

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

BISHTU NARAYAN BANDOPADHYA (DECREE-HOLDER) v. GANGA  
NARAYAN BISWAS (JUDGMENT-DEBTOR).\*

1869  
April 16.

*Execution of decree—Limitation—Special appeal—Act XXIII. of 1861, s. 11.*

A decree was obtained in 1849, and execution issued in 1862. Several subsequent applications for execution were made, against one of which objection was raised by some of the representatives of the judgment-debtor that the decree was barred by lapse of time, but was overruled by the High Court in special appeal. A further application was made, and was opposed by one of the representatives, who had since attained his majority, upon the ground that the suit was barred. The Moonsiff disallowed the objection. On appeal the Judge reversed his decision.

*Held*, in special appeal, that the terms of Section 11, Act XXIII. of 1861, do not prohibit an appeal by a representative of a deceased judgment-debtor against an order passed in execution of a decree against his ancestor.

*Sheikh Wahid Ali v. Musst. Jumayi* (1) distinguished.

THE decree of which execution was sought, had been obtained, nearly 20 years before, by Sristidhar Chuckerbutty against Kuraram Biswas. Execution was taken out for the first time on the 31st July 1862; execution was again taken out, and a plea of limitation, by some of the heirs of the judgment-debtor, was overruled by the High Court; execution was again sought against Ganga Narayan Biswas, who filed a petition of objection, on the ground that, as Act XIV. of 1859 came into operation on the 4th of May of that year, the decree was barred by limitation under section 21, as the application for execution was made after a lapse of three years from the passing of the Act; and that being a minor at that time, he was unable to raise any objection.

The Moonsiff held that the decree was not barred, and disallowed the objection.

On appeal the Judge held that the decree was barred, and reversed the judgment of the lower Court.

\* Miscellaneous Special Appeal, No. 67 of 1869, from an order of the Judge of West Burdwan, dated the 16th of December [1868, reversing an order of the Moonsiff of that district, dated the 28th of July 1868.

(1) 2 B. L. R., F. B., 73.

The decree-holder appealed to the High Court.

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v.  
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YAN BIWAS

Baboo *Rashbehari Ghose*, for the appellant, contended that the Judge had no jurisdiction to entertain the appeal. The only cases in which an appeal will lie, are those for which provision has been made by section 11, Act XXIII. of 1861. That section relates only to questions between parties to the suit. But in the present case the representatives of the judgment-debtor were no parties to the suit within the meaning of section 11, Act XXIII. of 1861, as explained in the Full Bench case of *Sheikh Wahid Ali v. Musst. Jumayi* (1).

Baboo *Bansidhar Sen*, for the respondent, was not called upon.

JACKSON, J.—This is a case of execution of decree against a person who is one of the representatives of the original defendant. It seems that the decree was originally passed in November 1850, and the proceedings are now being taken for the first time against the present respondent, who has been up to this time a minor. The Judge held, on appeal from the decision of the Moonsiff, that execution was barred as against the party in question, inasmuch as no proceedings had been taken within three years after the passing of Act XIV. of 1859. He also held that a decision passed against another representative of the original judgment-debtor, to the effect that execution was not barred, would not bind the party now before the Court.

In special appeal two objections are raised against this decision : one being that the Judge had no jurisdiction to entertain the appeal; and the second being that he was wrong to hold that execution was barred, as the High Court had already decided that execution might proceed.

On the first of these points, undoubtedly, the special appellant is able to refer, at least, to the reasoning employed in *Sheikh Wahid Ali v. Musst. Jumayi* (2). In that case the majority of the Court appears to have held that parties, who come into

(1) 2 B. L. R., F. B., 73, 84, 85.

(2) 2 B. L. R., F. B., 73.

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YAN BISWAS,

execution proceedings, as representatives of deceased judgment debtors, are not to be regarded as parties to the suit for the purposes of section 11, Act XXIII. of 1861, so as to be debarred from bringing a separate suit to question an order made by the Court in execution of the decree. The effect of that decision, therefore, was that a suit, brought by such a party for that purpose, might be maintained. I do not consider that we are bound by the reasoning which led to that decision, but only by the decision itself; and I confess, it seems to me so unjust to hold that a party may be brought into proceedings in execution, and compelled to pay money in execution, and yet be debarred from appeal against the order by which he is affected, that I should not feel myself at liberty to hold that an appeal could not be made, unless there were an express authoritative decision to that effect, or an express declaration of the Legislature. I cannot think that the terms of section 11 prohibit an appeal in such a case. It seems to me that the intention of this section was to extend the powers of the Court executing the decree to the widest extent, for the purpose of enabling it to decide questions which arise in the execution; and, in like manner, to extend the powers of the Appellate Court, so as to enable it to deal with all orders made under those extended powers in the course of such execution. I think also that the words "between the parties to the suit" apply only to the immediately preceding words "any other question," and not to the whole of the preceding words of section 11. I find it impossible to come to the conclusion that the Legislature meant to enable orders to be made in execution of a decree affecting persons who were not originally parties to the suit, and who became parties subsequently to the decree in their representative character, and then to shut out such parties from the benefit of an appeal to the superior Court. I do not think, therefore, that we ought to say that this is an appeal which the Judge was not competent to entertain.

On the other point raised, I think we must look to the facts found by the Court below. The Court finds that the decision of the High Court, on a former occasion in this execution, was against another judgment-debtor, and not against the present respondent. It is

admitted that, if this decision of the High Court were out of the way, the plea set up by the judgment-debtor is perfectly valid, namely, that execution had become barred by the lapse of three years from the passing of Act XIV. of 1859, and could not afterwards be received. Thus, whether the Judge had jurisdiction or no, his order was manifestly right, and this Court ought not to interfere.

I think, therefore, that the decision of the Court below ought to be affirmed with costs.

MARKBY, J.—I am of the same opinion. It appears that the proceedings in this case were taken against the representative of a deceased judgment-debtor under section 210, Act VIII. of 1859, which provides that, when the person against whom a decree has been made should die before execution, the application for execution of the decree may be made against his legal representatives. Now, it appears that a person against whom proceedings in execution are taken under that section, is not, in the strict sense of the words, a party to the suit; and it may be, therefore, that section 11, so far as it provides that certain questions which arise between the parties to the suit, shall be decided by the Court which has to execute the decree, may not apply to persons in that position; and so far as I understand the decision of the Full Bench, which has been referred to by the pleader of the appellant, this is all that that decision comes to, namely, that so far as section 11 is a restrictive section, it does not apply to persons in that position. But it does not seem to me in any way to follow; and as fully shown by Mr. Justice Jackson, it would be an extreme injustice to hold that that part of the section which gives an appeal is to be, in the same manner, only applicable to persons who are parties in the strict sense of the word. If a person is in a position to have the decree executed against him, he must have all the means of contesting that execution which a party has, and all the rights of appeal which a party would have had. Upon the other point, I do not think in necessary to add anything.

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