

take away from the present applicant the purchase-money which he still continued to hold in execution of his decree, and we consider that his right to apply only accrued from the 22nd of February, 1923, when the auction-purchaser recovered the money. On this finding the present application is within time. We, therefore, allow this appeal with costs and restore the order of the court of first instance.

1927

FADAL SINGH
DEEI SARAN
DEHAR DUBB.

Appeal allowed.

FULL BENCH.

Before Sir Cecil Walsh, Acting Chief Justice, Mr. Justice Lindsay, Mr. Justice Dalal, Mr. Justice Mukerji, Mr. Justice Ashworth, Mr. Justice Kendall and Mr. Justice Pullan.

BAIJ NATH AND ANOTHER (DECREE-HOLDERS) v. RAM BHAROS (OBJECTOR).*

1927
January,
24.

Civil Procedure Code, section 48—Execution of decree—Limitation—Application for revival of execution proceedings—“ Fresh application.”

The holders of a decree for sale, which was made final on September 28, 1912, applied for execution (the second application) on December 22, 1915. Pending this application, the parties came to a compromise and agreed that the decree should be payable by instalments. Three instalments were paid, and then the judgement-debtors made default. A third application for execution was made, but without result. The fourth application was made on October 22, 1923, and execution of the decree was transferred to the Collector. Meanwhile the original judgment-debtors' interest in the property had been sold in execution of a simple money decree and one RB became the purchaser. He paid Rs. 1,000 to the decree-holders and asked for a year's time to enable him to pay the balance. The Collector gave three months' time and finding it unnecessary to

* First Appeal No. 68 of 1926, from a decree of Vishnu Ram Mehta, First Subordinate Judge of Cawnpore, dated the 7th of November, 1925.

1927

BAJI NATH
v.
RAM BHAKOS.

keep the case pending in his court returned the decree and the papers to the civil court. After the expiry of the three months granted by the Collector, the decree-holders again applied asking that the "papers of the former application" might be sent to the Collector for execution. This was on January 28, 1925. This application was granted on February 6, 1925. Shortly after this the principal decree-holder, Ram Lal, died, and his sons applied on April 28, 1925, praying that they might be brought on the record in place of their late father and that the execution might be proceeded with.

Held, on objection taken by the judgement-debtor, that there was no bar to execution being proceeded with on this application.

Jurawan Pasi v. Mahabir Dhar Dube (1) and *D. S. Apte v. Tirmal Hanmant Savnur* (2), referred to. *Chhattar Singh v. Kamal Singh* (3), followed.

THIS case was laid before a Full Bench at the instance of DALAL and PULLAN, JJ., in view of certain apparent discrepancies between the Allahabad and the Bombay and Lahore High Courts.

The following is the Referring Order:—

DALAL and PULLAN, JJ.:—The lower court decided this execution application on the basis of a judgement of a Bench of this High Court in *Jurawan Pasi v. Mahabir Dhar Dube* (1). The facts of this case are the same as those in the case therein decided. But in view of the fact that this ruling has not been accepted by the Bombay High Court in *D. S. Apte v. Tirmal Hanmant Savnur* (2), and the Lahore High Court has taken a contrary view, although without noting the judgement of the Allahabad High Court to which we have referred, in *Banarsi Das v. Ramzan* (4), we are of opinion that this appeal should be referred to the decision of a larger Bench. We, therefore, submit the case to the Hon'ble Chief Justice with a request that he will form a Bench for the hearing of this appeal.

(1) (1918) I.L.R., 40 All., 198.

(2) (1925) I.L.R., 49 Bom., 695.

(3) (1926) I.L.R., 49 All., 276.

(4) (1923) 73 Indian Cases, 671. .

On this appeal—

Pandit *Uma Shankar Bajpai*, for the appellants.

Dr. *N. C. Vaish*, for the respondent.

1927

BAIJ NATH
v.
RAM BEHROS.

MUKERJI, LINDSAY, DALAL, ASHWORTH, KENDALL and PULLAN, JJ. :—This case has been referred to a Full Bench to obtain a decision of the question, viz., which of the two cases—*Jurawan Pasi v. Mahabir Dhar Dube* (1) and *D. S. Apte v. Tirmal Hanmant Saenur* (2)—was correctly decided?

The facts of the case are only partially given in the judgement of the lower court. This being a first appeal, we looked into all the facts involved in the case and we find that having regard to certain facts, to be presently mentioned, the question referred does not arise for decision.

The appellant's late father, Ram Lal, and certain other persons obtained a decree for sale which was made final on the 28th of September, 1912. The date given in the execution application is presumably the date of the preliminary decree. After an infructuous application, another was made on the 22nd of December, 1915. In the course of this execution the parties came to terms. It was agreed that out of the sum of Rs. 5,338 then found due, the judgement-debtors should pay up at once the sum of Rs. 338 and should pay the balance by yearly instalments of Rs. 330. The judgement-debtors regularly paid three instalments and thereafter made a default. Another application, accordingly, followed and it ended in no result. The fourth application was made on the 22nd of October, 1923, and, the property being ancestral, the execution of the decree was transferred to the Collector. In the meantime the judgement-debtors' interest in the property had been sold in

(1) (1918) I.L.R., 40 All., 198.

(2) (1925) I.L.R., 40 Bom., 695.

1927
BALJ NATH
v.
RAM BHAROS.

execution of a simple money decree obtained by the respondent against them, and was purchased by him, and, consequently, the respondent was made a party as a successor in title of the original judgement-debtors. The respondent made a deposit of Rs. 1,000 and asked for a year's time to enable him to pay up the balance of the decretal amount. The Collector gave three months' time and finding it unnecessary to keep the case pending in his court, returned the decree and the papers to the civil court. After the expiry of the three months which were granted by order dated the 16th of October, 1924, Ram Lal, by an application, dated the 28th of January, 1925, prayed that the "papers of the former execution" might be sent to the Collector for execution. This application was granted by order dated the 6th of February, 1925. Almost immediately after this Ram Lal died and his sons, the present appellants, put in the last and sixth execution application on the 28th of April, 1925, praying that they might be brought on the record in place of their late father and that the execution might be proceeded with. It is to be noted that Ram Lal had been taking out execution for the benefit of himself and his co-decree-holders, and his sons also made a similar prayer.

When the execution proceedings were pending in the court below, the respondent Ram Bharos preferred an objection to the execution, basing his case on section 48 of the Code of Civil Procedure. He urged that twelve years had expired from the date of the decree, viz., 28th of September, 1912, and that, therefore, the sixth application of the 28th of April, 1925, was not entertainable. The learned Subordinate Judge accepted this plea and dismissed the application as barred by time.

In the court below it was urged that the compromise between the original judgement-debtors and the decree-holder, effected on the 18th of December, 1916, having been accepted and recorded by the court, there came into existence a "subsequent order" within the meaning of section 48 of the Code of Civil Procedure, by which recurring periods were fixed for payment of the decretal amount and that, therefore, the limitation of twelve years would begin from the dates of default in making payment at those recurring periods. The learned Subordinate Judge found that he was bound by the case of *Jurawan Pasi v. Mahabir Dhar Dube* (1) and that the order of the execution court could not be a "subsequent order" contemplated by section 48.

1927
BAIT NATH
D.
RAM BHAROS.

In this Court this argument has been repeated on behalf of the decree-holders.

As already stated, on examination of the record and on the admission of the parties, we discovered that certain aspects of the case, already noted above, were not noticed in the court below. Those were these. The respondent himself asked for a year's time and obtained three months on the 16th of October, 1924. The grant of time by the Collector did not in any way dispose of the application. The application should have been kept pending by the Collector on his file. He, however, chose to return the papers to the civil court. On receipt of the papers on the 23rd of December, 1924, the civil court passed the following order:—

"The papers having been received today it is ordered that an entry be made in the register of execution and the papers be consigned to the record room in the judgeship of Cawnpore along with the *basta* (the files of other cases)."

1927

BALI NATH
v.
RAM BHAROS.

The order shows that the learned Subordinate Judge did not consider the application on the merits and did not decide whether the application was to be dismissed or was to be granted. He received the papers back from the court of the Collector and ordered that they should be consigned to the record room. As recently held in the Full Bench case of *Chhattar Singh v. Kamal Singh* (1), a disposal of an execution proceeding like the above was not a final decision of an execution application. The application must be treated as still pending on the 23rd of December, 1924. The decree-holder, Ram Lal, by his application dated the 25th of January, 1925, did not ask for any fresh prayer. All that he wanted was that the (*māssil ijra sabik*) records of the previous execution should be sent back to the Collector. He was, therefore, simply asking for reviving the execution which had been suspended by the order of the Collector and by the consignment of the papers into the District Judge's record room. In this view, which is in accordance with the Full Bench case already mentioned, the application of the 25th of January, 1925, was not a "fresh application" within the meaning of section 48 of the Code of Civil Procedure. It was an application to carry on a previous application which was still pending.

When the sons of Ram Lal, on his death, made the application of the 28th of April, 1925, they did not ask for any fresh proceedings. They said that Ram Lal's name might be removed and the petitioners' names might be entered in the array of decree-holders. They had to make an application in the usual form of ten columns, because there is no rule of law which enables the legal representative of a deceased decree-holder to apply for mere substitution

(1) (1926) I.L.R., 49 All., 276.

of names. He must apply, whenever he does apply, for execution of the decree, vide order XXI, rule 16, of the Code of Civil Procedure. It is clear, therefore, that neither the application of the 28th of January, 1925, nor the application of the 28th of April, 1925, was a "fresh application" within the meaning of section 48 of the Code of Civil Procedure.

1927

BAJI NATH
r.
JAM. BHAROS.

The result is that the question whether a fresh application should be granted or not has not yet arisen.

We set aside the decree of the court below, dismiss the respondent's objection to the execution and remand the case to the lower court with the direction that the execution be proceeded with according to law. The appellants will have their costs in this Court and in the court below.

WALSH, A. C. J. :—I have read the judgement of Mr. Justice MUKERJI and agree. This is sufficient to dispose of the case, and renders it unnecessary to express any opinion upon the question of law which was referred to this Special Bench, namely, the true interpretation of the expression "subsequent order" in section 48 of the Code of Civil Procedure. I prefer to reserve my opinion upon the question whether *Jurawan Pasi v. Mahabir Dhar Dube* (1) was right. There are difficulties about the contrary interpretation, and I entertain considerable doubt whether the execution court has jurisdiction to alter the decree by directing payment by instalments even by consent. But all difficulty can be removed by the exercise of a little common sense. If the execution court is applied to, it can refer the parties to the trial court, where the application can be dealt with, and in the great majority of cases the two courts are identical.

BY THE COURT.—We set aside the decree of the court below, dismiss the respondent's objection

1927
 BAIJ NATH
 v.
 RAM BHAROS.

to the execution and remand the case to the lower court with the direction that the execution be proceeded with according to law. The appellants will have their costs in this Court and in the court below.

Decree set aside.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

1927
 January,
 24.

BHAGWAN SAHAI (DEFENDANT) *v.* NANAK CHAND AND OTHERS (PLAINTIFFS) AND RAM LAL AND OTHERS (DEFENDANTS).*

Pre-emption—Two suits by rival pre-emptors standing on same footing—Transfer of property in suit by the vendee to one of the two pre-emptors—Lis pendens.

Inasmuch as the doctrine of *lis pendens* applies to a suit for pre-emption, it is not possible for a defendant vendee to give preference to one of two pre-emptors with equal claims, each of whom has brought a suit for pre-emption, by selling the subject-matter of the suit to him to the exclusion of the rival pre-emptor. *Manpal v. Sahib Ram* (1), distinguished. *Kamta Prasad v. Ram Jag* (2), referred to.

THE facts of this case are fully stated in the judgement of the Court.

Mr. *B. Mullick* (for Dr. *Surendra Nath Sen*) and *Munshi Ajudhia Nath*, for the appellant.

Babu Piari Lal Banerji and *Munshi Kailas Chandra Mital*, for the respondents.

LINDSAY and SULAIMAN, JJ.:—Both these appeals arise out of a suit for pre-emption which was brought by one Moti Ram, now represented by Nanak Chand and others. It appears that on the 17th of

* Second Appeal No. 1224 of 1925, from a decree of R. L. Yorke, District Judge of Bulandshahr, dated the 27th of March, 1925, modifying a decree of Kashi Nath, Subordinate Judge of Bulandshahr, dated the 22nd of April, 1924.

(1) (1905) I.L.R., 27 All., 544. (2) (1913) I.L.R., 36 All., 60.