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SINGH  
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SUKHDEO  
TELL.

COURTNEY  
TERRELL,  
C. J.

Bench case went on a wider basis still and, upon the ground stated by Walmsley, J., was based upon the strict interpretation of the words of the section that once an application had been made under any of those sections the matter could never be the subject of a suit again in the Civil Court. In my view the reasoning of the majority of the Calcutta High Court is difficult to understand and I prefer the reasoning given by Suhrawardy, J., in his minority judgment.

*Appeal dismissed.*

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## APPELLATE CIVIL.

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*Before Kulwant Sahay and Macpherson, JJ.*

FAKHRUL ISLAM

v.

RANI BHUBANESHWARI KUER.\*

1928.

May, 4.

*Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 22—Notice issued but not served—sale set aside—fresh sale proclamation issued and property sold—whether fresh notice under rule 22 necessary.*

Ordinarily a sale without service of notice under Order XXI, rule 22, is without jurisdiction, but where a notice has in fact been issued and the judgment-debtor, though not served with the notice, has appeared and contested the execution, the object of rule 22 has been achieved and the court has jurisdiction to hold the sale.

An execution sale having been set aside on the application of the judgment-debtor on the ground that a notice issued under Order XXI, rule 22, had not been served, the court directed the decree-holder to take further steps in execution and, accordingly, a fresh sale proclamation was issued, and the property was sold. On an application to set aside the sale on the ground that a fresh notice under rule 22 should have been issued, *held*, that a fresh notice under rule 22 was not necessary.

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\*Appeal from Appellate Order nos. 276 to 280 of 1927, from an order of Rai Bahadur A. N. Mitter, Officiating District Judge of Gaya, dated the 31st August, 1927, reversing an order of Maulavi Amir Hamza, Subordinate Judge of Gaya, dated the 14th May, 1927.

## Appeals by the judgment-debtors.

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In December 1922 several rent decrees were obtained by the respondent against the tenants. The first execution of the decrees was taken out in April, 1924, but it was dismissed for default on the 15th December, 1924. The second application for execution was made on the 19th December, 1925, that is, more than a year after the first execution. Under Order XXI, rule 22, the application being made more than a year after the date of the decree, a notice was necessary to be issued upon the judgment-debtors requiring them to show cause why the decree should not be executed against them. It appeared that notice under Order XXI, rule 22, was issued against the judgment-debtors and the property was sold on the 26th July, 1926. On the 4th December, 1926, the sale was set aside on applications under Order XXI, rule 90, filed on behalf of the judgment-debtors. The chief reason why the sale was set aside was that notice under Order XXI, rule 22, had been suppressed and that other notices had not been properly served. The Court, on the 4th December, 1926, after setting aside the sale, directed the decree-holder to take proper steps for further execution on the 6th December, 1926. The order sheet in one of the cases, namely, in the case in which Zamiruddin was the judgment-debtor contained an order directing the decree-holder to take steps by Monday the 6th December, 1926. The order sheet in the other cases was to the effect that the decree-holder should take necessary steps for issue of fresh sale proclamations by the 6th December, 1926. Fresh sale proclamations were issued and the property, namely, the holding in each case, was again sold on the 5th February, 1927, and the judgment-debtors again made an application for setting aside the sale. The Sub-Judge found that there was no illegality or irregularity in the execution proceedings or in the conduct of the sale and that there had been no inadequacy of price, and he accordingly dismissed the application for setting aside the sale. The question as regards the notice under Order XXI, rule 22, was again raised by the

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judgment-debtor and the Subordinate Judge found that the notice had been issued and properly served. This finding was directly contrary to the finding arrived at in the previous proceedings for setting aside the sale, in which the Subordinate Judge had held that although the notice under Order XXI, rule 22, had been issued it was suppressed and not served. The matter went in appeal before the District Judge. The District Judge held that the finding in the previous application for setting aside the sale, to the effect that the notice under Order XXI, rule 22, had been suppressed, operated as *res judicata* and that it was not open to the Subordinate Judge in the present proceedings to hold that the notice under Order XXI, rule 22, had been served. He was, however, of opinion that the service of notice under Order XXI, rule 22, after setting aside the first sale, was dispensed with by the Court under the provisions of sub-rule (2) of rule 22 and that, therefore, the sale was not a bad sale on account of non-issue of a notice under Order XXI, rule 22. As regards the question of irregularity and illegality and the inadequacy of price the District Judge agreed with the Subordinate Judge and he dismissed the appeals. The judgment-debtors therefore preferred this second appeal.

*Kailas Pati*, for the appellants.

*S. N. Rai*, for the respondent.

KULWANT SAHAY, J. (after stating the facts set out above, proceeded as follows:) The point argued by the learned Advocate on behalf of the appellants is that the entire proceeding in execution was without jurisdiction inasmuch as the notice under Order XXI, rule 22, had not been served upon the judgment-debtors. Now, the finding of the learned District Judge, which is a finding of fact and must be accepted, was that a notice under Order XXI, rule 22, was issued but suppressed. The first sale was held on the 26th July, 1926. That sale was set aside on the 4th December, 1926, on the ground that the notice under Order XXI, rule 22, had been suppressed. After setting aside the sale, the Court made an

order directing the decree-holder to take further steps in execution and in the same execution proceedings fresh sale proclamations were issued and the property was sold. The contention that after the setting aside of the sale on the 26th July, 1926, the decree-holders ought to have taken out fresh notice under Order XXI, rule 22, is in my opinion not sound. It was a continuation of the same execution proceedings in which a notice under Order XXI, rule 22, had already been issued.

It is next contended that a sale without the service of the notice under Order XXI, rule 22, was without jurisdiction. In ordinary circumstances it would be so and there are authorities to the effect that a sale held without the service of the notice under Order XXI, rule 22, is a sale held without jurisdiction. In the present case, however, the facts are that a notice was issued but suppressed. Thereafter the judgment-debtors appeared and raised objections to the execution of the decree as well as to the validity of the sale. Those objections were heard and disposed of by the Subordinate Judge and thereafter he directed the decree-holder to take further steps. Under the circumstances there is no sense in insisting on the issue of a fresh notice under Order XXI, rule 22, and the service thereof, requiring the judgment-debtors to show cause why execution should not proceed. The judgment-debtors had appeared in Court and such objections had been taken by them. There was no necessity for issuing and serving fresh notices under Order XXI, rule 22, before holding the sale. All that Order XXI, rule 22, requires is that an opportunity should be given to the judgment-debtors against whom execution is taken out more than a year after the decree to show cause why execution should not proceed. If a notice is issued but not served and yet the judgment-debtors appear in Court and raise objections, the object of Order XXI, rule 22, is attained. In my opinion the fresh issue of a notice under Order XXI, rule 22, after the setting aside of the first sale was not

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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.

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.*

RAMBUJHAWAN THAKUR

v.

BANKEY THAKUR.\*

1928.

May, 7.

*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.