

(1878) 01 CAL CK 0007

Calcutta High Court

Case No: None

Sobha Bibee

APPELLANT

Vs

Mirza Sakhamut Ali
and Others

RESPONDENT

Date of Decision: Jan. 4, 1878

Hon'ble Judges: White, J; Mitter, J

Bench: Division Bench

Judgement

White, J.

The appellant in this case applied, u/s 208 of the Code of 1859, for leave to execute a decree, which she alleged she had purchased at an auction sale. The Court below, taking into consideration a certain judgment that had been passed by this Court in a suit to which the present appellant was a party, has decided that she is not entitled to take out execution of the decree, and, accordingly, has refused her application.

2. Now, by the 364th section of the Code, no appeal lies against this order, unless an express provision can be found in the Code which allows of an appeal. The only express provision is contained in Section 283 of the Code. This section has been repealed by Act XXIII of 1861, and Section 11 of the latter Act has taken its place. Hence, unless the appellant has a right of appeal u/s 11 of Act XXIII of 1861, she cannot carry the case further so far as the present suit is concerned. The only part of Section 11 which we need consider is that which directs that questions "arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree and not by separate suit, and the order passed by the Court shall be open to appeal." It is perfectly clear that Sobha Bibee, the appellant, is not technically a party to this suit. She purchased, according to her statement, the decree on the 16th June 1870, and on the 5th July she applied to be made a party, but her application was refused.

3. It is argued, however, upon the authority of *Hurro Lal Dass v. Soojawut Ali* 8 W.R. 197 that although she has not been made a party to the suit, she is yet within the meaning of the 11th section, because she has by her purchase become the assignee of the decree, and as such is entitled to be made a party. We think that the doctrine laid down in *Hurro Lal Dass v. Soojawut Ali* 8 W.R. 197 if it be not taken to be overruled by the recent decision of the Privy Council in *Abidunnissa Khatoon v. Amirunnissa Khatoon* compare Section 244 of the CPC (Act X of 1877) must at least be considered as confined to cases in which there is no dispute as to the assignment of the decree having taken place, or as to the person who is the assignee. Their Lordships in dealing with the case before them, which in principle is substantially the same as the present, and in considering the judgment of the late Chief Justice of this Court, expressed their concurrence with the view which he had taken, viz., that the 208th Section of Act VIII of 1859 was not intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. That being so, it is clear that where such a contest existed, a party claiming to be the assignee of the decree would not be entitled to succeed in an application for execution made u/s 208 of the Code, and for the same reason would not be entitled to be made party to the suit. In no sense therefore could he be considered as coming within the meaning of Section 11 of Act XXIII of 1861. That there is a serious contest in this case as to the party who is the real transferee of this decree there cannot, we think, be a shadow of doubt, for it appears upon the proceedings that the purchase was originally made by a mukhtear benami for somebody else. Who that somebody else is, whether the present applicant or not, has been the subject of litigation, and is not yet finally determined. The certificate of sale was issued in the name of Fukeerunnissa, one of the defendants. She has tried to establish her title, and has failed. Her case came before this Court in 1875, in a suit to which the present applicant was a party, and this Court whilst negating Fukeerunnissa's claim pronounced a very strong opinion that the present appellant had no title to be considered a bond fide transferee of the decree, but that a third person was the real purchaser. It is not necessary to determine now who is the real assignee of the decree. It is sufficient to say that it is a question which admits of very considerable doubt.

4. It appears to us, therefore, that the appellant who has neither been made a party to the suit nor is entitled to be made a party, cannot in any view of the case be treated as coming within the purview of Section 11. That being so by force of the 364th section of the Code of 1859, she has no right of appeal, and her case, so far as the proceedings in this suit are concerned, must rest where it is left by the lower Court.

5. The appeal, therefore, will be dismissed with costs.

Mitter, J.

6. I am also of the opinion that, in this case, Sobha Bibee has no right of appeal. She applied u/s 208, Act VIII of 1859, as a transferee, to execute a decree which was obtained by a third party, and which she alleged she had purchased in execution of a decree against that third party. For reasons stated in the judgment of the lower Court, her application to execute the decree as a transferee u/s 208 of the Procedure Code of 1859 has been refused. The question before us is, whether this order is open to appeal u/s 11 of Act XXIII of 1861, as it has been pointed out by my learned brother. Section 364 of the Code^[1] distinctly prohibits an appeal, unless there is an express provision in that Code. The contention of the appellant is, that that express provision is to be found in the section mentioned above, viz., Section 11 of Act XXIII of 1861. The Privy Council, in the case already quoted, have distinctly decided against that contention. They, after referring to the fact that the case before them was not a case in which the Court executing the decree should have entertained, an application u/s 208, observe, that "they are further fortified in this view by the consideration that, u/s 364 of this Act, no appeal would lie from any judgment or decision given in a proceeding u/s 208." They have distinctly, therefore, held in that case that no appeal lies from any judgment or decision given in a proceeding u/s 208 of Act VIII of 1859. One of the reasons given by their Lordships for coming to this conclusion is, that in no sense is an applicant who applies to be put upon the record on the ground that he has acquired a title to the decree by transfer a party to the suit unless his application is actually granted. Referring to the position of the applicant in that case, they say, "he was not on the record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree, but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit." The same observations will apply here. An alleged transferee by merely applying for execution of the decree does not constitute himself a party to the suit.

7. I am, therefore, of opinion that, in this case, the judgment of the lower Court u/s 208 of Act VIII of 1859, is not open to appeal.

[1]

No appeal from order

passed after decree, and

relating to the execution

thereof except as provided, Section 12.)

Section 364: No appeal shall lie from any order

decree and relating to the execution thereof except

before expressly provided. (Amended by Act XXIII of 1861)