accordance with justice to refuse a party who has failed to appear on the adjourned date at the time fixed, but appears at a later hour, the chance of having the suit restored. Generally I should like to point out that a party who has failed to appear at the time fixed for the hearing, if the equity of the case demands it, certainly should have an opportunity of satisfying the Court that he had sufficient cause for not appearing. Otherwise much delay is caused before a decision is arrived at on the merits. (See *Shrimant Sagajirao* v. *S. Smith*[1].) The rule must be made absolute, and we send back the case for trial on the merits. Costs costs in the cause.

SHAH, J. :—I agree.

Rule made absolute.

J. G. R.

[1] (1895) 20 Bom. 736 at p. 743.

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Shah.

1922. *March 16.*

RASUL VALAD MALIK PINJAR (ORIGINAL PLAINTIFF), APPELLANT *v.* AMINA KOM HANIF AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS*.

Indian Limitation Act (IX of 1908), Schedule I, Articles 165, 181—Execution of decree—Property recovered in excess—Application by judgment-debtor for possession—Limitation.

Where, in execution of a decree, the decree-holder recovers property in excess of the decree, an application by the judgment-debtor to recover possession thereof is governed by Article 181, and not by Article 165, of the Indian Limitation Act, 1908.

* Second Appeal No. 147 of 1921.

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Abdul Karim v. *Islamun-Nissa Bibi*[1] and *Vachali Rohini* v. *Kombi Aliassan*[2], followed.

SECOND appeal from the decision of F. K. Boyd, District Judge of Belgaum, confirming the order passed by Sumitra A. H., Subordinate Judge at Gokak.

Execution proceedings.

In execution of a decree, the defendants were placed in possession of lands not covered by the decree and belonging to the plaintiff.

The plaintiff, after a lapse of thirty days from the date of his dispossession, filed a suit to recover possession of the excess lands. The plaint was treated by the Court as an application under section 47 of the Civil Procedure Code, 1908.

The lower Courts were of opinion that the application was governed by Article 165 of the Indian Limitation Act, 1908, and dismissed it as time-barred.

The plaintiff appealed to the High Court.

R. A. Jahagirdar, for the appellant.

S. R. Parulekar, for *D. N. Deshpande*, for respondents Nos. 1 to 4.

MACLEOD, C. J.:—This appeal raises an interesting question of law which has not previously come before this High Court. A partition decree was passed in a suit, and in execution of the decree the plaintiff complained that he had been dispossessed of certain land by the Collector's Subordinate Officers which was his own property and not subject to partition. He seems originally to have filed a suit to recover possession of the property, but it was decided by the District Court that the plaint should be treated as an application

(1) (1916) 38 All. 339 at p. 343. (2) (1919) 42 Mad. 753.

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under section 47 of the Civil Procedure Code, and it was treated so accordingly. The trial Judge held that Article 165 of the Indian Limitation Act applied and the application was held barred as not having been filed within thirty days from the date of dispossession. The question seemed so clear to the applicant's adviser that, as the learned Judge points out, he seems to have admitted that there was no way of getting rid of the application of Article 165.

In First appeal this decision was upheld. The learned Judge said:

"Partition was made by the Collector in pursuance of a partition decree, and in pursuance of that partition the present applicant was admittedly dispossessed of certain land which he now claims to be his own exclusive property and, therefore, not liable to partition. It is admitted that the suit now treated as an application was instituted several months after this dispossession. These facts, I think, are exactly covered by Article 165. This is an application 'under the Civil Procedure Code, 1908, by a person dispossessed of immoveable property and disputing the right of the decree-holder to be put into possession.' It is argued by Mr. Majli, the learned pleader for the appellant, that Article 181 applies to all applications under section 47. No doubt there are applications under that section to which Article 181 would apply. But, of course, it can have no application where a period of limitation is provided elsewhere, and, in my opinion, 'elsewhere' in the present case is Article 165."

A similar question came before the High Court of Allahabad in *Abdul Karim* v. *Islamun-Nissa Bibi*[1]. The learned Judges said:

"On appeals being brought by both the decree-holders and the judgment-debtors, the District Judge, holding himself, as we think quite properly, bound by certain authorities mentioned hereafter, decided that the judgment-debtor's application was time-barred, on the ground that Article 165 of the Limitation Act applied to it, and that the time of thirty days had run out. We are clearly of opinion that when the matter is closely examined this view is untenable. In a technical matter of this kind, when the language relied upon does not in express terms cover the case, it is of the highest importance to realize the

[1] (1916) 38 All. 339 at p. 343.

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position of the parties and the context in which the language is used. Where the interpretation sought to be put upon the words is arrived at by implication and by reference, the Court ought not to adopt a construction which has a restricting and penalizing operation unless it is driven to do so by the irresistible force of language. Now in the ordinary course of things a person who is wrongfully dispossessed of immoveable property has a remedy by a suit for possession only. In matters arising out of the execution of decrees, possibly because they are the indirect result of the active interference of the Court itself, the Legislature has provided two exceptions. The judgment-debtor must apply to the Court under section 47. If he is dispossessed of land which is outside the decree, and he does not so apply, he loses his land. He cannot bring a suit. He is worse off than the ordinary person wrongfully dispossessed. On the other hand, if a third person outside the suit is unfortunately the victim of some mistake in the decree itself, or by the decree-holder, he may apply to the Court in a summary manner, and if he is right he may be put back into possession. That is expressly provided by Order XXI, Rules 100 and 101. Such a person is better off than the ordinary person wrongfully dispossessed. He can bring a suit, of course, within twelve years; but he can, if he pleases, apply summarily for possession. That is a privilege of a peculiar and special character, from which the judgment-debtor is excluded in express terms. It is not surprising to find such a privilege accompanied by certain restrictions. By Article 165 of the Limitation Act of 1908 (the Article now in question), such an application must be made within thirty days. The Article is in these terms:—'*Description of application*:—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. *Period of Limitation*:—Thirty days from the date of dispossession.' Now that is a precise and compendious description of the right given, and the application allowed to 'a person other than the 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, 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. 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."

The learned Judges then referred to *Ratnam Ayyar* v. *Krishna Doss Vital Doss*[1], and *Har Din Singh* v. *Lachman Singh*[2], in which cases it was held that Article 165 would apply, and eventually they differed from those decisions.

The case of *Ratnam Ayyar* v. *Krishna Doss Vital Doss*[1] was considered by a Full Bench of the Madras High Court in *Vachali Rohini* v. *Kombi Aliassan*[3], and in over-ruling the decision the Chief Justice traced the history of Articles 165 and 168 of the Indian Limitation Act of 1908. The Chief Justice said:

"The Legislature has, however, itself restricted the scope of Article 165 by restricting in the Code of 1908 applications by third parties under Order XXI, Rule 100, to applications with reference to property covered by the decree or sale in pursuance thereof, and the fact that this procedure is not now applicable to complaints by third parties of dispossession of property not covered by such decree or sale appears to me to afford additional reason for excluding from the scope of the article similar complaints by defendants who, as I am satisfied, were never intended to be covered by it. I think, moreover, that the rights of defendants are sufficiently restricted by their being required to apply under section 47 within the period limited by Article 181."

This question, therefore, having been considered recently by the High Courts of Allahabad and Madras,

(1) (1898) 21 Mad. 494. (2) (1900) 25 All. 343.
(3) (1919) 42 Mad. 753 at p. 760.

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we should have to show very clear grounds for differing from those decisions. For myself, I see no reason why Article 165 should apply to judgment-debtors so as to restrict their rights very seriously when dispossessed of property which they allege had not come within the terms of the decree which is being executed. Ordinarily they would apply under section 47, and would have a period of limitation for such an application of three years under Article 181. As pointed out by the learned Judges in *Abdul Karim* v. *Islamun-Nissa Bibi*[1], a person other than the judgment-debtor is not restricted to making an application under Order XXI, Rule 100, which is merely a summary remedy, and his rights to a suit remain the same. The judgment-debtor on the other hand has no remedy by suit. I agree that the wording of Article 165 makes it absolutely clear that it was intended to apply to an application provided for by Order XXI, Rule 100 and no other, and that, therefore, where the applicant is a judgment-debtor, the proper Article which applies to his application is Article 181. I think, therefore, that the appeal should be allowed and the Darkhast directed to proceed according to law. The appellant should get his costs of the appeal.

SHAH, J. :—The point arising in this appeal is not free from difficulty; but on the whole I think that the view taken by the Allahabad High Court in *Abdul Karim* v. *Islamun-Nissa Bibi*[1] and by the Madras High Court in *Vachali Rohini* v. *Kombi Aliassan*[2], is to be preferred to the view taken by those Courts in the earlier decisions referred to in those cases. On the wording of the Article no doubt it may appear as if it would apply also to the case of a judgment-debtor dispossessed of immoveable property; and it is urged on behalf of the respondent before us that

[1] (1916) 38 All. 339. [2] (1919) 42 Mad. 753.

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Article 166 which follows Article 165 has been interpreted as governing the case of an application by a judgment-debtor to set aside a sale in execution of a decree. It is clear that the considerations applicable to Article 166 are different; and we are not concerned in this appeal with the scope of Article 166. I do not desire to suggest for a moment that Article 166 would not apply to the case of an application by a judgment-debtor to set aside a sale in execution of a decree. But the wording of Article 165 is somewhat different and is capable of being read in a restricted sense, in which it has been read by the Allahabad and Madras High Courts in the cases to which I have already referred. I think that that is the view which we should give effect to in this appeal.

Appeal allowed.

R. R.