judgment he gave before the reference to the arbitrators. Chedu's right was only under the agreement, and the Commissioner concluded his judgment by saying that the issue was reduced to "what consideration is Chedu Khan entitled to in consequence "of Abdul Hakim's promises and agreements with him?" The arbitrators say in the award that they had inquired into the case, and they may have considered that justice would be done by giving to Chedu the Rs. 70 per month for his life, that being a sufficient reward for his services in obtaining the release of Abdul Hakim and Saadat from prison.

Their Lordships will humbly advise His Majesty to reverse the decree of the Judicial Commissioner, and order the appeal to him to be dismissed with costs.

The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant—Messrs. *T. L. Wilson* and *Co.*

Solicitors for the respondent—Messrs. *Barrow Rogers*, and *Nevill.*

APPELLATE CIVIL.

1901
April 13.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

CHUNNI LAL (PLAINTIFF) *v.* ABDUL ALI KHAN AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 88, 89—*Decree for sale—Decree assigned before the passing of an order absolute—Appeal—Assignee not made a party to appeal until after expiry of limitation—Civil Procedure Code, section* 372—Lis pendens.

A decree under section 88 of the Transfer of Property Act, 1882, being only a decree *nisi* and not a final decree, the suit in which such a decree is passed does not terminate until an order absolute is made under section 89. Where therefore such a decree is assigned before any order absolute is made, the assignee takes subject to all the liabilities resulting from the application of the doctrine of *lis pendens*. Such an assignee, for example, may properly be made a party, under section 372 of the Code of Civil Procedure, to an appeal from the decree preferred against his assignors, and it is not competent to him to raise any defence, such as a plea of limitation, to the appeal which could not be raised by his assignors.

* Second Appeal No. 358 of 1899 from a decree of Babu Nihal Chandar, Officiating Subordinate Judge of Shahjahanpur, dated the 14th March, 1898, reversing a decree of Maulvi Muhammad Hamid Hasan, Munsif of Pawayan, District Shahjahanpur, dated the 18th March, 1898.

1901

CHUNNI LAL v. ABDUL ALI KHAN.

THE facts of this case are fully stated in the judgment of the Chief Justice.

Mr. *W. K. Porter* and Munshi *Gobind Prasad*, for the appellant.

Maulvi *Ghulam Mujtaba* (for whom Pandit *Sundar Lal*), for the respondents

STRACHEY, C.J.—This was a suit for sale upon a mortgage. The original plaintiffs in the suit were Kalyan Mal and Lekhraj. On the 18th March, 1898, the Court of first instance gave the plaintiffs a decree for sale in the form prescribed by section 88 of the Transfer of Property Act, 1882. After the decree was passed the decree-holders sold it to the appellant before us. No order absolute for sale was ever passed under section 89 of the Transfer of Property Act. At the time of the sale of the decree no appeal had been presented against the decree on behalf of the defendants. Shortly after the transfer an appeal against the decree was presented To that appeal they made respondents only the original plaintiffs, Kalyan Mal and Lekhraj. It is clear from the fourth paragraph of their memorandum of appeal to the lower appellate Court that at the time when they instituted that appeal they were aware of the transfer of the decree to the present appellant. On the 29th July, 1898, the appellant Chunni Lal made an application to the lower appellate Court that he should be made a respondent in the appeal in substitution for the original respondents, saying that, by reason of the transfer to him, he was interested in the suit, and that he had no additional evidence to adduce. That application purported to be made under section 372 of the Code of Civil Procedure. On the 10th of October, 1898, the lower appellate Court made an order purporting to be passed under section 372, read with section 582 of the Code, to the effect that it was necessary to make Chunni Lal a party, as the decision of the appeal might affect his purchase; and accordingly Chunni Lal was added as a respondent to the appeal, but the names of the original respondents, Kalyan Mal and Lekhraj, still remained on the record as respondents. The application of the 29th July, 1898, was made some time after the period of limitation would have expired if the appeal had originally been brought against Chunni Lal alone. The lower appellate Court took

certain additional evidence, held that the mortgage-debt had been satisfied, set aside the decree of the first Court, and dismissed the suit as against all the respondents before it. Against that decree Chunni Lal now appeals, and his main ground is that, as regards him, the appeal must be taken as not having been preferred until the 10th of October, 1898, when the order bringing him on the record as a respondent was passed, and consequently the lower appellate Court ought to have dismissed the appeal as time-barred, so far as he was concerned. The first question is, under what provision of the law was Chunni Lal made a respondent in the lower appellate Court? He was not, and could not have been made a party under section 559 of the Code of Civil Procedure, which only authorizes the addition of persons as respondents who were parties to the suit in the Court of first instance. It was suggested that Chunni Lal was made a party under section 32 read with section 582 of the Code. The application however, and the order by which he was made a party, expressly purported to have been made under section 372 read with section 582 of the Code. Section 372 refers to cases of assignment, creation, or devolution of any interest pending the suit otherwise than by the death, marriage, or insolvency of parties to which the preceding sections of Chapter XXI relate. The application and order certainly presuppose that Chunni Lal stood in the position of a transferee pending the suit, and the question is whether that was really his position. It was contended on behalf of the respondent that Chunni Lal's purchase of the decree was a purchase made *pendente lite*, because it was subject to an appeal from the decree, that the presentation of the appeal revived the suit, that such revival related back to the passing of the original decree, and that consequently a transfer made between the date of the decree of the first Court and the presentation of an appeal was a transfer made *pendente lite*, subject to the doctrine of *lis pendens*. Now the question whether the doctrine of *lis pendens* is applicable to the transfer of property during the interval between the passing of the decree of a Court of first instance and the presentation of an appeal is one of considerable difficulty, and the authorities which have been cited show that it has been the subject of difference of opinion both in this country and in England. There is

1901

CHUNNI LAL v. ABDUL ALI KHAN.

probably much to be said in support of both sides of the question, and I should be very unwilling to decide such a question unless it was absolutely necessary for the determination of this case. In the view which I take of the case, it is not necessary to decide that question. There is another ground on which I think that the appellant's purchase must be regarded as a purchase made *pendente lite*. There can be no doubt, at all events, that a suit continues for the purposes of the doctrine of *lis pendens* until the passing of a final decree in the Court of first instance. The *lis* is not at an end until there is a final decree, and a decree which is not final—such, for instance, as a decree for an account—has always been held not to terminate the suit—see the cases referred to in *Venkatesh Govind* v. *Maruti* (1). Now a decree under section 88 of the Transfer of Property Act, 1882, is, on the face of it, not a final decree but a decree *nisi*. It has to be supplemented by an order absolute for sale under section 89, and even after an actual sale in some cases it may become necessary to pass a supplementary decree under section 90, and that can only be a decree in the original suit. The *lis* would probably not be completed before the actual sale, and certainly not before the passing of the order absolute, before which, as section 89 shows, the defendants' right to redeem and the security are not extinguished. This conclusion is, I think, in no way affected by the circumstance that for certain purposes an order absolute under section 89 has in some cases been held to be an order passed in execution of the decree under section 88. That is quite true in a sense and for certain purposes of the Limitation Act and the Code of Civil Procedure; but it does not alter the fact that the decree under section 88 is a preliminary and conditional one, which requires to be supplemented by the order absolute, and is not final in itself. In America it appears to have been held that in the analogous case of a decree for foreclosure, the suit continues for the purposes of *lis pendens* until the mortgagee is actually placed in possession under his foreclosure. (See Van Fleets' Treatise on the Law of Former Adjudication, p. 1098; and Hukum Chand on Res Judicata, pp. 697, 698.) In his edition of the Transfer of Property Act, Dr. Rash Behari Ghose (2nd

(1) (1887) I. L. R., 12 Bom., 217.

ed., p. 435) refers to an unreported decision of the Calcutta High Court as an authority for the proposition that in the case of a sale by a mortgagee under a decree the proceedings for the purposes of *lis pendens* must be taken to continue till the property is actually sold. It was suggested that the doctrine would not be applicable, because the thing that was transferred here was not immovable property within the meaning of section 52 of the Transfer of Property Act but the decree itself. But the decree represented all the interest which the mortgagee had in the mortgaged property, and the transfer of the decree undoubtedly carried with it a transfer of that interest in immovable property, which, after the transfer, obviously did not remain in the mortgagee, and therefore passed with the decree to its assignee. It was a transfer to which, I think, the doctrine of *lis pendens* was applicable, because it was made before the final decree in the suit in the original Court. Now that being so, and Chunni Lal having been made a respondent under section 372 of the Code, the question is how does this affect the plea of limitation? I think it shows that no question of limitation can arise. Assuming that the purchase was made *pendente lite*, it was not necessary to add Chunni Lal as a respondent to the appeal at all, and the decree passed on appeal would be binding on him, though only the original mortgagees had been made parties. Now if Chunni Lal would have been bound by the appellate Court's decree without his having been made a party to the appeal at all, he would not be less bound if he were made a party to the appeal after a certain time. He was added as a respondent under section 372, not as a matter of right, but because his assignors, having no further interest in the matter, could not be expected to support a decree in which they had no longer any concern. It is clear from the terms of section 372 of the Code that when a party is brought on the record under that section, there is, as regards him, no new suit at all. He is added in the suit already instituted, and that suit is "continued by or against" him. The phraseology of section 372 in this respect is totally different from that of section 22 of the Limitation Act or section 32 of the Code, which has been so much discussed in the argument. In the same way where, by reason of section 372 read with section 582, a person is added as

1901

CHUNNI LAL v. ABDUL ALI KHAN.

a respondent, there is, as regards him, no new suit or appeal dating from the time when he was so added. The original suit continues, and the original appeal continues, and no new suit or appeal begins. The essence of section 372, whether applied to proceedings in the Court of first instance or proceedings in appeal, is that the suit is one from the beginning, and that the addition of the transferee does not initiate, as regards him, a new proceeding. The new respondent introduced in that way can, I think, only take such pleas as his assignors could have raised and cannot introduce any new issue. That being so, I think that the main ground of appeal by Chunni Lal fails.

The other ground which has been urged on his behalf relates to the manner in which evidence was taken by the lower appellate Court. I must say that the circumstances in which that evidence was taken are not very satisfactory. The Court appears to have been under the mistaken impression that when Chunni Lal was made a respondent under section 372, he would not be bound or affected by the evidence which had been given in the Court of first instance, and that therefore it was necessary to take the evidence of certain persons over again. I infer that this was the view of the Court from the terms of the order directing the evidence to be taken. Then the decision of the lower appellate Court is based upon the omission in certain account books produced by Lekhraj of any mention of the mortgage debt, and the fact that Lekhraj did not produce in that Court any account books for certain years in which, if that debt were outstanding, it might have been mentioned. The account books which were produced were produced by Lekhraj in the lower appellate Court. He was directed to produce them in consequence of an application of 22nd September, 1898, in which the defendants, appellants in that Court, offered to be bound by Lekhraj's statement on oath if he would make such a statement and produce his account books. Ultimately, after Chunni Lal was brought on the record, that offer was withdrawn; but in the meantime, acting apparently on the assumption that it would hold good, Lekhraj produced the books, an order was made for their examination and for a report upon them by a commissioner, and at the hearing of the appeal the report of the commissioner regarding the account books was

taken into consideration. So far as the books are concerned, it cannot be said that the provisions of the last paragraph of section 568 of the Code requiring the Court to record the reasons for the admission of additional evidence were complied with; but any irregularity in the admission and treatment of the account books, as well as in the examination of Lekhraj, appears to be covered by the fact that no objection was raised to those proceedings in the Court below. It is expressly recorded that the pleaders on both sides agreed to the examination of Lekhraj: he himself produced the books, and no objection was ever made to their consideration or to the consideration of the commissioner's report regarding them. There is not a trace of any objection being made, and that being so I do not think that we ought to interfere on that ground with the decision of the Court below. The Court below clearly recognised that the *onus* lay upon the defendants to prove their plea of payment. It found in substance that they had sustained that *onus*, and that consequently the mortgage debt must be considered to have been paid. We cannot in second appeal consider whether the Court's reasons for that conclusion were well founded. I think that this appeal must be dismissed with costs.

BANERJI, J.—I am of the same opinion. The contention of the learned counsel for the appellant that the appeal of the respondents to the Court below as against the present appellant was barred by limitation is, in my opinion, untenable. No question of the application of section 22 of the Limitation Act, or of section 32 read with section 582 of the Code of Civil Procedure, arises in this case. The present appellant applied under section 372 of the Code to be substituted for the original plaintiffs as a respondent to the appeal which had already been brought against those plaintiffs. The order directing him to be added to the record purports to have been made under the same section. If that section applied to the case, it was not open to the present appellant to raise any plea of limitation which his assignors could not have raised. He was added with the object that the appeal which had already been instituted against his assignors should be continued against him also. No fresh appeal was filed against him, but the appeal which had originally been

1901

CHUNNI LAL v. ABDUL ALI KHAN

instituted was continued as against him. That being so, no question of limitation could arise. The real point in the case is whether section 372 did apply to the case of the present appellant. He was the assignee of a decree which was a decree *nisi* for sale under section 88 of the Transfer of Property Act. He took that decree subject to its being made absolute by an order under section 89 of that Act. Until such order was made it cannot be said that the suit had come to an end. Therefore as he took the assignment *pendente lite*, the doctrine of *lis pendens* applies to his case. Section 372 was consequently applicable, and the appellant was not competent to raise any plea of limitation which, as I have said above, his assignors could not have put forward. Upon the other points which were discussed in this appeal I am in full accord with what has been said by the learned Chief Justice. I agree in dismissing the appeal.

Appeal dismissed.

1901
April 16.

Before Mr. Justice Knox and Mr. Justice Burkitt.

CHIMMAN LAL (DEFENDANT) *v.* BAHADUR SINGH (PLAINTIFF).*

Usufructuary mortgage—Mortgagee put into possession—Contemporaneous lease of mortgaged property to mortgagee—Lease and mortgage not one but separate transactions.

On September 18th, 1883, Chimman Lal by a usufructuary mortgage of that date, in consideration of a loan of Rs. 1,350, put Bahadur Singh into possession of certain property. He covenanted with the mortgagee to pay him interest at the rate of annas 14 per cent., which after deducting the Government revenue (which the mortgagor undertook to pay and did pay regularly), left the sum of Rs. 141-12 payable annually by the mortgagor to the mortgagee for interest. It was further agreed that the mortgagee should pay himself the interest from the profits of the mortgaged property; and further that if the amount of the profits in any year exceeded the sum payable as interest, the surplus should be applied by the mortgagee in reduction of the principal of the loan, and on the other hand that if the profits fell short of the sum payable for interest, the defendant-mortgagor would be liable for the balance and would pay it along with the mortgage money. A further clause permitted the mortgagee at any time he chose to call in the mortgage money, and to recover it with interest and costs from the mortgagor and the mortgaged property.

* Second Appeal No. 249 of 1899 from a decree of J. J. McLean, Esq., District Judge of Meerut, dated the 22nd December 1898, confirming the decree of Babu Nihal Chandar, Additional Subordinate Judge of Meerut, dated the 26th September 1896.