(1868) 03 CAL CK 0002

Calcutta High Court

Case No: None

Hanuman Prasad		APPELLANT
	Vs	
Ajodhya Prasad		RESPONDENT

Date of Decision: March 10, 1868

Judgement

L.S. Jackson, J.

In the present case, I am concerned to say, with the greatest deference for the opinion of the Chief Justice and of my learned brethren, who are unanimous, that I feel compelled to adhere to the opinion I have long entertained, and which I expressed when referring the case for the determination of a Full Bench. The single question before us is, whether, in respect of an order made by a Court executing a decree under the authority of Section 243 of the Code of Civil Procedure, an appeal lies or does not lie to the Superior Court; and the right of appeal, in such a case, is supposed to be given by Section 11, Act XXIII. of 1861. My answer to the question shortly is, that the right of appeal conferred by Section 11 of Act XXIII of 1861[3] is exactly co-extensive with the authority to determine particular questions conferred on Courts of original jurisdiction by the same section. If, therefore, I could suppose that the Principal Sudder Ameen in this case had at all derived his competency to make the order granting time to the judgment-debtor from Section 11 of Act XXIII, that is to say, that in making the order he was merely, under the general terms of that section, determining a question arising between parties to the suit and relating to the execution of the decree, I should have no difficulty whatever in coming to the conclusion that an appeal was given; in fact I should be constrained by the terms of the section to hold that there must be an appeal. But the order in the present case was made by the Principal Sudder Ameen, not by any means u/s 11, or by virtue of any authority conferred by that section, but under the express provisions of Section 243 of the Procedure Code itself.

2. For the purpose of my argument, we may look on Section 11 as if it had been originally passed as a part of the Procedure Code, and it may fall into the place of the original Section 283, which it was intended to replace. It appears to me that in

regard to the admissibility or otherwise of appeals from orders passed in execution of decrees, we must be guided by the distinct provision contained in Section 364 of the Procedure Code,[4] which declares that "no appeal shall lie from any order passed after decree, and relating to the execution thereof, except as is hereinbefore expressly provided;" that is to say, that where an order is made after decree, by virtue of any provision of the Procedure Code antecedent to Section 364, we are merely to see whether the section of the Act provides an appeal or not; and, accordingly, several sections relating to such orders do expressly authorize an appeal, and there are other sections which are silent as to appeals. Where they are silent, of course no appeal will lie. It seems to me, consequently, that all that we have to do is to enquire whether the order made is made under one of the sections which provide an appeal, or under one of the sections which are silent or expressly exclude appeals. Are we, then, to look for the present order in Section 283 of Act VIII of 1859, or in Section 11 of Act XXIII of 1861, or elsewhere? If u/s 283,[5] or u/s 11, there is clearly an appeal; but if u/s 243, which gives no appeal, I fail to see how we can do otherwise than apply the provision of Section 364, which excludes an appeal.

3. Something was said as to the inconvenience which might arise if appeals were not allowed in cases of this description.

4. That has always seemed to me an argument of very doubtful admissibility, but in point of fact it would be impossible to admit appeals in all cases where inconvenience might arise if there was no appeal. It has been said that by an order u/s 283 the Principal Sudder Ameen might make an order deferring the payment of a debt for 20 years; but, in like manner, he might in any suit appoint a day for fixing the issues distant 20 years, and as great inconvenience would arise in the one case as in the other, there would be no appeal as to the order postponing the fixing of the issues, but the party would have to wait for the final decree, and might then object to the order (Section 363, Code of Civil Procedure.)[6] In like manner, the Principal Sudder Ameen might frame an issue which the parties would be obviously unable to support by proof, and he might then give to the plaintiff unlimited time to adduce his evidence. I only give these instances by way of illustration as bearing upon the argument that an appeal must he, because if do appeal be allowed, inconvenience would result. It may be added that an argument of this kind always proposes to sacrifice the maximum of convenience to the minimum of inconvenience, for surely it must be assumed that in the great majority of cases where a discretion is allowed, the Courts will give a proper and reasonable order, and it seems far better that such order should be undisturbed than to open a door for interference with all, by way of providing against a few orders which might possibly be made under unusual circumstances. It is with very great regret that I differ from my learned brethren; but having considered the question very attentively, I feel I should not be doing right if I were to surrender the opinion I have deliberately formed to the opinions of my colleagues, however great my respect for them may be.

Sir Barnes Peacock, Kt., C.J.

5. It appears to me that an appeal does lie in the case. Section 243 of Act VIII of 1859, speaking of executions, says, that "when the property" attached shall consist of land, if the judgment-debtor can satisfy the Court that "there is reasonable ground to believe that the amount of the judgment may be" raised by the mortgage of the land, or by letting it on lease, or by disposing, by private sale, of a portion of the land, or of any other property belonging to the judgment-debtor, it shall be competent to the Court, on the application of the judgment-debtor, to postpone the sale for such period as it may think proper, "to enable the judgment-debtor to raise the amount." The discretion, which by this section was vested in the Court executing the decree, was a very wide one, and one in the exercise of which the Court might easily fall into error, and by which the execution-creditor might sustain very great damage.

6. Section 364 enacted that "no appeal shall lie from any order passed after decree and relating to the execution thereof, except as hereinbefore expressly provided." An order made u/s 243 clearly fell within the provisions of "Section 364, and was not appealable, no express provision having been made by that Act for giving an appeal. Section 243 was silent as regards an appeal, and the words of Section 283 did not give an appeal. There was no other section in Act VIII by which an appeal was given in such a case. Act XXIII of 1861 was passed for the purpose of amending Act VIII of 1859. It recited that it was expedient to amend the Act, but it did not state in what respects it was expedient to amend it. Section 283 of Act VIII of 1859 was repealed. A new Section (11) was inserted, and it was declared that Act XXIII of 1861 should be read and taken as part of Act VIII of 1859. Section 11 of Act XXIII of 1861 contained the following words, "and any other questions arising between the parties to the, suit, in which the decree was "passed, and relating to the execution of the decree," which were not in Section 283, Act VIII of 1859; and by reason of the insertion of those words, the questions referred to by them, as well as the other questions which had been provided for by Section 283, were directed to be determined by order of the Court executing the decree, and not by separate suit, and the order of the Court was expressly made subject to appeal.

7. The question, whether the sale of land attached in execution shall be stayed under the provisions of Section 243, or not clearly comes within the meaning of the words to which I have referred; and which were, for the first time, used in Section 11, Act XXIII of 1861. Such a question, when determined by the order of the Court executing the decree, comes within the words" and the order passed by the Court shall be open to appeal." The importance of the question to be determined u/s 243 would be no ground for holding that an appeal lay from ft, but it is an important matter to be considered when it is contended, that the question, although falling within the words of Section 11, is to be excluded from its provisions.

8. There is considerable force in the argument of Mr. Justice Jackson. His argument is, that section 11 is not a Section merely for the purpose of giving an appeal, but for the purpose of referring the determination of certain questions for the decision of the Court executing the decree with an appeal against the decision when passed. But when we come to look narrowly to Section 283, which, was repealed, and to Section 11, Act XXIII of 1861, which was substituted for it, I cannot help thinking that the insertion of the new words in Section 11, which were not in Section 283, was quite as much for the purpose of giving an appeal in the case of all orders, determining questions arising between the parties in the suit and relating to the execution of the decree, as for the purpose of referring the determination of the questions to the Court of execution. For instance, there was no necessity to enact that all questions regarding the amount of mesne profits, which were reserved for adjustment in the execution of the decree, should be determined by order of the Court executing the decree; and many other questions of a similar nature might be put. I think one of the amendments intended by the insertion of those words, was to give an appeal from decisions on all questions which were included in the words newly introduced.

9. If, instead of mixing the whole thing up together in one section and in one sentence, the provisions had been separated, the point would have been very clear. If, instead of saying" and the order passed by the Court shall be open to appeal, "the section had said, "and any order passed by the Court arising between the parties to the suit, and relating to the execution of the decree shall be open to appeal," no question could have arisen as to the construction of the section. If the Legislature had not intended to give an appeal in cases similar to that now under consideration, I think they would have said" and any other questions than those which by this Act or by Act VIII of 1859 have been expressly referred for the decision of the Court of execution."

10. The case falls within the words of the section. It is one, amongst many others, in which, I think, it is important that there should be an appeal, and in which I think that it was the intention of the Legislature to give an appeal by the insertion of the words in Section 11, although the section is not very aptly worded, either as regards the direction that the questions mentioned in the section should be determined by the Court executing the decree, or as regards the questions in respect to which it was intended to give an appeal.

Seton-Karr, J.

11. I am of the same opinion as the learned Chief Justice. Four cases have been quoted as bearing directly on the point referred to us : Bhubanmayi Debi v. A. Mooty, 1 W.R. (M. A.,) 11. Thakur Chandra v. Chowdhry Choti Singh Mar., 261. Bisram Singh v. Indrajit Kunwar 2 W.R. (M.A.,) 49. Girijanand Upadhya v. Rati Raman Upadhya 8 W.R. 136. In the first of these cases, the opinion appears to have been arrived at without argument or discussion. In the next two cases, I was one of the

division Bench which passed the orders, which have made this reference necessary. In the first of these cases, the appeal was preferred against an act done by a manager, who had been appointed u/s 243, Act VIII of 1859, and we held that Section 11, Act XXIII of 1861, was not meant to apply to acts done by a person so appointed. In the second case we certainly did hold that an appeal would lie u/s 11, but as between parties to the suit and to the execution. The last case quoted is certainly in conflict with our opinion, but looking to the very broad and general terms of Section 11, Act XXIII of 1861, and also to the hardship which might be caused if there were no redress against unjust or illegal orders passed u/s 243 of Act VIII of 1859, I am of opinion that it was the intention of the Legislature that an appeal should lie.

Phear, J.

I agree in the decision of the Chief Justice, and the arguments by which he has supported it.

Macpherson, J.

I also concur with the Chief Justice.

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[1]When the property attached consists of debts or immoveable property, a manager may be appointed.

Court may postpone sale of land if satisfied that amount of judgment may be raised by mortgage, etc.

[Sec. 243:--When the property attached shall consist of debts due to the party who may be answerable for the amount of the decree, or of any lands, houses or other immoveable property, it shall be competent to the Court to appoint a manager of the said property, with power to sue for the debts, and to collect the rents or other receipts and profits of the land or other immoveable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits, or receipts, towards the payment of the amount of the decree and costs; or when the property attached shall consist of land if the judgment-debtor can satisfy the Court that there is reasonable ground to believe that the amount of the judgment may be raised by the mortgage of the land, or by letting it on lease, or by disposing by private sale of a portion of the land or of any other property belonging to the judgment-debtor, it shall be competent to the Court, on the application of the judgment-debtor,, to post-none the sale for such period as it may think proper to enable the judgment-debtor to raise the amount.]

[2]Sudder Court may call for record of Lower Appellate Court, and set aside its decision, though no appeal shall lie to the Sudder Court.

[Sec. 35:--The Sudder Court may call for the record of any case decided on appeal by any Subordinate Court in which no further appeal shall lie to the Sudder Court, if such Subordinate Court shall appear in hearing the appeal to have exercised a jurisdiction not vested in it by law, and the Sudder Court may set aside the decision passed on appeal in such case by the Subordinate Court or may pass such other order in the case as to such Sudder Court, may seem right].

[3]How questions regarding the amount of mesne profits and interest and sums paid in satisfaction of decrees, etc., are to be determined.

[Sec. 11:--All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution of the decree, of any mesne profits or interest which may be payable in respect of the subject-matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other 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- Provided that if upon a perusal of the petition Of Appeal and of the order against which the appeal is made, the Court shall see no reason to alter the order, it may reject the appeal, and it shall not be necessary in such case to issue a notice to the respondent before the order of rejection is passed.]

[4]No appeal from order passed after decree, and relating to the execution thereof except as provided.

[Sec. 364:--No appeal shall lie from any order passed after decree and relating to the execution thereof except as is hereinbefore expressly provided. (Amended by Act XXIII, 1861, S. 12.)]

[5]How questions regarding amount of mesne profits and interest, and sums paid in satisfaction of decree, are to be determined.

[Sec. 283:--All questions regarding the amount of any mesne profits which by the terms of the decree may have been reserved for adjustment in the execution; of the decree, or of any mesne profits or interest which may be payable in respect of the subject matter of a suit between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, 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. (Repealed by Act XXIII. 1861. S. 1.)]

[6]No appeal from order passed before decree, but error or defect therein may be set forth as an objection if the decree be appealed against.

[Sec. 363:--No appeal shall lie from any order passed in the course of a suit and relating thereto prior to decree; but if the decree be appealed against, any error, defect, or irregularity in any such order affecting the merits of the case or the jurisdiction of the Court, may be set forth as a ground of objection in the memorandum of appeal.]