1870

QUEEN v. UMESH CHANDRA CHOWDHRY.

complaint contemplated by section 66 of the Code of Criminal Procedure.

In the case referred to us, the Magistrate sent the petition presented by the complainant to the Deputy Magistrate who exercises the full powers of a Magistrate. We think that, under section 66 of the Procedure Code, and the Circular Order No. 6, dated 16th May 1864 (1), the Magistrate of the district was justified in making over the petition to the Deputy Magistrate for enquiry and trial.

[FULL BENCH.]

1870

May 11.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, and Mr. Justice Mitter.

MAHARAJA DHIRAJ MAHTAB CHAND ROY BAHADUR (JUDGMENT-DEBTOR) *v.* BACHARAM HAZRA (DECREE-HOLDER).*

Act XIV of 1859, *ss.* 20, 22—*Limitation—Summary Decision.*

An order of a Court dismissing an application for execution of a decree, on the ground that it is barred by the Law of Limitation, is not a "summary decision" within the meaning of section 22, Act XIV of 1859. It is an order within the meaning of section 20 of that Act.

* Miscellaneous Special Appeal, No. 468 of 1869, from a decree of the Officiating Judge of West Burdwan, dated the 31st July 1869, affirming a decree of the Subordinate Judge of that district, dated the 26th June 1869.

(1) The Circular Order contained the following Rules:

2.—"A Judge shall not be engaged in any other business whilst the examination of a witness is going on, or whilst any documentary evidence is being read.

3.—"If, after the examination of a witness has commenced, the Judge be compelled to attend to any other business, the examination of the witness shall be suspended as long as such other business is being attended to.

4.—"The examination of a witness shall not be interrupted for the purpose of enabling the Judge to attend to other business, unless such business be of an urgent nature.

5.—"If the evidence be not taken down by the Judge, he shall, at the time that the evidence is being given by the deponent, make a memorandum in his own hand-writing of the substance of what each witness deposes. Such memorandum shall be written legibly in the vernacular language of the Judge, or in English, at the option of the Judge, if he is sufficiently acquainted with the language, and it shall be signed by the Judge, and dated, and shall form part of the record, and be always sent up with the record to the Appellate Court in the event of an appeal."

1870

MAHARAJA DHIRAJ MAHTAB CHAND ROY BAHADUR v. BACHARAM HAZRA.

THE Maharajah Mahtab Chand Roy Bahadur had obtained a decree against Bacharam Hazra, in the Court of the Principal Sudder Ameen of West Burdwan. On the 24th of March 1866, he sought to execute his decree, but the Principal Sudder Ameen dismissed his application as barred by lapse of time.

He appealed to the Judge who, on the 28th November 1866, confirmed the previous decision and again gave costs against the Maharajah. He then appealed to the High Court, and again, on the 24th August 1867, his application was dismissed with costs.

The costs awarded to Bacharam Hazra made him in his turn judgment-creditor to a considerable amount. In June 1869, Bacharam Hazra applied to the Principal Sudder Ameen of West Burdwan to execute his decree for costs.

The Maharaja contended, that as the decision of the High Court was given on the 24th August 1867, the decree-holder should have preferred his petition for the enforcement of his decree within one year from that date, under section 22 of Act XIV of 1859 (1), but that, as he had not done so, process of execution could not issue.

The decree-holder, on the other hand, contended that the decree or order, directing payment of costs to him, was not a summary decision within the meaning of Act XIV of 1859, section 22 (1).

The following issues were tried:—

1*st*.—Whether the order, under which the decree-holder has applied for costs, could be considered as a summary decision of the Court or not?

2*nd*.—Whether the suit could be laid under section 20 or 22 of Act XIV of 1859?

The Principal Sudder Ameen held that the order, under which the decree-holder sought to execute his decree for the recovery of costs, could not be called a summary decision under

(1) *Act XIV of* 1859 *section* 22.—"No process of execution shall issue to enforce any summary decision or award of any of the Civil Courts *not established by Royal Charter*, unless some proceeding shall have been taken to enforce such decision or award, or to keep the same in force within one year next preceding the application for such execution."

1870

MAHARAJA DHIRAJ MAHTAB CHAND ROY BAHADUR v. BACHARAM HAZRA.

section 22, but that the provisions of section 20 applied to it. He relied upon *Mohan Lal Sukul* v. *Srimati Ulfutunnissa* (1) and

(1) *Before Mr. Justice Bayley and Mr. Justice Hobhouse.*

MOHAN LAL SUKUL (JUDGMENT-DEBTOR) v. SRIMATI ULFUTUNNISSA (DECREE-HOLDER).*

The 5th February 1869.

Mr. *R. T. Allan* and Baboo *Akhil Chandra Sen* for appellant.

Baboo *Kali Mohan Dass* for respondent.

BAYLEY, J.—This is a special appeal from an order of the lower Appellate Court, holding that section 22 Act XIV of 1859, does not bar the application for execution of the decree which in this case was one for costs.

The facts are that the purchaser of the original decree applied in execution to make one Hashmat Ali, the representative of Hyder Ali, as the son and heir of the latter.

It was held by this Court, on the 19th April 1865, affirming the decree of the lower Appellate Court, dated 16th September 1864, that Hashmat Ali did not inherit the property of Hyder Ali, and so was not the heir, and consequently, not the representative of the judgment-debtor for the purpose of satisfying the petitioner's decree.

In special appeal it is urged that the lower Appellate Court was wrong in stating that Hashmat Ali is not barred by section 22 of Act XIV of 1859, and in considering that the decision of the High Court in *Puresh Narain Roy* v. *J. Dalrymple* (2) applies to this case. The words of that case are:

"We think that the order for costs "made upon a contested matter in execution of a decree is not of the nature "of a summary decision or award, as "described in that section, but that it "comes within the word 'order,' contained "in section 20, the order being made by "the Court in the course of executing a "decree made in a regular suit."

I think this is a correct construction of the law, and that the proceedings in execution in the present instance were of the character of those ordinarily taken in the progress of a suit towards final decision.

The appeal is, therefore, dismissed with costs.

HOBHOUSE, J.—The applicant in this case was a decree-holder in the year 1833.

In the course of the execution of the decree he applied to enforce it, in accordance, I presume with the procedure laid down in section 216 of the Code of Civil Procedure against Hashmat Ali as the representative of the judgment-debtor Hyder Ali.

On the 16th September 1864, the Judge, in appeal, held that Hashmat was not the representative of Hyder Ali, and gave the said Hashmat Ali costs of the proceeding.

This judgment was upheld in appeal by the High Court on the 19th April 1865, and costs of that Court were also awarded to Hashmat.

On the 30th January 1867 Ulfatunnissa, the representative of Hashmat and the respondent in this Court, applied to execute the orders for costs of the 16th September 1864 and the 19th April 1865.

The order of the High Court of date the 19th April 1865 is an order passed by a Court established by Royal Charter and the provisions of section 22, Act

* Miscellaneous Special Appeal, No. 498 of 1868, from an order of the Additional Judge of Chittagong, dated the 5th September 1868, reversing an order of the Principal Sudder Ameen of that district, dated the 16th March 1867.

(2) 9 W. R., 458.

1870

MAHARAJA DHIRAJ MAHTAB CHAND ROY BAHADUR v. BACHARAM HAZRA.

Puresh Narain Roy v. *J. Dalrymple* (1), and stated that the circumstances in the present case were different from those in *Ramdhan Mandal* v. *Rameswar Bhattacharjee (2)*.

This decision was upheld by the Judge, on the 3rd July 1869, who observed:

"I think the Subordinate Judge is right. I think a question of limitation arising in execution of decree is a contested matter of the nature of that referred to in *Puresh Narain Roy* v. *J. Dalrymple* (1), and that an order for costs on that contested matter comes under the 'order' of section 20 of Act XIV. A late ruling, *Ramdhan Mandal* v. *Rameswar Battacherjee* (2), is quoted by the appellant, but I think that clearly this quoted case must be held to be of a somewhat different nature from that before me, which I consider analogous to the case of *Puresh Narain Roy* v. *J. Dalrymple* (1) alluded to above, for I observe that Mr. Justice L. S. Jackson was a Judge in each of the cases quoted; and had he not considered the cases different, he would hardly have expressed two such contrary opinions. The respondent also quotes a case of 5th February 1869, *Mohan Lal Sukul* v. *Srimati Ulfutunnissa* (3), in his favor. I think the weight of High Court Rulings is with the respondents and my own opinion, and, therefore, I dismiss this appeal with costs and interest."

The Maharaja then appealed to the High Court, on the ground that, under section 22, Act XIV of 1859, the sum

XIV of 1859, do not, therefore, apply to such an order, and it is admittedly therefore still in force.

The order of the Judge, dated the 16th September 1864, is an order of a Civil Court not established by Royal Charter, and it is contended for the special appellant that the order is the nature of "the summary decision or award" contemplated in section 22, Act XIV of 1859, and that therefore the respondent, not having sued out execution within one year from the 19th April 1865, limitation now bars the execution for the costs given by that order.

The application for execution in this case, I should mention, was of date the 30th January 1867. I agree with Mr. Justice Bayley that the order of the Judge, of date the 16th September 1864 cannot be said to be in the nature of a summary decision or award, such as for example, an order under Act XIV of 1841, against which an appeal lies in a regular suit in a Civil Court. It is in the nature of an order of a Civil Court having final jurisdiction—a jurisdiction given expressly by the provisions of section 216 of the Code of Civil Procedure. The case of *Puresh Narain Roy* v *J. Dalrymple* (1) in which I was one of the Judges, is in point, and governs this view of the case. I agree therefore, in dismissing the appeal with costs.

(1) 9 W. R., 458.

(2) 2 B. L R., A. C., 235.

(3) See *Ante*., p., 64.

1870

MAHARAJA DHIRAJ MAHTAB CHAND ROY BAHADUR v. BACHARAM HAZRA.

mary award for costs was barred by lapse of time. Section 20 had no application to the present case.

The case was heard by L. S. Jackson and Markby, JJ., who "in consequence of a conflict of opinion between Division Benches of the Court in *Mohan Lal Sukul* v. *Srimati Ulfutunnissa* (1) *Puresh Narain Roy* v. *J. Dalrymple*" (2) referred the question to a Full Bench, *viz.*:

"Whether the application to enforce an award for costs arising upon a question determined by the Court in execution of a decree comes within the terms of section 22, Act XIV of 1859, or within the terms of section 20."

Baboos *Jaggadanand Mookerjee* and *Chandra Madhab Ghose* for appellant.

Baboo *Rash Behary Ghose* for respondent.

The following cases were cited in argument: *Ramdhan Mandal* v. *Rameswar Bhattacharjee* (3), *Puresh Narain Roy* v. *J. Dalrymple* (2), *Mohan Lall Sukul* v. *Srimati Ulfutunissa* (1).

The judgment of the Full Bench was delivered by

COUCH, C. J.—Before we can hold that this order comes within the meaning of section 22, and that the party has only a year to enforce it, we must be satisfied that it is clearly within the meaning of the word "summary." Now it is very difficult to say what is meant by this word or to give a definition which would be applicable in all cases. There are instances in which a proceeding is undoubtedly a summary one. A suit for dispossession within six months is a summary proceeding, that is a summary decision not to be questioned by an appeal; but the matter of which may afterwards be contested by a regular suit. That shows the nature of a summary proceeding. It is the decision of a Court which hears and determines the matter, but does not finally conclude the parties, a proceeding in which the Court makes an order and determines the matter in issue,

(1) See *Ante*., p. 164. (2) 9. W. R., 458. (3) 2 B. L. R., A. C., 235.

1870

MAHARAJA DHIRAJ MAHTAB CHAND ROY BAHADUR v. BACHARAM HAZRA.

if I may so describe it for the present occasion, in order to prevent some mischief which might ensue, if there was not a mode of coming to some decision at once in the matter. It may also be that by a summary proceeding is meant one where no appeal lies, and where the decision of the tribunal which hears and determines the matter is final. I think the present is a case in which it is impossible to say that the proceeding is a summary one within the meaning of section 22; it is an order made by a Court in the exercise of its jurisdiction in the execution of the decree in a suit,—an order by which the execution-debtor was declared entitled not to have the decree executed against him because it was barred by the Law of Limitation, and having succeeded in that he was awarded his costs. I think that cannot be considered as a summary decision or award within the meaning of section 22. It is an order within the meaning of section 20. It does not appear to me when the cases come to be examined that there is any real conflict of decision between them.

I think the two decisions in *Puresh Narain* v. *J. Dalrymple* (1) and *Mohan Lall Sukul* v. *Srimati Ulfutunissa* (2), are correct, and that we should adopt them. The appeal will be dismissed with costs.

[APPELLATE CIVIL.]

Before Mr Justice Bayley and Justice Sir C P Hobhouse, Bart.

KHETTRA MOHAN BABOO (PETITIONER) *v* RASHBEHARI BABOO (OPPOSITE PARTY).*

1870
March. 4.

Act XVI of 1864, *s* 51—*Act XX of* 1866, *s* 53—*Act VIII of* 1859, *s* 194—*Registration—Bond—Power of Court to alter terms of a Specially Registered Bond,*

By a bond specially registered under Act XVI of 1864, the obligor stipulated to pay the entire amount secured thereby, with interest at the rate therein mentioned,

Rule Nisi, No 177 of 1870

(1) 9 W R 458 (2) See *Ante* p 164