

(1933) 12 AHC CK 0006
In the Allahabad High Court

B. Shiva Shankar Das and Others

APPELLANT

Vs

Mufti Syed Yusuf Hasan

RESPONDENT

Date of Decision : 22-12-1933

Acts Referred:

Citation : (1933) 12 AHC CK 0006

Hon'ble Judges : Sulaiman, C.J.;Rachhpal Singh, J;King, J

Bench : Full Bench

Final Decision : Disposed Of

Judgement

Sulaiman, C.J.—I regret that I have come to a contrary conclusion. The previous application of 13th March 1919, contained a prayer that the execution be transferred to the Collector for the sale of the properties given in the list attached and contained an intimation to the Court that if the properties given in the list were not to prove sufficient to pay the principal, interest and costs, then an inventory of other hypothecated properties would be given for the balance of the amount due. The last statement in my opinion was not a prayer made to the Court to take any steps at that stage. The decree holder had given no intimation to the Court whether the rest of the property was ancestral or non-ancestral. Accordingly, the Court was not in a position to decide whether the execution with regard to that property would have to be transferred to the Collector or whether it would take place under the supervision of the Civil Court. Furthermore, there being no description or specification of the rest of the property the Court could not select which of the remaining items of the mortgaged properties the decree-holder would like to sell subsequently. It seems to me that it was not the intention of the decree-holders at that time that the Court should take any steps with regard to the rest of the property of which a list was to be supplied afterwards, nor was it their intention that the Collector should be asked to deal with those properties at all. It seems to have been implied that if the decree is not satisfied the decree-holder would move the Court subsequently by supplying a fresh list of the properties sought to be sold.

2. Now, although a mortgage decree certainly orders that the amount, if not paid within the time fixed, should be realized by the sale of the mortgaged properties, or "any sufficient part thereof" (Order 34, Rule 5, Sub-rule 3) the Court cannot proceed to sell any of the properties without there being a previous application for execution under Order 21, Rule 10. Rule 11(2) provides what an application for execution should contain and includes among others the mode in which the assistance of the Court is required whether "by the attachment and sale or by the sale without attachment of any property" : Rule 11(2)(j)(ii). It obviously implies that the decree-holder should specify what property he wants to be sold without attachment. It seems to me that the application for execution would be defective if it does not specify the property sought to be sold, *Asghar Ali v. Troylokho Nath Ghosh* (1890) 17 Cal. 631(F.B.) and *Dhonkal Singh v. Phakkar Singh* (1893) 15 All. 84 A defective application of this type, if not-amended, would be liable to be dismissed" under Rule 17(1). In the case of an application for execution of a decree, which is more than a year old, notice has to be issued to the judgment-debtor under Rule 22 and then the Court, has, under Rule 23(1) "to order the decree to be executed." It. therefore seems to me that where the decree-holders did not want that the Court should proceed against certain items of the mortgaged properties and chose not to supply a list thereof but merely informed the Court that they would take steps later on, they must be taken not to have made any application for the execution, of the decree as against the properties not so specified, but to have confined his application for execution as against the properties specifically mentioned in the application. It is always open to a decree-holder not to proceed against any property he likes. I am further of opinion that where a decree-holder applies that the execution, be transferred to the Collector u/s 68, Civil P.C. it is his duty to specify the properties, the execution as regards which he wants to be transferred, in order that the Court may determine whether it is ancestral property or not. The various notifications issued by the Local Government of these Provinces show that it is the Civil Court alone which has to decide whether any Immovable property is ancestral property, the execution against which must of necessity be transferred to Collector. The Civil Court cannot, u/s 68, order the execution of the decree to be transferred in respect of any particular property, without first deciding that the property is of that particular kind the execution against which in the Government Notification is directed to be transferred to the Collector. I may in this connexion refer to *Ahmad Ghaus Khan v. Lalta Pd.* (1906) 28 All. 631 which dealt with the earlier notification. The notification of 1911 also provided that if the Collector has reason to believe that a certain property is ancestral, he should report to the Civil Court for determination whether the property is ancestral. Rule 107 added by this Court to Order 21 now directs that the Civil Court shall, before ordering the sale of any property, call upon the parties to state whether such land is or is not ancestral and fix a date for determining the said question and after making such inquiry as it deems necessary it shall determine whether such land or what part of it is ancestral land. In my opinion the decree-holder in this case, when he expressly withheld the particulars of the other items of the properties and did not

want the Court to make the inquiries as regards them at that stage, was not applying for execution of the decree as against those properties.

3. The present application is in the form of an application under Order 21, Rule 11 and supplies all the particulars and contains a fresh prayer for the transfer of the decree to the Collector for the sale of the properties which were not specified in the previous application. The Court will have to make fresh inquiries as regards the nature of these properties and will transfer the execution to the Collector if they are found to be ancestral, and will execute the decree itself if they are non-ancestral. The exact nature of these properties has not yet been finally determined. The first thing that appears is that the decree-holders were not prevented from proceedings with the execution of their decree against the second set of properties while the execution against the first set of the properties was pending before the Collector. If the second set of properties was also ancestral, they could very easily have applied to the Civil Court that the execution of the decree against them also be transferred to the Collector so that he might deal with the entire lot simultaneously. If these properties were non-ancestral, it was still open to the decree-holders to apply to the Execution Court to proceed with the execution. The Court might either have recalled the execution proceedings from the Court of the Collector as regards the ancestral properties. If the decree-holders wanted to abandon the proceedings for the time being, or, at any rate, allowed the application remain pending on the file so that limitation might not be a bar, such a subsequent application could have been easily revived at a future time. But if the decree-holders chose not to ask the Court to move in the matter and waited for more than 12 years and allowed the period prescribed by Section 48, Civil P.C. to expire, they are not now entitled to have the time taken by the Collector, to be excluded. As the decree-holders were not in any sense temporarily deprived of their remedy, they are not in my opinion entitled to claim exclusion of any period of time under Schedule 3, paragraph 11(3) with regard to the properties which were not before the Collector. Had any of the properties, the execution as regards which was transferred to the Collector not been sold, they would undoubtedly have been entitled to an exemption under Rule (1) so far as such properties were concerned.

4. The second question is whether the present application can be treated as a mere revival of the previous application. The general principles appear to be well settled and the question is mainly one of applying them to the present case. A fresh application for execution cannot be made after the expiry of 12 years from the date of the decree. Section 48 is a complete bar to such an application. But if there is an earlier application still pending and not finally disposed of, or, so to speak, is in a state of suspended animation, it can be revived and proceeded with by a fresh application, which would be more in the nature of reminding the Court that it should be taken up and disposed of. It is necessary for the revival of a previous application, that it should not have been disposed of or dismissed finally and should not have been struck off owing to a default of the decree-holder. (Order 21, Rule 57). Obviously, if the fresh application is in character and

substance different from the previous one or any relief different from that claimed in the previous one is asked for, it cannot possibly be treated as a mere revival, but it must of necessity be considered to be a fresh application. To be a revival, the reliefs must be identical without any variation. If any new property is sought to be attached or sold, it cannot be a mere revival. If a new relief like attachment or arrest is added it cannot be a revival, for in reviving an application which has been shelved or filed and not struck off for default of the decree-holder, the Court merely takes up the previous application on being reminded of it and proceeds with it. Cases of this type occur when execution has been suspended on account of an injunction or a stay order or the file has been shelved on account of the pendency of any other litigation, or the case is wrongly struck off for no fault of the decree-holder. In such cases when the previous application is taken up, the scope and character of it remains the same and the decree-holder asks for exactly the same relief. A few cases in support of this proposition may be cited. In *Sreenath Gooho v. Yusoof Khan* (1881) 7 Cal. 556 the decree-holder had applied for the attachment and sale of certain specified property belonging to the judgment debtor and then after the expiry of 12 years filed a fresh application praying that certain other property of judgment-debtor might be attached and sold in lieu of that given in the previous application. It was held that the second application was not a revival of the previous application. Prinsep, J., observed that it was intended by the corresponding section of the old Act that the decree-holder should have one opportunity of executing his decree and that if he should fail to satisfy it on that application, any further application becomes barred. Meld, J., remarked:

It appears to have been the intention of the legislature that an inventory or sufficient description, of the property sought to be attached, whether moveable or immovable, should be attached to the application.

5. The learned Judge further remarked that if an application does not contain at its foot a description of the property sufficient to identify it, it would be defective in form, and that if a fresh inventory of the property is sought to be filed, the second application cannot be accepted by way of an application amending and supplementary to the original application, and

if a supplementary list of property were allowed to be put in after the expiration of 12 years the essential portion of the law would be practically defeated.

6. In *Har Sarup v. Balgobind* (1895) 18 All. 9 a second application for attachment and sale of the property was held not to be in continuance of the previous application for arrest. In *Khetpal v. Tikam Singh* (1912) 34 All. 396 a Bench of this Court held that where previously an application for transfer of a decree from one Court to another had been made, and a second application for execution after the expiry of 12 years was filed, the latter could in no sense of the words be regarded as an application in continuance of the previous application. They regarded that an application containing a prayer for the transfer of the decree was not in essence an application for execution at all; and further held that:

in order that an application may be a continuance of another application, it is necessary that the two applications be of the same nature, and the application for transfer being an application of an entirely different nature from that for execution of a decree it was barred by time.

7. In *Saklu Chaudhari and Another Vs. Harbansdeo Rai*, , it was held that an application for transfer of a decree can be treated as an application for taking a step-in-aid of execution, and that, inasmuch as an application for execution is of an entirely different nature from an application for the transfer of the decree of another Court, the former can in no sense be treated as one in continuation of the latter application. In *Chutterput Singh v. Sait Sumari Mull* AIR 1916 Cal. 488 the plaintiffs had obtained a money decree in the High Court and got the decree transmitted to the District Court for execution which was returned as unsatisfied; another application for execution by arrest was made, but nothing further was done. On 1st June 1903, the plaintiffs made another application for execution of the decree by transmission of the same to the District Court and attachment of the defendant's property, on which the Master ordered execution to issue. No further steps were taken till 18th January 1915, when a further application was made to the High Court for execution by attachment. A Full Bench of the Calcutta High Court held that:

the application of the 1st of June did not constitute a revival and that the order for transmission is not an order on an application for execution, though it is an order on an application in execution.

8. The transmission proceeding is taken with a view to further action by way of execution elsewhere. In AIR 1927 73 (Privy Council) their Lordships of the Privy Council remarked:

It was decided by the High Court of Calcutta in the case of *Chutterput Singh v. Sait Sumari Mull* AIR 1916 Cal. 488 a Full Bench decision of the year 1916, that an application for transmission of a decree from the High Court to a District Court was not by itself a revival of the decree within the meaning of the Act inasmuch as it was a mere ministerial act of an officer of the Court and not a judicial act of a judge. Their Lordships have considered that case, and they think that it was rightly decided.

9. In *Shiam Karan v. Collector of Benares* AIR 1919 All. 64 the property of the judgment-debtor was taken charge of by the Collector u/s 326 of the Code of 1882, corresponding to 8. 72 of the present Act; and after the management had continued for several years it was released. It was then that an application for attachment and sale of the property was made on behalf of the decree-holder. The Bench held that there could be no doubt that the second application was in substance a fresh application for the execution of the decree and that it was not an application in continuance of any previous application for execution. The learned Judges however held that the limitation was saved with regard to the property which had actually been under the charge of the Collector. In *Ram*

Batan v. Datar Kuar AIR 1928 Lah. 808 the decree-holder had first filed an application for execution within limitation and then after the expiry of the period of limitation, while the last application was still pending, applied that he might be allowed to attach certain properties belonging to the judgment-debtor which were not included in the previous application, the actual prayer was to ask for permission to file a supplementary list of properties. It was held by a Bench of the Lahore High Court that the application asking for permission to file a supplementary list of properties was in substance a fresh application for execution and was time-barred. The learned Judges held that if the decree-holder's contention were accepted the clear provisions of Section 48 would be rendered nugatory and he could not be allowed to proceed against the properties not included in the previous application. In B. Bandhu Singh Vs. K.T. Bank Ltd. , a Bench of this Court, of which I was a member, held that where a decree-holder applies after the expiration of 12 years from the date of the decree for the attachment and sale of property not mentioned in any of the previous applications for execution, the application is a fresh application and cannot be entertained; and that the mere fact that the execution proceedings started by the previous application were still pending and had not been struck off would not be sufficient to save limitation.

10. In the case of Maharaj Bahadur Singh v. A.H. Forbes AIR 1929 P.C. 209 their Lordships of the Privy Council had a case before them where the decree holder had first applied for the attachment of certain properties of a patnidar other than the patni, and then after the expiry of the period of limitation applied for process against the darpatnidar, for the sale of the patni mohal in execution. Their Lordships had no doubt that the previous applications were essentially different in character from the last one and that it was impossible to hold that the last application was a continuance of the previous application. The application of 1922, being a fresh application within the meaning of Section 48, Civil P.C. their Lordships held it to be barred by limitation. The same principles have, more or less, been applied to the execution of mortgage decrees, and it has been held at least in two cases that the supplying of a fresh list of mortgaged properties is asking for a fresh relief and is therefore tantamount to the filing of a fresh application for execution. In Hayatunessa Chowdhurani Vs. Achia Khatun, , a Bench of the Calcutta High Court held that a subsequent application made after the expiry of the period of limitation for the execution of a mortgage decree to add other properties to the list given in the original application, which had been within limitation, could not be allowed. In this case the decree-holder had first mentioned certain properties against which he wanted to proceed and had then later asked for permission to be allowed to add several other properties to the list given in his original application. He was not allowed to proceed against the properties other than those which had been mentioned in the previous application only. In the case of Krishna Dayal Gir v. Mt. Sakina Bibi AIR 1916 Pat. 300 it was held that an application for execution of a mortgage decree made more than 12 years after the decree was barred by time, and it could not be

treated as a continuation of a prior application where the relief asked for is different and is directed against the property not "attached" (covered sic) by the first application. Even if we assume that the second set of properties is not ancestral, but non-ancestral, the position is no better for the decree-holders.

11. The previous application, though in the form of an application for execution, was in substance an application for the transfer of the execution of the decree to the Collector for the sale of certain properties specified therein. The prayer asked for was not that the civil Court itself should execute the decree, indeed it could not do so. The reference at the end that the decree-holder would file a further list of other mortgaged properties if the properties remained insufficient was a mere intimation to the Court of his intention and was not a prayer for execution against those properties. On the assumption that the new set of properties are non-ancestral, the character of the two sets of properties being different, one being ancestral and the other non-ancestral, the same Court could not have executed the decree against both these properties. The prayer in the second application, although couched in the form of a supplementary application for supplying a list of fresh properties, would be made to the civil Court itself for execution of the decree, This would not be identical with the prayer in the previous application that the execution should be transferred to the Collector. In substance and in essence these two prayers would be distinct and independent. By merely filing a fresh supplementary list the decree-bolder cannot evade the bar of limitation. The Courts which could grant the two prayers being different and the prayers themselves as well as the properties being different. I would be unable to bold that this second application is merely a revival of the old application. Accordingly on this hypothesis also the decree-holder cannot succeed. It is impossible for the civil Court to take up the previous application and proceed with it and execute the decree against the properties now named. Indeed, the first application has been completely disposed of because the prayer was granted, the execution, as far as the properties specified were concerned, was transferred to the Collector and the Collector has realized the assets from the sale of all the properties so mentioned; and so the proceedings before the Collector have been completed in their entirety. It was open to the decree-holders to ask for only some of the mortgaged properties and to proceed against them only for the time being. If they now wish to proceed against the other properties as to which no relief had been asked for originally, they must be deemed to be applying afresh for execution. I accordingly agree with the Court below that the present application is in form, substance and character a fresh application in respect of fresh properties asking for a new prayer altogether, and is not an application for the revival of the previous application for the transfer of execution to the Collector as regards the properties therein specified. I see no good ground for stretching the plain language of Section 48, Civil P.C. in order to hold that the present belated application is not a fresh application for execution. I would accordingly dismiss the appeal with costs.

King, J.

12. I think that the only substantial question for our decision is whether the application made by the decree-holder, on 16th March 1931, should be held to be a "fresh application" for execution, within the meaning of Section 48, Civil P.C. or an application supplementary or ancillary to his previous application dated 13th March 1919. The argument that the period during which the decree was being executed by the Collector should be excluded, under para. 11(3), Schedule 3, Civil P.C. from the period of 12 years mentioned in Section 48, has not been pressed. The decree-holder alleges that all the mortgage properties are ancestral properties. If this is so, the civil Court could not sell such properties in execution of the decree and it follows that the decree-holder was not temporarily deprived of any remedy in the civil Court.

13. The facts have been stated in the judgments of my learned brothers. The previous application of 13th March 1919, is in my opinion, both in form and in substance an application for execution of a decree, and not merely an application that the decree be transferred to the Collector for execution. The decree was for sale of certain specified items of Immovable property in enforcement of a mortgage. The decree-holder in his previous application prayed that the decree be executed by sale of certain specified items, out of the items included in his decree, and stated that if the decretal amount and interest were not fully satisfied by the sale of those items then he would give particulars of the remaining mortgaged properties for recovery of the unsatisfied balance. He also prayed that the decree be transferred to the Collector for selling the properties specified, as they were ancestral property. The civil Court found that the properties mentioned were ancestral properties and accordingly transferred the decree to the Collector for execution. I think it is clear that this application was primarily and substantially an application for the execution of the decree and, as such, it was rightly made to the civil Court. The additional prayer, that the sale of the ancestral property be conducted by the Collector, does not in my opinion, convert the application into a mere application for the transfer of a decree to another Court for execution. After the proceedings had been transferred to the Collector there was no need for the decree-holder to make any application to the Collector for execution. Under the rules the Collector was bound to issue notice to the parties and to take necessary action without waiting for any application from the decree-holder.

14. The application of 1931 cannot, therefore, be treated as a "fresh" application on the ground that it was an application for execution, whereas the previous application of 1919 was merely for the transfer of the decree to the Collector for execution. Both applications were for execution by sale of the mortgaged property, and in both cases the sale was to be conducted by the Collector, if all the properties were ancestral as alleged. The question remains whether the latter application should be regarded as supplementary or ancillary to the former, or whether it should be regarded as a "fresh" application. I think it should be regarded as supplementary or ancillary. It is important to note that the decree is a decree for sale upon the basis of a mortgage. The decree itself contains full

particulars of the properties to be sold. The properties to be sold were, therefore, known from the outset. There was no need for attachment. The only question was in what order the several properties should be sold. I interpret the application of 1919 in the following sense.

I hold a decree for sale of certain mortgaged properties. Please have the decree executed, through the Collector, by sale of the following properties to start with. If these properties prove insufficient, please realize the balance of the mortgage-money by sale of the remaining properties. I will furnish a further list of the remaining properties if necessary.

15. It is true that the decree-holder did not, in so many words, pray that the remaining properties be sold, if necessary, to realize any balance that might remain unsatisfied, but I think his meaning is perfectly clear. The words "baqiya motalba ke liye", taken in their context, clearly imply that the remaining properties of which he would furnish particulars, if necessary, were to be sold to satisfy a possible deficit. If the previous application is interpreted in this sense then I think the subsequent application, giving particulars of the remaining properties and praying that they be also sold, must be treated as supplementary and ancillary to the previous application. When the Collector returned the proceedings, after selling the properties specified for sale in the first instance, the previous application had not been completely disposed of. No orders had been passed on the prayer for sale of the remaining properties, if necessary. I think it was open to the civil Court, at that stage, to give notice suo motu to the decree-holder to furnish the further list of properties. There was no need for any further application on the part of the decree holder as the previous application was still alive so far as the prayer for sale of the remaining properties was concerned. Considering that the Collector had taken about 11 years to sell the properties specified, it is not surprising that the civil Court was reluctant to take further action of its own motion, but I think it might have done so. On this view the previous application, although consigned to the record room, was only dormant and not extinct. I think the decree-holder was entitled to revive it by his application of 1931 which should be regarded as merely supplementary or ancillary to, or in continuation of the previous application, and not as a "fresh" application within the meaning of Section 48.

16. Numerous rulings have been cited by each party, but none of them seem to be very helpful. The decision of the question before us depends upon the language of the application of 1919 and the facts of the case, and they are materially different from those considered in any ruling which has been cited. In my opinion the application of 1931 is not a "fresh" application within the meaning of Section 48 and execution is not barred by the 12 years" rule of limitation.

Rachhpal Singh, J.

17. This is a decree-holders" appeal arising out of an execution proceeding.

18. In order to understand the controversy between the parties, it is necessary

to mention the facts which have given rise to the present appeal. The decree-holders instituted suit No. 400 of 1912, against the judgment-debtors on the basis of the mortgage-deed and obtained a preliminary decree on 6th April 1913 which was made final on 21st August 1915. The first application for execution was made on 27th November 1916, and was dismissed on 17th January 1919. The second application for execution was made on 13th March 1919, but as the property sought to be sold was ancestral, the decree was transferred to the Collector for execution on 22nd May 1920 where these proceedings continued till 2nd February 1931, that is to say, for about 11 years. After the properties mentioned in the application of 13th March 1919, had been sold by the Collector, the case was returned to the Civil Court and was consigned to the record room. It may be stated here that during the period running from 12th February 1924 to 15th March 1927, the estate of the judgment-debtor was under the management of the Court of Wards and was eventually released without the payment of the debts due by them.

19. On 16th March 1931, the decree-holders made the present application. The judgment-debtors pleaded that it, having been made more than 12 years after the date of the decree, was incapable of execution, in view of the provisions of Section 48, Civil P.C. On behalf of the decree-holders it was contended that the present application was within limitation for the following reasons: (1) The period during which the estate of the judgment-debtors was under the management of the Court of Wards should be excluded, in view of the provisions of Section 52, Court of Wards Act. This period according to calculation was three years, one month and three days, running from 12th February 1924 to 15th March 1927. (2) That under Schedule 3, para. 11, Rule 3, Civil P.C. the whole period during which execution proceedings were pending in the Court of the Collector should be excluded. The learned Subordinate Judge accepted the first contention, but rejected the second. But he came to the conclusion that even if the period during which the estate of the judgment-debtors was under the superintendence of the Court of Wards be taken into account, the application, having been made more than 12 years after the date of the decree, was not within limitation. The contention raised by the decree-holders was that the present application was not a new application for execution, but was merely in continuation of the application made by them on 13th March 1919. The learned Subordinate Judge did not accede to this contention with the result that the application was dismissed. The decree-holders have, come up in appeal against that order.

20. The principle question which was argued in this appeal before us and which is to be determined is whether the application which the decree-holders made on 16th March 1931 is a fresh application or is one in continuation of the old application of 13th March 1919. It is important to remember that the decree which the decree-holders seek to execute was passed on the basis of a mortgage-deed. In their application of 13th March 1919, the decree-holders asked the Court for the sale of certain properties out of the entire mortgaged properties. They prayed that the decree be transferred to the Collector because

the property sought to be sold was found to be ancestral. It was further mentioned in that application that if these properties proved insufficient for the realization of the amount due on the decree, then the decree-holders would give a further list of the other mortgaged properties later. The words used are:

Bad ijrae notice zaed sal muqadma bar sani bagharaz nilam jaedad mauroosi colleatory muntaqil kia jave aur amil nilam saheb karrawai sabiqah par karrawai nilam ke farmawen aur agar jaedad mundarja taliqa se kul motalbah asal wa sud wa karcha na ada ho to baqiya motalbah ke liye dusari jaedad mohfula ka taliqa diya jawega.

21. The Court in which the application for execution had been made, made an inquiry and found that the properties which the decree-holders wanted to be sold were ancestral and therefore the decree was transferred to the Collector under the provisions of Section 68, Civil P.C. for execution. After the sale of those properties which took a very long time, the Collector returned the papers to the Civil Court on 2nd February 1931. The decree-holders contend that because they have made a prayer in the application of 1919 that in case the properties specified in the application prove insufficient for the satisfaction of the amount due to them, they would give a further list of the other mortgaged properties, so the present application was in continuation of the application of 1919 which they were entitled to execute. When an application is made by a decree-holder after the expiry of the period of 12 years from the date of the decree, the Court has to decide whether it is a fresh application or one in continuation of an application already made within time which has been lying dormant. The test is to see whether the character of the fresh application is different from that of the former application, as for instance, where the relief claimed, in the second application, is against properties, or persons different from those mentioned in the former application, the second application will be deemed to be a "fresh application" within the meaning of Section 48, Civil P.C. Where the proceedings under the prior application come to an end, the second application cannot be taken to be in continuation of the prior application.

22. After the consideration of the question, I am of opinion that the present application is not a fresh one, but is one for the revival of the application which the decree-holders made in March 1919. The expression "fresh application" denotes a substantive application for execution and not an application preparatory or ancillary to put the Court in motion for execution. In the case before us the decree-holders in one and the same application made two prayers. A large sum was due to them on foot of a mortgage-decree and considerable property was liable for the payment of the decree money. The first prayer of the decree-holders was that the amount due to them should be realized by the sale of the properties which were; mentioned and specified in the decree. The second prayer was that in case the sale-proceeds proved insufficient to satisfy the decree money, then the decree-holders would ask the Court to proceed against other mortgaged properties of which a list would be given subsequently. The

Court to which this application was made granted only the first prayer and passed no orders as regards the second prayer. It was competent to the Court to have said, if it so wished, to the decree-holders that it was transferring the decree for execution, so far as it related to the property specifically mentioned in the application to the Collector, but that if the decree-holders wished to proceed against the other mortgaged properties, then they should mention those properties in their application or give a list of them immediately. In any case, the Court should have passed an order on the second prayer of the decree-holders. Where an application for execution is made which is not in proper form or is otherwise defective, the duty of the Court is to dispose of it.

23. It can give the decree-holders an opportunity to amend their application or it can reject it. In other words an order disposing of the application must be made. In my opinion, in the present case the Court left the matter open, passed no orders as regards the second prayer of the decree-holder. I would therefore treat it as a case in which an application for execution made by the decree-holders was not disposed of. Where an application has been made in time, but has not been properly dismissed so as to come to a legal termination, it must be taken to be alive though dormant for the time. If an application of this nature is made within a period of 12 years and remains undisposed of, Section 48, Civil P.C., would have no application. It may remain pending for any length of time so long as it is not disposed of. What Section 48 provides for is that no fresh application for execution will be permitted after the expiry of 12 years from the date of the decree. It does not apply to cases in which an application for execution has already been made. In *Maharaj Bahadur Singh v. A.H. Forbes* AIR 1929 P.C. 209 their Lordships of the Privy Council held that:

where an application for execution is, having regard to the nature of the relief sought and other surrounding circumstances, essentially different in character from the previous application which the decree-holder had virtually abandoned, and marks a substantial departure therefrom, it cannot be regarded as a continuation of the execution proceedings initiated by the earlier application, but must be treated as a fresh application for execution within the meaning of Section 48, Civil P.C. 1908, and would be barred by limitation if presented more than 12 years from the date of the decree sought to be executed

24. In *Venkatamma v. Manikkam Nayani* AIR 1915 Mad. 407 it was held that:

an application for execution is to be taken as pending until it is validly disposed of, and therefore where there was nothing to show that an execution petition praying for the execution of a conveyance was either dismissed, or struck off, or otherwise disposed of, it was still pending and that a subsequent execution petition containing the same prayer was only a petition to continue proceedings under the old petition.

25. In *Sant Lal v. Srinivas* AIR 1916 All. 27 two learned Judges of this Court held that:

the question whether an application for execution of a decree is a new application or a revival or continuation of an old one is a simple question of fact and is also a question of substance and not of form.

26. In *Sakina Bibi v. Ganesh Prasad* AIR 1918 Pat. 296 it was decided by the Patna High Court that Section 48 Civil P.C. applied to a fresh application only and that it had no application whatsoever to the case of a revival of an antecedent application for execution which had been in suspense by reason of some bar. Rule 11, Order 21, Civil P.C. lays down the procedure how applications for execution of decree shall be made. The application has to be in writing, in proper form and must contain the various particulars specified in Rule 11, Order 21, Civil P.C. Now I take it that the application of March 1919 was an application for execution containing two prayers, one for sale of the property specified therein and the other for the sale of the remaining mortgaged property, not specified in the application, in case the sale-proceeds proved insufficient to satisfy the mortgage decree. It cannot be said that the application, so far as it related to the second prayer was a mere intimation to the Court and not a prayer for execution. All that can be said against the contention of the decree-holders is that this application was defective, inasmuch as it did not comply with the provisions of Rule 11, Order 21, Civil P.C. But it cannot be said that this omission to comply with those requirements would justify us in saying that it was not a prayer for execution of a decree.

27. In a large number of cases applications for execution are made which are defective in their nature because they do not comply with the provisions or some of the provisions of Rule 11, Order 21, Civil P.C. But it cannot be said that they are not applications for execution because of a defect. As I have already stated in such applications the duty of the Court is either to give an opportunity to the decree-holders for amendment so as to bring their applications in conformity with the provisions of the aforesaid rule or to reject them; but if on a defective application for execution no order is passed, then I take it that it would remain pending. Take the following instance : A decree-holder makes an application for execution of a decree in which all the necessary details which ought to be set forth are given with this exception that the list of the property is omitted. What would the Court do in a case like this? It is clear to me that it will either ask the decree-holder to amend his application or it will dismiss it; but if no order is passed, then there can be no doubt that the application for execution will remain pending. A defective application has to be disposed of according to law. In *Satish Ghandra v. Puma Ghandra Dutt* (1911) 11 O.C. 696 this matter was considered and the learned Judges made the following remarks on this point:

Because it appears to us plain that, when an application for execution is defective, the Court may do one of the two things only, it may, under Order 21, Rule 17, either reject the application or allow the defect to be remedied then and there or at any time fixed by it.

28. In the case before us, according to my view, there was an application by the

decree-holders in respect of the properties other than those specified in the application; but a clear indication was given by them in their second prayer that they also wanted to execute their decree against other mortgaged properties of the judgment-debtors, in case the sale-proceeds proved insufficient. In *Wajihan v. Bishwanath Prasad* (1891) 18 Cal. 462 it was decided that a mere technical irregularity did not vitiate the execution proceedings. The facts of that case were briefly these : A decree had been obtained on the basis of a mortgage and the decree-holder made an application for execution by sale of the mortgaged properties mentioned in the application for execution. That application, however, was dismissed by the Court because the decree-holder failed to deposit talbana as ordered. Later on he made a fresh application, but in that he did not mention the mortgaged properties. It was contended on behalf of the judgment-debtors in that case that the second application was defective. On this point I quote the observations of the learned Judges which are to be found at p. 465 of that ruling:

It is first objected to by Mr. Garth, for the appellant judgment-debtor, that this application is informal and cannot be acted upon inasmuch as it does not expressly state in what manner the decree is to be executed and we are referred to the recent decision of a Full Bench of this Court in the case of *Asghar Ali v. Troylokho Nath Ghosh* (1890) 17 Cal. 631 (F.B.). We find however that though the application for execution before us is not complete in itself so as to show in what manner execution is to be taken out, still it is capable of being acted upon, for it refers to the former application in which the mortgaged properties were set out and it prayed that the decree may be executed by sale of these properties. We think therefore that the objection at most is regarding only a technical irregularity, in form rather than in substance, and that the Court was competent to proceed, taking the former application which is on the record of the suit as part of the application then before it, so as to indicate how the decree should be executed.

29. In the case before us the decree-holders had made two separate and distinct prayers as already mentioned above. Their first prayer was granted. Before the Court could take any further steps as regards the first prayer, it had to ascertain whether the properties sought to be sold were ancestral or not. It held an inquiry and found that the properties were ancestral and therefore it transferred, the decree for execution to the Collector. In my opinion, the Court was fully competent to proceed with the second prayer of the decree-holders after the first prayer had been acceded to. If in an application there are two prayers which the Court is competent to grant and one is granted and the decree is transferred to the Collector for execution, there is nothing to prevent the Court from proceeding to consider the second prayer of the decree-holders, simply because the decree, so far as the first prayer was concerned had been ordered to be transferred to the Collector for execution. Para. 11, Schedule 3, Civil P.C. contains a provision that during the period in which the Collector is exercising powers in respect of judgment-debtor's Immovable property or any part thereof no Civil Court shall issue any process of execution where the Collector has taken action under para.

7, Schedule 3. In a mortgage decree where several properties are liable to be sold, the mortgagee decree-holder is fully competent to say in his application for execution that in respect of some of the properties which are ancestral, the decree should be transferred to the Collector and as regards other properties which are non-ancestral the Civil Court itself should execute it. Similarly it is open to him to say to the Court that for the sale a part of the mortgaged property the decree should be transferred for execution to the Collector and if the sale-proceeds prove insufficient, then the remaining mortgaged property should be sold. If in the case before us the decree-holders had, instead of stating that they would give a further list of the mortgaged properties later on, mentioned all the properties and had asked that at first one lot should be sold and if the sale-proceeds proved insufficient, the second lot should be sold; then it could not have been said that their second prayer was not one for execution and was a mere intimation to the Court to make a fresh application. In my opinion, the second prayer was also an application for execution, though it was defective because of the omission to specify the properties which the decree-holders wanted to be sold later on, in case the sale-proceeds of the properties in respect of which the decree was being transferred to the Collector proved insufficient for payment of the entire decretal amount. If we look to the substance and not to the form, it would appear that the present application is not a fresh application, but is only for the revival of the former application which had remained undisposed of all along. In the application which they have now made, all they ask is that the mortgaged property which remained unsold should be sold as prayed by them in their former application. A mere omission to mention the remaining mortgaged properties in the first application would not make the present application a fresh one. The Court could have ascertained the remaining mortgaged properties by a reference to the previous application which was a part of the record. As I have emphasized above, it was open to the Court to have rejected the second prayer of the decree-holders because of the non-compliance with the provisions of Rule 11, Order 21, Civil P.C. But the Court passed no orders and so according to my view the former application, so far as this prayer was concerned, remained in abeyance. It appears to me that the ruling reported in *Khetpal v. Tilcam Singh*, (1912) 34 All. 396 is not in conflict in any manner with the view that I take. The facts of that case were however different. An application was made on 24th February 1909, to the Court which passed the decree, praying for the transfer of the decree to another Court. The prayer was granted. Then on 23rd March 1909 the decree-holder applied to the other Court for execution when it was found that the decree had become barred by the 12 years" rule of limitation. It was contended that the application for execution to the transferred Court was in continuation of the application made to the Court passing the decree for transfer. This contention was rightly repelled. The learned Judges who decided the case remarked that:

in order that an application may be a continuation of another application, it is necessary that the two applications should be of the same nature.

30. Nor do I think that the Pull Bench ruling reported in *Ghutterput Singh v. Sail Sumari Mull* AIR 1916 Cal. 488 is against the decree-holders. That was a case in which the plaintiff obtained a money decree in the High Court against the judgment-debtors. That decree was subsequently transmitted to the District Court for execution; but was returned by that Court as unsatisfied. Thereafter, another application for execution by arrest and imprisonment of the defendant was made to the High Court on its original side and the returnable date of the order on this application was fixed finally for 12th July 1901. No further steps were again taken until 1st June 1908 when the plaintiffs made another application for execution of their decree by transmission of the same to the District Court and attachment of the defendant's property situate within the jurisdiction of the latter Court. Again no further steps were taken until 18th January 1915, when a fresh application was made for attachment. The learned Judges who decided the case held that the application of 1st June 1908, and the order of 30th June 1908, did not constitute a revivor within Article 183, Schedule 1" Limitation Act. I may state that in that case also the learned Chief Justice stated in his judgment that the substance and not the form must be looked into.

31. The case reported in *Hayatunessa Chowdhurani Vs. Achia Khatun*, appears to be distinguishable. That was a case in which the decree-holder had made an application for execution of a mortgage-decree on 29th June 1920, in which he had mentioned certain properties against which he wanted to proceed. On the 21st August he put in a petition asking for permission to be allowed to add certain properties to the list given in his original application. This prayer appears to have been made after 12 years from the date of the decree and so it was held that it was time-barred. But in the case before us the decree-holders do not seek to add any new properties, but all that he asks is that apart of the mortgaged property which has not been sold as yet should be put to sale. Similarly the case reported in *Mahant Krishna Dayal Gir v. Ml. Sakina Bibi* AIR 1916 Pat. 300 appears to be distinguishable. There the decree-holder had made several applications for execution. One of them was made on 28th July 1911. It was struck off on 29th June 1912, after the decree-holder recovered a part of the decree money. After that another application was made on 6th September 1912, which was dismissed for want of prosecution on 5th December 1912. Then another application was made on 18th July 1913, and it was contended before the Court that this last application was in continuation, of the application of 28th July 1911. The learned Judges rejected this contention. The properties sought to be sold under the last application were not the same as those mentioned in the application of 1911. In the case before us the facts are different. Here a prayer had been made by the decree-holders that they should be allowed to proceed against "other mortgaged properties" in case the sale-proceeds of a part of the mortgaged property proved insufficient for the satisfaction of the decree.

32. I would for the purpose of this case divide the application of 1919 into two parts, one was a prayer that the Court might transfer the execution proceedings relating to a part of the mortgaged property to the Collector. That prayer was

granted. I would treat the other prayer in that application as separate and distinct from the first prayer. I would say that the second prayer in substance was that as soon as it was found by the Court whose duty it was to execute the decree that if the sale-proceeds proved insufficient to realize the amount, it should proceed in respect of the remaining mortgaged property, the list of which would be supplied later on. It was open to the Court to have this prayer amended by asking the decree-holders to mention in it the other mortgaged properties which he wanted to be sold or reject the prayer. Then it could not have been said that the present application was merely in continuation of the former application. But the Court never passed any orders. It must therefore be held that the application of 1919, so far as it related to the second prayer, was not legally disposed of by any order. The order passed by the Court transferring the application for execution to the Court of the Collector in regard to the properties specified in the application did not have the effect of disposing the second prayer in the application. I am therefore of opinion that the application of 1931 is nothing else but an application in continuation of the former application of 1919. The decree-holders inform the Court that as the sale-proceeds have proved insufficient, their prayer contained in the former application for sale of the remaining mortgaged properties and which was not disposed of, should now be taken into consideration. In my opinion therefore the decree-holders are entitled to ask for the execution of their decree by sale of the remaining mortgaged property.

33. I would therefore allow this appeal of the decree-holders with costs, set aside the order passed by the Court below and direct that it should proceed with the execution by taking steps to sell the remaining mortgaged property of which a list has been supplied by the decree-holders.