

1880

SIBTA  
P.  
BADRI  
PRASAD.

no right in the presence of the nearer heirs of Nand Lal. The Judge has affirmed the decree of the Court of first instance which decreed the claim on the ground that Nand Lal, as the son of Chotey Lal's daughter, did not succeed as full owner of the property, but had only a life-interest, and in the same way his widow Inda took only a life-interest, and at their death the heirs will be the plaintiffs, the *gotraja-sapindas* of Chotey Lal; and the Judge made no finding as to the *factum* of the will in favour of Inda by Nand Lal, or the genuineness of the deed of gift by Inda in favour of the appellant, it being unnecessary to do so on his finding that Nand Lal and Inda had but limited interests and no power to make such bequests.

The Courts below have, however, erred in holding that Nand Lal had only a limited interest. On the contrary, as the son of Chotey Lal's daughter, he took the inheritance as full owner; and on his death the succession would pass to his heirs and not to the heir of his maternal grandfather Chotey Lal.—*Mitakshara*, Chap. ii, s. 2, v. 6; and *Mayne's Hindu Law*. If therefore there are any heirs of Nand Lal alive among his *gotraja-sapindas*, that is, related to him through his father, as appellant asserts, they will have a preferential right of succession over plaintiff, who in that case cannot maintain the suit. We direct the Judge to try the issue indicated, and if he finds that there are no such *gotraja-sapindas* of Nand Lal alive, he will further try the issues in respect of the genuineness and validity of the alleged testamentary bequest by Nand Lal in favour of Inda and of the gift by the latter in favour of the appellant. We remand the case accordingly, and allow ten days for objections to be preferred to it.

*Cause remanded.*

*Before Mr. Justice Pearson and Mr. Justice Oldfield.*

NARAIN DAS (JUDGMENT-DEBTOR) v. LACHMAN SINGH (DECREE-HOLDER).\*

1880  
August 1

*Pre-emption—Execution of Conditional decree.*

The decree of the original Court in a suit to enforce a right of pre-emption, dated the 18th February, 1879, directed that, on the deposit of the purchase-money

\* Second Appeal, No. 44 of 1880, from an order of F. E. Elliot, Esq., Judge of Mainpuri, dated the 23rd April, 1880, affirming an order of Mirza Abid Ali Beg, Subordinate Judge of Mainpuri, dated the 6th March, 1880.

1880  
 BRAJ DAS  
 v.  
 MOHAMMAD  
 SINGH

within one month of the date on which the decree became final, the decree-holder (plaintiff) should obtain possession of the property in suit, and that, if the decree-holder failed to make such deposit within such period, the decree should become null and void. The vendee (defendant) preferred an appeal from this decree, which the appellate Court, on the vendee's application, struck off on the 18th September, 1879. *Held* that, assuming that the order of the appellate Court, by reason that it did not award costs to the decree-holder (respondent), might have been made the subject of a second appeal to the High Court, inasmuch as the decree of the 18th February, 1879, could not have been affected by the result of such an appeal, that decree became final on the 18th September, 1879, when the appeal from it was withdrawn and struck off, and not on the expiry of one month and ninety days from the date of the appellate Court's order of the 18th September, 1879.

THE decree in this case bearing date the 18th February, 1879, was made in a suit to enforce a right of pre-emption in respect of certain property. It directed that on the payment of the purchase-money into court within one month of the date of the decree becoming final, the plaintiff should obtain possession of the property, and that if the plaintiff failed to pay the purchase-money into court within the time fixed the decree should become null and void. The purchaser preferred an appeal from this decree which he subsequently abandoned before notice of the appeal had been served upon the respondent (pre-emptor) under an application, dated the 17th September, 1879. In that application he prayed that the appeal might be struck off, as the decree-holder (pre-emptor) had not up to that date paid the purchase-money into court and the decree had therefore become null and void. On the 18th September, 1879, the appellate Court ordered "that the case be struck off." On the 16th December, 1879, the decree-holder applied for the execution of the decree. He stated in his application as follows:—"The decree was passed on the 18th February, 1879, and directed that the plaintiff should obtain possession by depositing Rs. 1,475-11-0, the pre-emption amount, within one month from the date of the decree becoming final: subsequently an appeal was preferred by the vendee, and the 30th of September was fixed for hearing: the plaintiff-respondent filed a vakalat-nama on the 1st September, 1879: the appellant made an application on the 18th September, 1879, to the appellate Court, without the knowledge and information of the respondent, to the effect that owing to the default of payment of the pre-emption amount

1859

---

 NARAIN L  
 V.  
 LAUGHMA  
 SINGH.

by the plaintiff the decree has become null and void, and that the appeal be struck off: that accordingly the case was struck off, but the respondent had no notice of this proceeding: he came to know of it on the 1st December, 1879: computing the term from the date of the decision of the appellate Court he deposits Rs. 1,475-11-0, and prays that he be put in possession." The Court executing the decree directed, as regards the purchase-money, that, as the Government treasury had closed for the day, the decree-holder should produce the purchase-money at the next sitting of the Court. The purchase-money was eventually paid into Court on the 3rd January, 1880. The judgment-debtor objected to the execution of the decree on the ground that the purchase-money had not been deposited within the time fixed by the decree, and the decree therefore had become null and void. The Court held that the purchase-money had been deposited within time, its reasons for so holding being as follows:—"The Court is of opinion that it has undoubtedly been so deposited, because the decision of the Court cannot become final until after expiry of the period for second appeal, which is ninety days, or until the disposal of the second appeal, if it be preferred. The money has been deposited within one month after expiry of ninety days. If the first appeal had not been preferred on the part of defendant the money ought to have been paid within one month after expiry of thirty days, but an appeal having been preferred, the case becomes different." On appeal by the judgment-debtor the lower appellate Court affirmed the order of the Court of first instance on the following grounds:—"The whole question turns upon whether there was any right of special appeal against the order striking off the appellant's suit or not. It appears that, although no notice had been issued to the respondent at the appellant's instance in the appeal in question, the former filed a vakalat-nāma and thus incurred costs which were not awarded to him. An appeal can lie as to costs, thus the respondent could appeal. The appeal is dismissed with costs."

On second appeal to the High Court the judgment-debtor contended (i) "that, when the decree-holder did not deposit the consideration-money within one month from the date of the decision becoming final, the decree has become inoperative; (ii) that the

1880

KARAIN DAS  
v  
LACHMAN  
SINGH.

decision of the lower Court to the effect that, if the money be paid within one month from the date of the expiration of the time allowed for appeal, the payment is to be considered to have been made within time is not correct; (iii) and that, when the appeal was not decided by the Court but the appellant withdrew it himself, it is improper to rule that the decision did not become final till the expiration of the period allowed for appeal."

Munshi Hanuman Prasad and Babu Oprokash Chandar Mukarji, for the appellant.

Pandit Ajudhia Nath and Munshi Kashi Prasad, for the respondent.

The judgment of the Court (PEARSON, J., and OLDFIELD, J.,) was delivered by

PEARSON, J.—In our opinion the Subordinate Judge's decree dated 18th February, 1879, became final on the 18th September following, when the appeal preferred to the Zila Judge from it by the vendee was withdrawn and struck off. The reason assigned by the lower appellate Court for thinking otherwise, viz., that the decree-holder might have preferred a special appeal to this Court in respect of his costs which were not awarded to him by the order of the 18th September, 1879, appears to us to be bad: for an order striking off an appeal at the request of the appellant was not an order liable to special appeal, and, even if it could have been made the subject of appeal, it is obvious that the decree of the 18th February, 1879, in so far as it related to the substance of the suit, the right of pre-emption and the amount of the sale-price could not have been affected by the result of such an appeal. We must, therefore, rule that the sale-price deposited on the 3rd January last was not deposited within the time allowed by the decree, and cannot be accepted; and that the decree-holder is not entitled to be put or maintained in possession of the property the subject of the sale, which should be restored to the vendee. Accordingly we decree the appeal with costs by reversal of the order of the lower Courts and allow the objection of the judgment-debtor-vendee.

*Appeal allowed.*