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in respect of the property in suit. In that event the plaintiffs' suit for possession will be dismissed. If he fails to do so within the time aforesaid, the property in suit will be put up for sale. Out of the sale proceeds the mortgage debt due upon the property will be satisfied first and the amount will be paid to the plaintiffs as the representatives of the mortgagee and the balance, if any, will go towards the satisfaction of the mortgage decree if it still remains unsatisfied; otherwise it will be paid to the defendant. The plaintiffs are not entitled to a decree for possession as on the date of the present suit they were not entitled to possession as the sale at which they purchased was not binding upon the defendant. The only right they had was a right on failure of redemption to bring the property to sale. We understand that since the order passed by the learned District Judge the plaintiffs are in possession of the property in suit and are enjoying the usufruct thereof. We have, therefore, not directed the taking of the account of the mortgage debt for the period after the 16th of June, 1926.

Under the circumstances it is directed that the parties will bear their own costs throughout.

AGARWALA, J.—I agree.

Appeal allowed.
Case remanded.

APPELLATE CIVIL.

1934.

January, 2, 3.

Before Wort and Varma, JJ.

LACHMINARAYAN TEKRIWALA

v.

JOGESH CHANDRA LAHARE.*

Code of Civil Procedure, 1908 (Act V of 1908), section 33—Rule 11, Chapter V of the Patna High Court Circular Rules and Orders—rule 11, whether ultra vires—decree not prepared

* Appeal from Appellate Order no. 149 of 1933, from an order of S. C. Mukharji, Esq., District Judge of the Santal Parganas, dated the 30th January, 1933, reversing an order of Babu B. N. Singh, Subordinate Judge of Deoghar, dated the 10th October, 1931.

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under rule 11—*application for copy of decree—subsequent application for direction to office to prepare decree—intervening period, whether time requisite for saving limitation—Limitation Act*, 1908 (*Act IX of* 1908), *section* 12(2).

Section 33, Code of Civil Procedure, 1908, lays down :—

"The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow."

Rule 11 of Chapter V of the Patna High Court Circular Rules and Orders provides :—

"In suits for money including suits upon mortgage, etc., no decrees need be drawn up if neither party has to recover anything unless the judge otherwise directs."

Held, (*i*) that section 33 of the Code of Civil Procedure in no way precludes the court from following the practice of preparing a decree when an application is made and does not preclude the High Court from making a rule that where a decree is unnecessary no decree should be prepared;

(*ii*) that, therefore, rule 11 is not ultra vires.

The judgment in a mortgage suit was pronounced on the 10th October, 1931, and on the 29th of the same month the appellant applied for a copy of the judgment and decree. The order on that application was

"No decree was drawn in view of Rule 11 at page 27 of the High Court Rules and there is no direction of the court to draw the decree....."

Nothing appeared to have been done by the appellant until the 5th January, 1932, when he made an application praying that the office be directed to prepare the decree.

Held, that the period between the 30th of October, 1931, and the 5th of January, 1932, was within the control of the appellant and could not be deducted under section 12(2) of the Limitation Act, 1908, in calculating the period of limitation prescribed for an appeal.

Pramatha Nath Roy v. *Lee*(1), followed.

Appeal by the defendant.

The facts of the case material to this report are set out in the judgment of Wort, J.

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S. M. Mullick and *S. S. Bose*, for the appellant.

N. N. Sen, for the respondent.

WORT, J.—This is an appeal from a decision of the learned District Judge of the Santal Parganas, remanding a case to the Court of the Subordinate Judge as the Subordinate Judge had disposed of a mortgage suit on a preliminary point. The appellant before us was the purchaser of the equity of redemption of the property mortgaged and was for that reason made a party to the mortgage action. The appellant seems to have been the defendant who bore the burden of the defence in the trial court and two substantial questions were raised by him.

It was contended in the first place that the transaction was a fictitious one intended to defeat creditors and, secondly, that the mortgage deed was unenforceable as it had not been attested in accordance with law. The trial court determined the latter of the two questions in favour of the defendant and accordingly dismissed the suit. The matter then came on appeal to the District Judge and the District Judge reversed the finding of the Subordinate Judge on the question of attestation, and accordingly remanded the action, as I have already stated, to the Subordinate Judge for the determination of the other issues in the case.

It was faintly argued by Mr. Sushil Madhab Mullick, who appears for the appellant, that the question of fact whether the document was properly attested or not was open to this Court; but that argument cannot possibly be supported. The determination of that question by the District Judge was the determination by the last Court of fact; and although the matter before us is whether the remand order was erroneous or not, no question of fact which was to be determined by the District Judge in his appellate jurisdiction can possibly be open to this Court. Speaking for myself, I cannot imagine such a case, but

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it may well be that if there were any questions of fact strictly within the ambit of the remand order as this Court is the first Court of Appeal as regards that order, it might be said that that question of fact, if strictly coming within the ambit of the remand order, might be open for determination by this Court. But I purposely do not come to any decision on that matter. I am, however, clearly of the opinion that the question of fact urged by Mr. Mullick is not open to this Court for determination. That would dispose of the appeal had it not been for another question which has been argued by Mr. Mullick on behalf of the appellant.

It is contended that the appeal to the District Judge was barred by limitation as not having been presented within the prescribed time. It is quite clear that by section 3 of the Limitation Act whether the point was taken or not the Court of the District Judge should have dismissed the appeal if he found that it was out of time. Exactly what happened in the court below as regards this matter is not clear but there is an affidavit before us, the facts in which have not been denied, that when the appeal came on for hearing before the District Judge the question of limitation was argued. It is a matter of surprise, therefore, to find no reference in the judgment of the District Judge on this point. That fact becomes relevant for reasons which I shall in a moment state. So far as the question of limitation was concerned, it is argued by Mr. Sen on behalf of the respondent that his appeal was within time. The actual facts which do not appear to be in dispute are these. The judgment of the Subordinate Judge was pronounced on the 10th October, 1931. On the 29th of the same month the plaintiff applied for a copy of the judgment and decree, and the order made on that application was this:

"No decree was drawn in view of Rule 11 at page 27 of the High Court Rules and there is no direction of the Court to draw the decree. The record is sent herewith."

Under the Circular Rules and Orders referred to, rule 11 of Chapter V provides as follows:

"In suits for money including suits upon mortgage, etc., no decrees need be drawn up if neither party has to recover anything unless the Judge otherwise directs."

That was the rule referred to in the order which I have just read. Nothing was done by the respondent plaintiff until the 5th January, 1932. He then filed a petition stating the effect of the former order and stating particularly, that as the case was dismissed and no costs were ordered no decree need be drawn up unless the Court otherwise directs. Then he referred to the Circular Rules and Orders which I have mentioned. Then he alleged in his petition that as he intends to prefer an appeal a decree is required:

"It is therefore prayed that your honour may be graciously pleased to direct the office to draw up the decree in the above case."

It is quite clear on the face of it, therefore, that he was out of time in applying for the direction of the Court to prepare a decree if the Circular rule to which I have referred is taken into consideration. At this stage reference is made by the appellant to the case of *Pramatha Nath Roy* v. *Lee*(1). In that case there was involved a similar rule on the Original Side of the Calcutta High Court. Lord Buckmaster, delivering the opinion of the Judicial Committee of the Privy Council, made this statement of fact: "After the order had been made on July 26th no steps were immediately taken by the plaintiff to have the order drawn up, but after the lapse of four days it was competent to the defendant to apply for that purpose. The four days elapsed and nothing was done. On August 6th, application was made by the plaintiff to have the order drawn up, and on the next day the draft of the order was sent to the appellant. The appellant delayed however in returning it till the 16th and ultimately on the 28th August it was signed and on September 3rd it was filed by the plaintiff." The

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Judicial Committee had to construe section 12, sub-clause (2), of the Limitation Act and in the course of the judgment said that the Judges in the High Court had so construed the section, to which I have referred, as to take into consideration the conduct of the appellant. Their Lordships approved of this view of the High Court and Lord Buckmaster expressed his opinion in these words: "In their Lordships' opinion no period can be regarded as requisite under the Act, which need not have elapsed if the appellant had taken reasonable and proper steps to obtain a copy of the decree or order. In the present case he took none, and the periods between July 30th and August 6th, and again between August 7th and August 16th, which were within the appellant's control are sufficiently great to prevent the appellant saying that the time that did elapse must have elapsed even if he had acted with reasonable promptitude."

Now it is quite clear from the facts of this case that the period between the 30th October, 1931, and the date upon which a copy of the judgment was given to the plaintiff, and the 5th January, 1932, when he petitioned the Court to order the preparation of the decree was a period, to use the words of Lord Buckmaster, within the control of the plaintiff, and therefore cannot be deducted for the purpose of determining the question of limitation.

It was faintly argued that the period up to the 14th November, 1931, which was the end of the Civil Court holiday should be deducted. There is no substance in this argument, but assuming that there were it still leaves the plaintiff in the position in which he would find himself but for that deduction, that is to say, the period from the 14th November, 1931, to the 5th January, 1932, was sufficient to bar his appeal. The respondent meets this point by making two contentions, first, that his application presented on the 29th October, 1931, was an application contemplated by rule 11 of Chapter V of the High Court Rules, and

the second is that the rule to which I have referred was ultra vires.

As regards the first point, it is quite obvious that the application of October, 1931, was of an entirely different character from the application of the 5th January, 1932: it is an ordinary application which is made in cases for a copy of a judgment and decree. He was then informed that no decree could be prepared. He then made a specific application in January of 1932, as I have said, referring to rule 11 of Chapter V. By no stretch of the imagination can it be said that either there was any confusion in the mind of the plaintiff or that the application of October, 1931, was an application contemplated by rule 11, Chapter V. I say there was no confusion in the mind of the plaintiff because it was faintly suggested in the course of the argument that he misunderstood the position and that he was led to misunderstand the position by a note which appears to have been added to the order of the 29th October to this effect:

"Decree sheet not yet drawn up."

The confusion lay in the fact that the plaintiff supposed that the decree was in the course of preparation. That that confusion did not exist in the mind of the plaintiff is clear from the subsequent petition he filed in which he referred to the body of the order of the 29th October, 1931, which made no reference to the note which I have just read and in the most specific terms he set out the effect of rule 11 of Chapter V of the General Rules and Circular Orders.

The first point, it seems to me, if it came to be determined by this Court, would have to fail. The next question is whether rule 11 of Chapter V is ultra vires. All I need say in regard to that matter is that if in fact rule 11 of Chapter V is ultra vires, it is a matter of great surprise to me that the same contention was not made and dealt with in the case of *Pramatha Nath Roy* v. *Lee*(1) to which I have already made

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reference. That case dealt with rule 27 of Chapter XVI of the Rules and Orders of the Calcutta High Court on the Original Side and was not dissimilar in its effect from the rule of this Court, being rule 11 of Chapter V. It is said that this rule is ultra vires by reason of section 33 of the Civil Procedure Code and that section 33 applies to all High Courts on the Original Side or on the Appellate Side and provides as follows:

> "The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow."

To repeat myself, I say that it is a matter of surprise that if there was any substance in this argument the same argument would have been put forward before the Judicial Committee of the Privy Council in *Pramatha Nath Roy* v. *Lee*(1). If rule 11, Chapter V, is contrary to section 33 of the Civil Procedure Code, then equally rule 27 of Chapter XVI of the Rules on the Original Side of the Calcutta High Court is ultra vires. But on a proper construction of section 33 of the Code it seems to me that the argument put forward is quite unsupportable. Section 33 merely states that the decree shall follow the judgment: it in no way precludes the Court from following the practice of preparing a decree when an application is made, and in my judgment it does not preclude the High Court from making a rule that where a decree is unnecessary no decree should be prepared. That seems to me to be the effect of rule 11, Chapter V, of the Rules of this Court. That would, in my judgment, dispose of the matter. But it is contended that had this point been taken an application would have been made under section 5 of the Limitation Act. To me it is clear from the record of the case that no such application was made and it would be difficult to extract from the facts which appear to be admitted before this Court that there was any valid reason why time should be extended under section 5 of the Limitation Act. But as the

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question of limitation may depend upon facts which are not before this Court and as the appellant has sworn an affidavit to the effect that the point was argued but not dealt with by the lower appellate court, it becomes a matter for determination by that Court.

In those circumstances the case will be remanded to the District Judge for the purpose of determining the question of limitation. The costs of this appeal will abide the result of the hearing in the court below.

WORT, J.

VARMA, J.—I agree.

Appeal allowed.

Case remanded.

REVISIONAL CIVIL.

Before Khaja Mohamad Noor and Agarwala, JJ.

1934.

January, 3.

ISHWARI PRASAD SINGH

v.

RAGHUBANS LAL.*

Decree—order postponing the passing of final decree till the disposal of appeal against preliminary decree, whether is appealable as "decree"—court, whether is precluded from passing final decree during the pendency of appeal against preliminary decree.

The pendency of an appeal against the preliminary decree does not preclude the court from passing the final decree. *Khair-un-nissa Bibi v. Oudh Commercial Bank, Ltd.*(1) and *Satprakash* v. *Bahal Rai*(2), followed.

Lalman v. *Shiam Singh*(3), not followed.

Jowad Hussain v. *Gendan Singh*(4) and *Gajadhar Singh* v. *Kishan Jiwan Lall*(5), distinguished.

* Civil Revision no. 249 of 1933, from an order of Babu R. C. Mitter, Subordinate Judge of Gaya, dated the 26th of April, 1933.

(1) (1929) I. L. R. 51 All. 640.
(2) (1930) I. L. R. 53 All. 283, F. B.
(3) (1925) 92 Ind. Cas. 608.
(4) (1926) I. L. R. 6 Pat. 24, P. C.
(5) (1917) I. L. R. 39 All. 641.