

BEFORE A FULL BENCH.

1876
May 11.

(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

IN THE MATTER OF THE PETITION OF HARSHANKAR PARSHAD.

Act VIII of 1859, s. 338—Act XXIII of 1861, s. 38—Execution of Decree—Appeal—Miscellaneous Proceedings.

Pending the determination of the appeal against an order passed in execution of decree, the appellate Court has power, under s. 338, Act VIII of 1859, and s. 38, Act XXIII of 1861, to stay execution (1).

This was an application to the High Court by the judgment-debtor for the postponement of a sale in the execution of a decree pending the determination of a miscellaneous regular appeal to the Court against the order of the Court of first instance refusing to postpone the same. The application was referred to a Full Bench by the Court (Pearson, J.) the order of reference being as follows :—

This application is stated to be preferred under the provisions of s. 338, Act VIII of 1859, a section which refers to the subject of staying the execution of decrees under appeal. There is no appeal pending in this Court against the decree which is in course of execution. I am, therefore, of opinion that s. 338 is *primâ facie* inapplicable to the present case. Whether it can be held to be applicable under s. 38, Act XXIII of 1861, is a question which I refer to the Full Bench, as I am informed that the practice of the Court in dealing with applications of the nature of the present is not uniform. To allow the present application would in effect be to allow the appeal beforehand.

The *Junior Government Pleader* (Babu Dwarka Nath Banarji), for the petitioner.

(1) The following sections of Act VIII of 1859 have been held applicable to proceedings in execution of decree—

section 6, see next case.

section 110, *Rajpal v. Chooramun*, H. C. R., N.-W. P., 1872, p. 10.

section 119, *Sedul Pershad v. Mahomed Kureem Khan*, H. C. R., N.-W. P., 1872, p. 164.

section 170, *Syud Deshan Hossein v. Khodeja*, 8 W. R., 64.

section 372, *Tara Chand Ghose v. Anand Chandra Chowdhry*, 2 B. L. R., A. C. 110; S. C. 10 W. R., 450.

section 378, *Nârâyambhai v. Gangâkrishna*, 4 Bom. H. C. R., A. C., 87.

See, however, the case of *Jadoo Monce Dossee*, 11 W. R. 494.

The opinion of the Full Bench was as follows:—

Proceedings in execution of decree would not, in our opinion, ordinarily fall within the term “miscellaneous proceedings.” They should be regarded rather as stages in the suit or proceeding in which the decree or order under execution was passed; whereas by miscellaneous proceedings we should understand ordinarily those applications commenced by petition, and not by plaint, of a less formal character than suits, and generally if not universally calling on the Court to exercise special powers conferred on it by the legislature, such as applications for certificates to collect debts, applications for probate or letters of administration, applications for appointment of guardians, &c.; and possibly also the term miscellaneous proceedings may also be applied with propriety to those proceedings which the Court is empowered to institute of its own motion, such as proceedings for the institution of prosecutions in certain cases.

But unless we hold that the term ‘miscellaneous proceedings’ in s. 38 has a wider significance, and applies to all proceedings for which no special provision is made, the Court appears to be left without powers which are necessary to enable it to deal with such proceedings. It would have no power to deal with them in default of appearance; it would have no power to enforce the attendance of witnesses; and there are no directions as to the form of the order nor as to the form of appeal from an order passed in such proceedings in cases in which an appeal lies (1). We would, therefore, read the term in this section as embracing all proceedings, not being regular suits or appeals, for which no procedure is expressly provided, and in that sense it embraces proceedings in execution of decree (2). In support of this contention, it may be mentioned that, in mofussil Courts, proceedings in execution have been treated as falling within the class

(1) The section gives no right of appeal in such proceedings—see *Hureenath Koondoo v. Modhoo Suondan Saha*, 19 W. R., 122.

(2) The following, in addition to proceedings in execution of decree, have been held to be “miscellaneous proceedings” within the meaning of s. 38, Act XXIII of 1861—

Proceedings under s. 246, Act VIII of 1859—*Bapu v. Lakshuman Baji*, 19

Bom. H. C. R. 19.

Enquiries by Civil Courts under s. 171, Act XXV of 1861, corresponding to s. 471, Act X of 1872—The case of the *Collector of Tirhoot*, 14 W. R. 390.

Applications to the Bombay High Court for the exercise of its extraordinary jurisdiction under Bombay Regulation II of 1827, s. 5, cl. 2—

The petition of *Nagappa*, 5 Bom. H. C. R., A. C. 215.

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of "*mutafarrikdt*," or miscellaneous proceedings or cases, as opposed to "*nambari*," or regular suits, and appeals from orders passed in proceedings in execution have up to the present time been filed as miscellaneous appeals. We are, therefore, of opinion that the Court had power to stay execution under the circumstances stated in the reference.

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GAYA PARSHAD (DECREE-HOLDER) v. BHUP SINGH AND OTHERS
(JUDGMENT-DEBTORS.)

*Act VIII of 1859, s. 6—Act XXIII of 1861, s. 33—Execution of Decree—
Miscellaneous Proceedings—Transfer.*

A District Court is competent, under s. 6, Act VIII of 1859, and s. 38, Act XXIII of 1861, to transfer to its own file proceedings in execution of decree pending in a Court subordinate to it (1).

The District Judge of Mirzapur was informed by the Subordinate Judge that a person applying in his Court for the execution of a decree was a person to whom he owed money, and that he considered himself precluded by that fact from entertaining the application. The District Judge consequently transferred the case to his own file by an order purporting to be made under s. 25, Act VI of 1871, and eventually rejected the application.

On appeal to the High Court by the decree-holder it was contended that the District Judge was not competent to transfer the case.

The Court (Pearson and Oldfield, JJ.), observing that the Subordinate Judge was not precluded from executing the decree himself by the provisions of s. 25, Act VI of 1871, and that that enactment contained no provisions enabling a District Judge to call up and place on his own file a case of execution of decree pending on the file of a subordinate Court, referred the following question to a Full Bench, *viz.*—

"Whether he was competent to do so under the terms of s. 6, Act VIII of 1859, or s. 38, Act XXIII of 1861, or otherwise?"

(1) See preceding case, p. 178, note (1).