appeals must be dismissed with costs.

MACPHERSON, J.—I agree.

Appeals dismissed.

APPELLATE CIVIL.

Before Kulwant Sahay and Macpherson, JJ.

1928.

May, 7.

RAMBUJHAWAN THAKUR

v.

BANKEY THAKUR.*

Restitution—application for ascertainment of mesne profits—Limitation—terminus a quo—Code of Civil Procedure 1908 (*Act V of* 1908), *section* 144—*Limitation Act*, 1908 (*Act IX of* 1908), *Schedule I, Article* 181.

*Miscellaneous Appeal no. 284 of 1927, from an order of J. A. Saunders, Esqr., I.C.S., District Judge of Muzaffarpur, dated the 20th September, 1927, modifying an order of Maulavi Syed Nasir Uddin Ahmad, Munsif, Muzaffarpur, dated the 14th April, 1927.

1928.

RAMBUJHAWAN THAKUR v. BANKEY THAKUR.

Where an appellate court has ordered restitution under section 144, 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.

Gajadhar Singh v. *Kishan Jiwan Lal* (1), *Saiyid Jowad Hossain* v. *Gendan Singh* (2), applied.

Balmukund Marwari v. *Basanta Kumari Dasi* (3), followed.

Appeal by the plaintiffs.

The facts of the case material to this report are stated in the judgment of Kulwant Sahay, J.

S. N. Ray and *B. P. Jamuar*, for the appellants.

S. K. Mitra, *A. K. Mitra* and *K. P. Upadhya*, for the respondents.

KULWANT SAHAY, J.—The question involved in this appeal is, whether an application for restitution filed under section 144 of the Code of Civil Procedure is barred by limitation. The appeal is by the plaintiffs. The suit was for recovery of possession of 7 bighas 4 kathas 15 dhurs of land in mauza Basua. The plaintiff claimed possession of the land as a tenant on the ground that he had been dispossessed by the defendant who is his landlord. The suit was decreed on the 11th of February, 1921, and in execution of the decree possession was delivered to the plaintiff on the 18th February, 1921. There was an appeal by the defendant which was decreed on the 26th of April, 1922, and a Second Appeal to the High Court was dismissed on the 21st of April, 1925. The defendant thereupon applied for restitution and possession was re-delivered to him by Court in Asin 1333 (September or October 1925). The defendant thereupon on the 4th of May, 1926, made an application for ascertainment of mesne profits by way of

(1) (1917) I. L. R. 39 All. 641. (2) (1927) I. L. R. 6 Pat. 24, P. C.
(3) (1924) I. L. R. 3 Pat. 371.

1928.

RAMBUJHAWAN THAKUR v. BANKEY THAKUR.

KULWANT SAHAY, J.

restitution and for the recovery thereof for the period between 18th February, 1921, and September, 1925, during which period the plaintiff was in possession in execution of the decree of the trial Court. The question is whether this application is barred by limitation.

It is settled, so far as this Court is concerned, that the Article applicable to an application for restitution is Article 181 of the Indian Limitation Act. This point was decided by a Full Bench of this Court in *Balmukund Marwari* v. *Basanta Kumari Dasi* (1). The question is, from what date the period of three years under Article 181 is to be computed.

It is contended on behalf of the appellants that the period of three years should be computed from the 26th of April, 1922, which was the date of the decree of the first Appellate Court setting aside the decree of the trial Court and that as the application of the 4th of May, 1926, was made more than three years after that date, the application was barred by limitation.

It is contended on behalf of the respondents that the period of limitation should be computed from the date of the High Court decree, viz., the 21st of April, 1925, which was the date of the final decree in the suit. It is further contended on behalf of the respondents that under Article 181 time began to run from the date when the right to apply accrued and the right to apply for ascertainment of mesne-profits accrued from the date of delivery of possession to the defendant in September or October 1925 and the present application made on the 4th of May, 1926, was within the period of limitation.

Both the Courts below have held that the application was not barred by limitation.

The first question for decision therefore is, whether the three years should be computed from the

(1) (1924) I. L. R. 3 Pat. 371.

date of the decree of the first Appellate Court or from the date of the decree of the High Court. Article 181 provides that the period of three years is to be computed from the time when the right to apply accrues. The right to apply accrued in the present case on the passing of the final decree in the suit. The final decree was the decree of the High Court and, therefore, I am of opinion that the right to apply accrued from the date of the decree of the High Court as held by the Courts below. As was pointed out by Banarji, J., in *Gajadhar Singh* v. *Kishan Jiwan Lal* (1) which was approved of by the Privy Council in *Saiyid Jowad Hossain* v. *Gedan Singh*(2), when an appeal has been preferred, it is the decree of the Appellate Court which is the final decree in the case. No doubt this observation was made with reference to an application for a final decree in a mortgage suit and the question was, whether the period of three years provided for by Article 181 should be computed from the date of the preliminary decree made by the trial Court or the decree made by the Appellate Court on appeal against that decree. The principle, however, is the same. In every suit there can be only one final decree and that final decree is the decree of the Court of final appeal. I am therefore of opinion that the view taken by the Courts below in the present case that time began to run from the date of the decree of the High Court, viz., 21st of April, 1925, is correct and the application is not barred.

Even assuming that the right to apply accrued on the passing of the decree by the first Appellate Court, viz., the 26th of April, 1922, I am of opinion that the right to apply for ascertainment of mesne profits did not accrue until after the delivery of possession to the defendant which took place in September or October 1925. The period for which mesne profits were to be ascertained could only be

(1) (1917) I. L. R. 39 All. 641. (2) (1927) I. L. R. 6 Pat. 24, P. C.

1928.

RAMBUJHAWAN THAKUR v. BANKEY THAKUR.

KULWANT SAHAY, J.

determined after the delivery of possession. The first application for restitution relating to the delivery of possession was admittedly made within time, and the second application, if it cannot be considered to be in continuation of the first application, could only be made after possession had been delivered in pursuance of the first application. In this view of the case also the application made on the 4th of May, 1926, was not barred.

This appeal is dismissed with costs.

MACPHERSON, J.—I agree that this appeal must be dismissed with costs. Even though Article 181 be applicable, there are insuperable difficulties in the way of the view pressed on us on behalf of the appellants.

Appeal dismissed.

APPELLATE CIVIL.

Before Ross and Fazl Ali, JJ.

SHAIKH JAN MOHAMMAD

v.

BIKOO MAHTO.*

1928.

May, 8.

Hindu Law—karta, power of, to borrow money—legal necessity—test to be applied—antecedent debt, meaning of—court, power of, to reduce interest—mortgagee, onus on, to prove necessity for borrowing at a high rate.

In order to validate a transaction of mortgage by a manager of a Hindu joint family, there must, to give effect to the doctrine of antecedency in time, be also real dissociation in fact.

Where, therefore, a mortgage bond was executed to pay off the consideration for a sale-deed executed about three days earlier.

*Appeal from Original Decree no. 10 of 1925, from a decision of Babu Jatindra Nath Ghosh, Subordinate Judge of Patna, dated the 15th of September, 1924.