

before applying it we must be satisfied that no other provision of the Limitation Act can be applicable. The appeal is dismissed with costs.

1880

KUNDUN LA
V.
BANSI DHAL

Appeal dismissed.

Before Mr. Justice Oldfield and Mr. Justice Straight.

1880

August 12.

BALLABH SHANKAR AND OTHERS (DECREE-HOLDERS) v. NARAIN SINGH
AND ANOTHER (JUDGMENT-DEBTORS)*

Execution of Decree—Res judicata.

On an application being made for the execution of a decree the judgment-debtor made three objections to its execution. The first of these objections the Court executing the decree, the Subordinate Judge, allowed, and refused to execute the decree. On appeal by the decree-holder, the District Judge disallowed all three such objections, holding that the decree should be executed; and remanded the case for that purpose. When the case came back to the Subordinate Judge, the judgment-debtor again raised the second and third of such objections, but the Subordinate Judge refused to entertain them on the ground that they had already been determined by such District Judge. On appeal by the judgment-debtor the successor of such District Judge ordered the Subordinate Judge to determine all three such objections. *Held* that such succeeding Judge could not re-open such questions, his predecessor having already finally determined them, and his predecessor's order, so far as such application for execution of the decree was concerned, was final.

The facts of this case are sufficiently stated for the purposes of this report in the judgment of the High Court.

Mr. Conlan and Munshi Sukh Ram, for the appellants.

Babu Jogindro Nath Chaudhri, for the respondents.

The Court (OLDFIELD, J., and STRAIGHT, J.,) delivered the following

JUDGMENT.—The facts are these: The appellants are holders of a decree against respondents, dated the 6th June, 1861. They applied for execution in 1861, and on the 23rd September, 1861, the decree-holders and judgment-debtors entered into an agreement that the judgment-debtors should pay Rs. 500 in cash, and the balance of the decree by annual instalments of Rs. 100, without

* First Appeal, No. 68 of 1880, from an order of R. G. Currie, Esq., Judge of Aligarh, dated the 20th April, 1880, reversing an order of Maulvi Farid-ud-din Ahmad, Subordinate Judge of Aligarh, dated the 28th February, 1880.

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interest, and, in event of default in payment of two instalments, the decree-holders might realize the balance of the decree money, with interest at one per cent., in a lump sum, from the property pledged by the sureties and the judgment-debtors. The instalments appear to have been punctually paid into court until a recent date, and now that default has been made the decree-holders have applied for execution for the balance due against the judgment-debtors by sale of their property. The judgment-debtors made three objections to execution:—(i). That the application was barred by limitation; (ii) that the agreement had suppressed the decree which was no longer capable of execution; (iii) that the decree-holders should proceed against the sureties under the agreement. The first Court (Subordinate Judge) held that the application was barred by limitation. The decree-holders preferred an appeal to the Judge, Mr. Watson, urging that the payment into court of the instalments had kept the decree alive. Mr. Watson allowed the appeal: his order is as follows:—“I must admit this appeal; the words of the precedent quoted exactly meet the case; the objection taken cannot and ought not to prevail: the decree-holder is entitled to take proceedings upon the *kist-bandi* as if it were part of the original decree: I therefore annul the order of the lower Court and decree the appeal with costs.” The case went back to the Subordinate Judge for disposal, and in his order, dated 28th February, 1880, after stating that the case was remanded in appeal by the Judge, and the judgment-debtors had petitioned to have their second and third objections disposed of, he proceeds to disallow them, holding that Mr. Watson’s order had already disposed of them. The judgment-debtors then appealed from this order to the Judge (Mr. Currie), Mr. Watson’s successor in office, and he has paid no attention to Mr. Watson’s (his predecessor’s) order, considering it not to be binding as *res judicata*, and has directed the Subordinate Judge to dispose afresh of all the objections originally urged by the judgment-debtors.

The decree-holders in appeal to the Court contend that Mr. Watson’s order is final, having been made in the same case between the parties. We are of opinion that the appeal is valid. Mr. Watson’s order was made in the matter of the same application

for execution which was before Mr. Currie, and, not having been appealed to this Court, must be held to be final so far as that application for execution is concerned. Mr. Currie could not in hearing an appeal arising out of a subsequent order of the lower Court in the same proceedings re-open a question already decided by his predecessor in office in the course of those proceedings. The judgment-debtors' course was to have preferred an appeal to this Court or applied for a review of judgment; but Mr. Currie could not set aside the order of his predecessor in office in the way he has done. His order treating Mr. Watson's order as void cannot be maintained; and since Mr. Watson's order did, as the Subordinate Judge held, in effect dispose of all the judgment-debtors' objections, Mr. Currie's order should be set aside and that of the Subordinate Judge restored. We decree the appeal with costs.

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Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.

JAIKARAN RAI AND OTHERS (PLAINTIFFS) v. GANGA DHARI RAI AND
OTHERS (DEFENDANTS)*

1880
August 1

Pre-emption—Conditional Sale—Act XV of 1877 (Limitation Act), sch. ii, No. 10.

Where a share-holder, if he desires to transfer his share, is bound to offer the transfer of it to his co-sharers before transferring it to a stranger, the right of pre-emption, in the case of a conditional sale, under which possession is not transferred, arises, not when such sale is made, but when the conditional sale becomes absolute.

Under No. 10, sch. ii of Act XV of 1877, the period of limitation runs from the date physical possession is taken of the whole of the property sold.

THIS was a suit to enforce the plaintiffs' right of pre-emption in respect of twenty-two bighas ten biswas of land, the suit being based upon the administration-paper of the village in which such land was situated. The clause in that instrument, which bore date the 9th August, 1854, relating to the right of pre-emption of co-sharers in the village, was as follows: "Clause 10.—We, when under necessity and the Government revenue falls into arrear,

* Second Appeal, No. 1331 of 1879, from a decree of Maulvi Mahmud Bakhsh, Additional Subordinate Judge of Gházipur, dated the 27th August, 1879, affirming a decree of Maulvi Ezad Bakhsh, Munsif of Muhammadabad, dated 17th March, 1879.