

## FULL BENCH REFERENCE.

*Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Miller, Mr. Justice Wilson, Mr. Justice Tottenham and Mr. Justice Field.*

SRIBULLAV BHATTACHARJEE (JUDGMENT-DEBTOR) *v.* BABURAM CHATTOPADHYA AND ANOTHER (DECREE-HOLDERS).<sup>o</sup>

1886  
January 7.

*Appeal—Summary Procedure under Act XX of 1866—Appeal from order in execution of decree under Act XX of 1866—Act XX of 1866, ss. 53, 54, 55.*

An appeal from an order or decree passed in proceedings had in execution of a decree made under s. 53 of Act XX of 1866 is not barred by anything in s. 55 of that Act.

ON the 17th January 1870 one Gopinath Tarkopunchanan borrowed Rs. 199 at 32 per cent per annum, from Baburam and Rakhal Das Chattopadhyaya, upon a bond specially registered under s. 53 of Act XX of 1866. On the 13th July 1871 they obtained a decree for Rs. 293-13-9 upon the bond under the provisions of the Act. Various applications for execution were made, but nothing was recovered. In July 1883 the decree-holders again applied for execution in the Court of the Munsiff of Tamruk, and certain properties belonging to Sribullav Bhattacharjee, a son of Gopinath Tarkopunchanan (Gopinath being then dead) were attached. The judgment-debtor objected that execution was barred by limitation; this objection was overruled and execution ordered to issue for the amount decreed with interest at 12 per cent per annum. On the 17th November 1883 the judgment-debtor appealed to the District Judge of Midnapore, and the decree-holders filed cross objections to the order of the Munsiff as to interest, claiming interest at the rate mentioned in the bond. On the 11th July 1884 the District Judge dismissed the appeal and allowed the decree-holders' objections.

The judgment debtor-appealed to the High Court, but on the 23rd January 1885 his appeal was dismissed, upon the ground that the suit out of which the appeal arose being one of a nature cognizable by a Small Cause Court, no appeal would lie.

<sup>o</sup> Full Bench Reference on an order in Misc. App. No. 32 of 1883, passed by the District Judge of Midnapore, dated 11th July 1884.

1886  
 SRIBULLAV  
 BRATTA-  
 CHAJJEE  
 v.  
 BABURAM  
 CHATTO-  
 PADHYA.

On the 13th March 1885 the judgment-debtor applied to the High Court, and obtained a rule calling upon the decree-holders to show cause why the order of the District Judge should not be set aside as made without jurisdiction, upon the ground that the decree being a summary one under the provisions of Act XX of 1866 no appeal to him would lie.

After hearing this rule the Court (TOTTENHAM and AGNEW, JJ.) referred to a Full Bench the question whether an appeal from an order or decree passed in proceedings had in execution of a decree made under s. 53 of Act XX of 1866 is barred by anything in s. 55 of that Act, and expressed in this reference the following opinion:—

Upon this point there is a difference of opinion between this Court and the Courts at Bombay and Allahabad. The first case in this Court is entitled *Petition of Rash Beharee Babu* (1). It was decided by Mr. Justice Jackson sitting alone, and does not appear to have been fully argued. The next case is *Hurnath Chatterjee v. Futtick Chunder Sumadar* (2), decided by Mr. Justice Jackson and Mr. Justice Markby, and the case in 7 W. R., 130, was followed. The subsequent cases are *Radha Kristo Dutt v. Gunga Narain Chatterjee* (3); *Huro Soonduree Debia v. Punchoo Ram Mundul* (4); and *Bhyrub Chunder v. Golap Coomari* (5). In each of these cases the point was treated as being concluded by authority. And in *Ramanand v. The Bank of Bengal* (6), a Division Bench of the Allahabad High Court followed the cases in this Court. But in *Wilayatunnissa v. Najibunnissa* (7), a Full Bench of the High Court overruled the last-mentioned case, and, dissenting from this Court, held that an appeal would lie from an order passed in the execution of a decree obtained under s. 53 of Act XX of 1866—and in *Bhikambhat v. Fernandez* (8), a Full Bench of the Bombay High Court came to the same conclusion. There is, we think, considerable force in the arguments used in both these cases; that, though the Legislature may reasonably be supposed to have intended to

(1) 7 W. R., 130.

(2) 18 W. R., 512.

(3) 23 W. R., 328.

(4) 24 W. R., 225.

(5) I. L. R., 3 Calo, 517.

(6) I. L. R., 1 All, 377.

(7) I. L. R., 1 All., 583.

(8) I. L. R., 5 Bom., 673.

take away the right of appeal from a person who has agreed to submit to a summary decree for money, yet that it would be unjust not to allow the parties to the agreement to have the same right of appeal in execution proceedings as ordinary decree-holders or judgment-debtors are entitled to. There is no special procedure provided for execution proceedings, but the decree-holder is left to execute his decree in the manner provided by the Code of Civil Procedure. And there does not appear to be any reason why the parties should not have the same opportunity of applying to the superior Court to correct any error that may take place in the execution proceedings as is given to litigants in ordinary cases. There being this difference of opinion between this Court and the High Courts of Allahabad and Bombay, and as we incline to the opinion that the latter Courts are right, we refer to the Full Bench the question whether an appeal from an order or decree passed in proceedings had in execution of a decree made under s. 53 of Act XX of 1866 is barred by anything in s. 55 of that Act.

1886

SIRULLAV  
BHATTACHARJEE  
P.  
BABURAM  
CHATTERJEE  
PADDHYA.

Baboo *Umakali Mookerjee* for the judgment-debtor.

Baboo *Jogesh Chunder Dey* for the decree-holders.

The opinion of the Full Bench was as follows:—

We think that the question referred to us should be answered in the negative.

It would seem from the earlier cases upon the subject decided by this Court—*Rash Beharee Babu* (1) and *Hurnath Chatterjee v. Futtick Chunder Sumadar* (2), which have been since followed as binding authorities, that the attention of the learned Judges was not sufficiently directed to the distinction between decrees made under ss. 53, 54 and 55 of Act XX of 1866, and orders made under the Civil Procedure Code in the process of executing those decrees.

The prohibition against appeals in s. 55 is expressly confined to such decrees or orders as are made under the above sections of the Act; the prohibition does not extend to orders made under the Code in the course of execution proceedings, although the

(1) 7 W. R., 180.

(2) 18 W. R., 512.

1886

SRIBULLAY  
BHATTACHARJEE  
v.  
BABURAM  
CHATTO-  
PADHYA.

object of those orders may be to enforce decrees, which have been made under s. 53; and there is quite as much reason why an appeal should lie from such orders if they are generally appealable, as from any other orders which may be made in execution proceedings.

The reason why an appeal should lie in the one case and not in the other is well explained by Mr. Justice Melville in the Full Bench case of the Bombay High Court—*Bhikambhat v. Fernandez* (1).

“It is clearly just,” he says, “that a party who has covenanted to submit to a summary decree, should not be allowed to appeal against such a decree. But in the execution of that decree both parties are exposed to all the ordinary risks and possible injury arising from an erroneous order; and there would appear to be no just cause why the sufferer should be deprived of any of the ordinary remedies, which the Code of Civil Procedure provides for a decree-holder or a judgment-debtor.”

The learned pleader who appeared before us for the judgment-debtor was obliged to admit, that if in his view of the case one party was to be deprived of the benefit of an appeal in the execution proceedings, the other party would be also deprived of the same benefit.

We therefore entirely agree with the learned Judges who referred this question, and we think that the judgment-debtor should pay the costs of the reference.

[In accordance with this ruling the Division Bench on the 26th January 1886 discharged the rule making no order as to costs.]

T. A. P.

(1) I. L. R., 5 Bom., 676.