

1928.

JAGDISH
NARAIN
SINGH
MUSSAMMAT
RAMSAKAL
KUER.

ROSS, J.

The last argument was that this money is not liable to attachment as being money which is in the hands of an Officer of the Court, under the decisions referred to in Halsbury's Laws of England, Vol. 14, page 94 and under the provisions of section 28 (5) of the Provincial Insolvency Act read with section 60 of the Code of Civil Procedure. The argument is that this is not property over which the insolvent has a disposing power which he may exercise for his own benefit. This argument is clearly sound so far as it goes. There are two possible contingencies. The appellant may succeed in his appeal in the Privy Council, or he may fail. If he fails then this Rs. 4,000 will have to meet the expenses of the successful respondent; but if he succeeds, the Rs. 4,000 will be at his own disposition and ought therefore to be available for his creditors and he should be prevented from dealing with it in any such manner as is proposed by the compromise referred to above. The proper order to make therefore would be an order attaching the Rs. 4,000 subject to the result of the appeal. If the appellant becomes entitled to a return of this money as the result of the appeal, the attachment will take effect, but not otherwise. A limited attachment of this kind was made in *Kabuthan v. Subramanya*⁽¹⁾. There will be no costs of the appeal.

DAS, J.—I agree.

APPELLATE CIVIL.

Before Das and James, JJ.

KUMAR KAMAKHYA NARAYAN SINGH

1928.

v.

Dec., 1928.

AKLOO SINGH.*

Mesne profits, application for the ascertainment of—limitation.

An application for the ascertainment of mesne profits, being an application in the suit itself, is not governed by any provision of the Limitation Act.

*Appeals from Original Decree nos. 11, 15 and 17 of 1926, from a decision of Babu Ashutosh Mukharji, Subordinate Judge of Hazaribagh, dated the 7th August, 1925.

Puran Chand v. Roy Radha Kishen (1) and *Bhatu Ram Modi v. Fogal Ram* (2), followed.

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Appeals by the plaintiff.

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

A. B. Mukerji, Government Pleader, for the appellant in all the cases.

B. C. De, for the respondents in F. A. 11 and 17.

DAS, J.—These appeals must succeed. The decision of the Full Bench of the Calcutta High Court in *Puran Chand v. Roy Radha Kishen* (1) is conclusive so far as this point is concerned. It may be pointed out that before the amendment of the present Civil Procedure Code, the Calcutta High Court took the view that proceedings in determining the amount of mesne profits are not proceedings in execution of a decree but merely a continuation of the original suit and carried on in the same way as if a single suit was brought for mesne profits by itself, so that the amendment of the Code of Civil Procedure merely gives effect to the view consistently taken by the Calcutta High Court in this matter. Now this being the position the Calcutta High Court had to consider whether to an application for ascertainment of mesne profits Art. 178 of the old Limitation Act which corresponds to Art. 181 of the present Limitation Act applied and it held that it did not apply. The learned Chief Justice of the Calcutta High Court in delivering the judgment of the Full Bench pointed out that to make the provisions of Art. 178 applicable, the application must be of such a nature that the Court would not be bound to exercise the powers desired by the applicant without such an application being made; and the Full Bench finally decided that an application for ascertainment of mesne profits

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DAS, J.

(1) (1892) I. L. R. 19 Cal. 132, F. B.

(2) (1926) I. L. R. 5 Pat. 223.

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DAS, J.

being an application in the suit itself, is not governed by any provision of the Limitation Act. This view was taken by this Court in *Bhatu Ram Modi v. Fogal Ram* (1).

The result is that these appeals succeed. The orders passed by the Court below are set aside and the cases remanded to that Court for disposal according to law. There will be no costs of these appeals.

JAMES, J.—I agree.

S. A. K.

Appeals decreed.

APPELLATE CIVIL.

Before Ross and Chatterji, JJ.

SHAIKH MUHAMMAD IBRAHIM

v.

BIBI MARIAM.*

Muhammadan Law—Hanafi School—oral Wakf—declaration of dedication necessary—deed of Wakf, admission of execution of, whether equivalent to declaration—dedication reduced to writing—oral evidence inadmissible to prove the terms—Evidence Act, 1872 (Act I of 1872), section 91—delivery of possession, whether necessary for validity of Wakf.

Under the Hanafi School of Muhammadan Law a valid wakf may be created by word of mouth but there must be a reasonably clear declaration of dedication.

Bibi Jinjira Khatin v. Mahomed Fakirulla Mea (2), *Doddem Jaun Beebee v. Abdollah* (3), *Mulla v. Subramania* (4) and *Banubi Kom Umarsaheb v. Narsingrao Ranojirao* (5), referred to.

*Appeal from Original Decree no. 153 of 1925, from a decision of Babu Kamala Prasad, Subordinate Judge of Muzaffarpur, dated the 29th of May, 1925.

(1) (1926) I. L. R. 5 Pat. 225. (3) (1838) Fulton's Report 345.

(2) (1921) 34 Cal. L. J. 444. (4) (1916) 31 Mad. L. J. 431.

(5) (1907) I. L. R. 31 Bom. 250.