

(1866) 02 CAL CK 0008

Calcutta High Court

Case No: None

In Re: J. Dacosta

APPELLANT

Vs

RESPONDENT

Date of Decision: Feb. 13, 1866

Judgement

Sir Barnes Peacock, Kt., C.J.

It is clear that we cannot, under the general powers vested in the Court by the Letters Patent, interfere by way of motion, and do indirectly that which we cannot do directly by way of appeal. Nor can we interfere in this case as a Court of Revision, under s. 35 of Act XXIII of 1861, or as a Court of Appeal, under s. 12 of that Act. The Judge was right in holding that he had no power to interfere with the order of the Sudder Ameen setting aside the sale under the execution. By s. 364 of Act VIII of 1859, it was enacted that no appeal should lie from any order passed after decree and relating to the execution thereof, except as therein-before expressly provided. There was no express provision in the Act which would enable the Court to deal with a case like the present. Act XXIII of 1861 did not repeal s. 364, but, by s. 11, enacted that any questions, arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, should be determined by order of the Court executing the decree, and not by separate suit, and that the order passed by the Court should be open to appeal. This is a question not arising between the parties to the suit, but between the debtor and a third party, who claims as purchaser under an execution. It occurred to me at first that s. 12 of Act XXIII of 1861 provided for this case. But when I considered the words "provided the application be preferred within ninety days from the date of the passing of this Act," it appeared clear that the intention of s. 12 was to provide only for cases in which orders had been made before the passing of the Act. That section says:-- "An appeal from an order passed in execution of a decree, which shall have been rejected as inadmissible under s. 364 of Act VIII of 1859, or which would have been inadmissible before the passing of this Act, may be admitted on an application in writing to the Court which rejected the appeal, or by which the appeal, had it been admissible before the passing of this Act, would have been cognizable, provided the application be preferred within ninety

days from the date of the passing of this Act." By s. 364 of Act VIII of 1859, it was expressly enacted that an appeal should not lie from an order relating to the execution of a decree. S. 11 of Act XXIII of 1861 applied only to future cases. The words are "shall be determined by order of the Court executing the decree;" and "the order passed by the Court shall be open to appeal." And s. 11 applied only to questions between the parties to the suit. It appears to us that s. 12 does not apply to any order made after the passing of Act XXIII of 1861, and that the words "which would have been inadmissible before the passing of this Act" may be admitted to apply to cases of orders made before the passing of Act XXIII of 1861. If the object of that section had been to give an appeal in cases of orders made subsequently, the words "provided the application be preferred within ninety days from the date of the passing of this Act" would not have been used.

2. We have carefully gone through the Charter, and there is nothing in it which induces the Court to think that it has any power to give relief to the parties. The Court cannot make any rules providing for cases like the present; for if the parties are precluded from appealing by s. 364 of Act VIII of 1859, which has not been repealed, an order giving a right to apply by motion would be contrary to the provisions of the Act. We cannot consider in this place whether a remedy ought to be provided by the Legislature. Sitting judicially, we cannot recommend the Governor-General in Council to amend the law.

⁽¹⁾See In the matter of the petition of Doorgachurn Sirkar, 2 B.L.R., A.C., 165; Ajonnisia Bibi v. Surja Kant Acharj, 2 B.L.R., A.C., 181; In the matter of the petition of Maharajah Dhiraj Mahtab Chand Bahadur, 2 B.L.R., A.C., 217; [Mirhabib Sobhan Vs. Mahendra Nath Roy](#) ; [Amra Nashya Vs. Gagan Shutar](#) ; [Narayani Dayi Debi Vs. Chandi Charan Chowdhry and Others](#) ; In the matter of the petition of Sankar Dobey, 4 B.L.R., A.C., 65; Hardayal Mandal v. Tirthanand Thakur, 4 B.L.R., App., 29 [Asrafannissa Begum Vs. Syad Inaet Hossein](#) ; In the matter of the petition of Hani Umasundari Debi, 5 B.L.R., App., 29; Maharaja Dhiraj Mahtab Chand Bahadur v. Shagor Kundu, 5 B.L.R., App., 91; In the matter of John Thompson, 6 B.L.R., 180; Tarini Charan Mookerjee v. Raja Purna Chandra Roy, 6 B.L.R., 717; Saris Chandra Gupto v. Srimali Shashi Mala Gupti, .6 B.L.R., 721; Kali Charan Gir Gossain v. Bangshi Mohun Das Baboo, 6 B.L.R., 727; In the matter of the petition of Srimati Nassir Jan, 7 B.L.R., 144; and In the matter of the petition of Mothuranath Chuckerbutty, 9 B.L.R., 354.