

(1878) 05 AHC CK 0004

Allahabad High Court

Case No: None

Thakur Prasad

APPELLANT

Vs

Ahsan Ali and Another

RESPONDENT

Date of Decision: May 27, 1878

Citation: (1875) ILR (All) 668

Hon'ble Judges: Turner, O.C.J.; Spankie, J; Pearson, J; Oldfield, J

Bench: Full Bench

Final Decision: Allowed

Judgement

Turner, Officiating C.J., Spankie and Oldfield, JJ.

In the case in which this application is presented, the decree-holder applied for execution of his decree by the attachment of moneys deposited in the Court to the credit of the judgment-debtor. On the 4th June 1877, the Court of First Instance refused attachment on the ground that the decree directed the sale of certain Immovable property for the satisfaction of the sum decreed, and awarded no other relief. The order of the Court of First Instance was affirmed by the lower Appellate Court on the 4th August 1877. The new CPC came into operation on the 1st October 1877. On the 13th November 1877, the decree-holder applied for the admission of a special appeal from the order of the lower Appellate Court on the ground that the decree had been misconstrued. The Judge to whom the application was made referred it to the Full Bench. Two questions are raised in this reference: whether the application is governed by the provisions of the repealed CPC or by those of the existing Code; and if by those of the existing Code, whether the second appeal lies from the order of the lower Appellate Court.

2. The 3rd section of the Code now in force, Act X of 1877, declares that the enactments mentioned in the second schedule in that Act (which includes so much of Acts VIII of 1859 and XXIII of 1861 as had not been theretofore repealed) were thereby repealed, subject to the proviso that nothing in that section contained should affect the procedure prior to decree in any suit instituted or any appeal

presented before that Code came into force. The proviso does not go on to exclude in express terms the operation of the General Clauses Act, but by implication it does exclude the operation of the 6th section of that Act in respect of the procedure after decree in suits or appeals. While then it is not denied that proceeding's in execution of decree initiated after the existing Code came into operation must be governed by the provisions of that Code, the question remains whether such proceedings initiated before the Act came into operation are affected by that law, so that thereafter they must be governed by it, or whether they are not to be prosecuted and brought to a conclusion as if the law under which they were instituted were still in force. By the 6th section of the General Clauses Act it was enacted that the repeal of any Act should not affect any proceedings commenced before the repealing Act shall have come into operation.

3. That the provisions of Section 6 of the General Clauses Act operate on proceedings in execution of decree has been already held by the High Court of Bombay (In the matter of the petition of Rutansi Katanji ILR 2 Bom 148 and we agree with the opinion expressed by the learned Chief Justice, Sir Michael Westropp, that the chapter of the Code which deals with execution of decree is prospective and does not affect proceedings already commenced. We may refer to several sections in support of the view. Section 311 empowers the decree-holder or any person whose property has been sold under that chapter to take objection to the sale on the ground of a material irregularity in publishing or conducting it, but it makes no reference to sales which have taken place under the repealed Code, though the period allowed for such objections under that Code might not have expired when Act X of 1877 came into operation. Section 312 declares orders passed under the preceding section final, but it does not refer to similar orders passed under the repealed Code. Section 283 declares any party affected by an order passed under Sections 280, 281, 282 entitled to institute a suit to establish his right to the property in dispute, but it is silent as to similar orders passed under the provisions of the repealed Code. Lastly Section 588 declares that an appeal shall lie from certain orders "under this Code." Among the orders specified as appealable are some which would be passed after decree, and which, if passed under the repealed Code, would under that Code have been appealable. It is not unreasonable then to conclude that, in abstaining from making provision for cases arising under the repealed Code in the instances to which we have alluded, and in giving prospective effect to the chapter relating to execution of decrees, the Legislature had in view the provisions of the General Clauses Act.

4. However this may be, unless the 6th section of the General Clauses Act is excluded by the Code, and, as we shall presently show, it is not in our judgment excluded, in respect of proceedings in execution, it cannot be disregarded, and its effect is to leave such proceedings initiated before the repealing Act came into force to be dealt with under the provisions of the repealed Code. For the position that the saving of "proceedings commenced" from the operation of a repealing Act extends

also to appeals from such proceedings we find authority in *Ratanchand Srichand v. Hanmantrav Shivbakas* 6 ACJ 166. An appeal is in fact a stage of a proceeding, and if, as it might happen, the right of appeal was taken away by a repealing Act, and a proceeding theretofore appealable converted into a final proceeding, it cannot be doubted that the proceeding would be affected by the alteration of the law. If in such a case it be intended to deprive the parties of the right of appeal, the intention to exclude the operation of Section 6 of the General Clauses Act should appear clearly in the repealing Act.

5. For the reasons we have stated we arrive at the conclusion that proceedings in execution of decrees instituted under Act VIII of 1859 are to be governed by the provisions of that Code, and that an appeal should be entertained from all orders passed in such proceedings which under the provisions of that Act were appealable. But it has been suggested that, inasmuch as by Section 647, Act X of 1877, the procedure in that Act prescribed is to be followed, so far as it can be made applicable in all proceedings other than suits and appeals, the provisions of the last paragraph of Section 3 declaring that nothing in the Act contained shall affect the procedure prior to decree in any suit instituted, etc., apply also to proceedings in execution, so that the procedure in such proceedings (whether instituted before the passing of the Act or not) subsequently to the formal order of the Court wherein the result of the proceeding is embodied is governed by the provisions of Act X of 1877.

6. That proceedings in execution of decree are among the proceedings other than suits or appeals to which Section 647 applies may be admitted. The Code, following the usage in this country, does not treat appeals as mere stages in a suit; and similarly, under Act VIII of 1859, proceedings in execution of decree have in accordance with the same usage been treated, not as stages in a suit, but as miscellaneous proceedings. The provisions of the analogous section in the former law, Section 38, Act XXIII of 1861, were held by this Court applicable to proceedings in execution of decree, * on the same ground on which it must be held that the provisions of Section 647 are applicable to such proceedings, namely, that otherwise no procedure is provided for such proceedings. It does not, however, follow from the admission that the provisions of Section 647 are applicable to proceedings in execution of decree, that; we must be compelled to the conclusion that the last paragraph of Section 3 is also applicable to the proceedings, or to all the proceedings, to which Section 647 applies. While had such been the intention of the Legislature, it could have been made to appear clearly by the introduction of a few words in Section 3, we find cogent evidence to the contrary in the prospective character of the sections relating to execution of decree to which we have already adverted. We would then reply that the last paragraph of Section 3 is not to be extended to proceedings in execution of decree. Should, however, our opinion on this point be erroneous, it would be necessary to consider what are the orders passed in execution of decree referred to in Section 588, Clause (j), ♦ and whether other orders passed in execution of decree are appealable under the Code save

such as are referred to in Section 588, Clause. (j); and inasmuch as these questions are necessarily raised in a number of references which are now before the Court arising out of proceedings instituted after the Act came into operation, it will be convenient to dispose of them on the reference now before us. By the provisions of the first paragraph of Section 588 read with Clause (j) appeals are allowed from orders u/s 244 as to questions relating to the execution of decrees of the same nature with appealable orders made in the course of a suit. The first observation that arises on this section is that, if, as we have field, the provisions of Section 647 apply to proceedings in execution of decree, Clause (j) is unnecessary, unless it was intended to restrain the larger right of appeal than would be given by Section 647. Yet unless we import a limitation which the terms do not warrant, the clause declares no more than is implied in Section 647, for, u/s 647 the procedure prescribed by the Act is to be followed in proceedings other than suits, and consequently the orders passed in such proceedings would be open to appeal when of the same nature as appealable orders made in the course of a suit. It is then argued that the term "orders" made in the course of a suit is to be restricted to orders passed in the course of a suit prior to decree, and that, inasmuch as the Code distinguishes between appeals from orders and appeals from decrees, the Court is constrained by the declaration that an appeal shall lie from those orders and no other such orders, to hold that no orders passed u/s 244 are open to appeal save such as are of the same nature with appealable orders passed in the course of a suit prior to decree.

7. On referring to Section 244, it will be seen that all the questions therein mentioned are to be determined by the "order" of the Court. They embrace not only the minor questions which may arise prior to determination of a proceeding, but the determination of a proceeding itself, which may be a matter of the utmost importance to the parties. It is scarcely to be supposed that no appeal would be provided from such orders, while an appeal is given from interlocutory orders of comparatively minor importance.

8. Again, orders passed after decree as well as orders passed before decree may be properly termed orders passed in the course of a suit, and indeed the decree itself is in one sense an order, and is so defined in the Code. By adopting the construction which has been urged, we import a limitation which, as we have said, the terms of the clause do not warrant. We are then compelled to the conclusion that the provisions of Section 588 do not embrace all the directions on the determination of proceedings which are termed in the Code "orders," and that, in declaring that an appeal should lie from the orders therein mentioned and from no other such orders, we must understand orders of a similar nature to those specified, and not to all "orders" that might be passed under the Code. The expression "orders" u/s 244 as to questions relating to execution of decree of a similar nature to appealable orders made in the course of a suit would be awkward if it were intended to apply to orders determining such questions; and again orders made in the course of a suit

may fairly be understood as not embracing the order which is also the decree. While then the provisions of Clause (j) allow an appeal from the orders made in the course of execution proceedings where an appeal is allowed from similar orders passed in the course of a suit, the provisions of Section 647 declare that the procedure prescribed by the Act shall be followed (so far as it is applicable) in all proceedings other than suits and appeals. It follows that an appeal will lie in such proceedings from the order which is analogous to a decree in a suit.

9. The definition of the term "decree" supports the conclusion at which we have arrived. "A "decree" means the formal order of the Court in which the result of the decision of the suit or other judicial proceed/no is embodied." Applying this definition to proceedings in execution of decree, we feel ourselves at liberty to hold that the formal order of the Court in which the result of the proceeding is embodied is a decree within the meaning of that term in the Code. It is therefore appealable in all cases in which a decree is appealable, and the procedure must in such cases be governed by the provisions of the chapters which relate to appeals from decrees.

10. It is true that the definition of the term "decree" is so large as to embrace some of the orders which are appealable u/s 588, but we are not on that account at liberty to reject it. It is also true, as we have shown, that Clause (j) is, on our construction of Section 647, superfluous, but the clause does not appear in any draft of the Code submitted to the Council save the last Bill, No. 5, and it may be that the effect of Section 647 escaped attention.

11. We reply to this reference that the application is governed by the provisions of the repealed Code, but that, if it be governed by Act X of 1877, an appeal would lie from the order.

Pearson, J.

12. The appealed order falling within the definition of a decree contained in Section 2 of Act X of 1877, is, in my opinion, appealable u/s 584 of that Act.

13. The appeal appears to be admissible also under the repealed Act VIII of 1859, under the provisions of Section 6 of Act I of 1868.

*In the matter of the petition of Hnrshankar Parshad ILR 1 All 178 Sec also Gaya Parshd v. Bhup Singh ILR 1 All 180.

◆Orders appealable.

[Section 588;--An appeal shall lie from the following orders under this Code and from no other such orders:

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(j) orders u/s 244, as to questions relating to the execution of decrees, of the same nature with appealable orders made in the course of a suit.

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