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the zemindar desires to oust the plantiff from the accretion that he holds, he must do so by attacking the original holding. He has not attemped to proceed in that way, nor has there been any issue whether the zemindar would be entitled to oust the plaintiff from the holding or not. So long, therefore, as the plaintiff occupies his original holding, I conceive he is entitled to occupy the accretion, which under the law forms part of it, and therefore he is entitled to be restored to possession of it by decree of the Civil Court.

For these reasons I think the decision of the Court below is quite correct, and that the appeal ought to be dismissed with costs.

Appeal dismissed.

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June 8.

Before Mr. Justice Norman (Offg. Chief Justice), Mr. Justice L. S. Jackson, and Mr. Justice Macpherson.

BORO KHASIA (PLAINTIFF) *v.* JATA SIRDAR AND ANOTHER (DEFENDANTS).*

Civil Procedure Code (Act VIII of 1859). *s.* 119.—*Jurisdiction—Special Appeal—Objections taken for the First Time.*

A Moonsiff entertained a petition by a defendant under section 119 of the Civil Procedure Code, and set aside his former judgment given *ex parte* in favor of the plaintiff, and dismissed the plaintiff's suit. The plaintiff, on appeal before the Judge did not raise the objection that the Moonsiff ought not to have entertained the petition of the defendant as it had not been presented in due time. It was held to be too late to raise the objection on special appeal.

The plaintiff in this case, in August 1867, sued the defendants for the possession of 11 hals of land with mesne profits. The defendants did not appear at the trial, and the Moonsiff passed a decree in favour of the plaintiff on the 24th December 1867.

In execution taken out by the plaintiff for costs adjudged in this *ex parte* decree, certain properties belonging to the defendants were brought to sale, it was alleged, in June 1869.

The defendants then appeared, and, by a petition dated the 23rd August 1869, applied to the Moonsiff under section 119

* Letters Patent Appeal, No. 20 of 1871, from a decree of Mr. Justice E. Jackson dated the 24 March 1871, passed in Special Appeal, No. 1844 of 1870, decided by Mr. Justice E. Jackson and Mr. Justice Mookerjee.

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of the Procedure Code to set aside the *ex parte* decision. They alleged in their petition that they were wholly ignorant of the fact that a suit had been instituted against them, that no summons had been served on them, and that, although their properties were attached, the notice of sale was not issued; but that nevertheless their properties were sold in June 1869.

The Moonsiff fixed a day for the examination of the defendants, but the defendants not having appeared on that day their application under section 119 was struck off the file on the 18th December 1869.

The defendants then made a second application on the 6th January 1870, explaining the cause of their non-attendance in Court, and praying that their application might be restored to the file and adjudicated upon.

This application was registered in the Court on the 7th January 1870. The Moonsiff then examined the witnesses, and, after having heard witnesses as to the service of the summons, was of opinion that the summons had not been duly served. The Moonsiff therefore set aside his former judgment, and appointed a day for the hearing of the suit. On the case coming on for trial the Moonsiff dismissed the plaintiff's suit on the merits with costs. The lower Appellate Court confirmed the decision of the Moonsiff.

The plaintiff then preferred a special appeal to the High Court, and urged that the Moonsiff had no jurisdiction to entertain the application by the defendant under section 119, inasmuch as the application had not been made within thirty days after any process for enforcing the judgment had issued.

The appeal was heard before Mr. Justice E. Jackson and Mr. Justice Mookerjee who gave the following judgments.

E. JACKSON, J.—I think that this special appeal should be dismissed. If the appellant was dissatisfied with the decision of the Moonsiff, admitting the case to a rehearing, he might have raised the question on the appeal to the Judge. He made no allusion to it, and the case having been tried upon the merits, both by the Moonsiff and the Appellate Court, it has been found that the plaintiff is not entitled to the decree which he obtained

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ex parte. I think then that it is too late now for him to contend that there was not sufficient enquiry made before the application for a rehearing was admitted. It seems to me that we are bound to administer the law in order todo justice between the parties, and it would not be doing justice to restore an *ex parte* decree which two Courts have, on a subsequent trial on the merits, found should not be renewed. If the objection which is now raised was a substantial objection, I have no doubt that it would have been raised at the proper time.

The Moonsiff's order admitting the case to a rehearing is not open to appeal. It is possible that we may have authority to interfere with it under our extraordinary powers of superintendence, though I am not quite certain even of that. It is not an authority which we are obliged to exercise, and I am of opinion that it would not be for the ends of justice that we should exercise it in this case. The appellant is entitled to a special appeal from the decision of the Judge. This is not any ground of appeal against the decision of the Judge, and though it may be an appeal against an alleged irregularity in the proceedings of the Moonsiff, it cannot be said to be one which affected the merits of the case.

I would dismiss this appeal with costs.

MOOKERJEE, J. (after stating the facts)—Baboo Ramesh Chandra admitted that this point was never specifically raised in any of the Courts below; but he contends that in a petition which was filed by his client in the Moonsiff's Court, it was distinctly stated that the defendants were fully aware of the execution of the process of attachment and sale. He also states that in the application made by the defendants themselves, they admit that the process of attachment was executed, and that the sale was held in June 1869.

Baboo Ramesh Chandra Mitter contends that, therefore, on the defendants' own showing the application under section 119 is out of time, having been preferred on the 23rd August following. The case of *Radha Binode Chowdhry* v. *Digamburee Dossee* (1) decided by the Full Bench of this Court is cited in

(1) Case No. 224 of 1867 : 3rd February 1868.

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support of this contention. It is contended by the vakeel for the respondents, that the process mentioned in section 119 must be a *bonâ fide* process ; but the Moonsiff as well as the lower Appellate Court has held in this case, that there was no *bonâ fide* process executed. On referring to the record, we find that there is a statement of the defendants, to the effect that the sale of their properties had taken place in June 1869, and that the application under section 119 was made on the 23rd August of that year. We also find that there is some sort of admission that the properties had been attached in execution, though that is not very clear. This attachment would have been an attachment prior to the sale of the properties, and if it be the case that the properties of the applicants were sold in June 1869, the attachment must have been of a date at least a month before the sale, and, therefore, very much beyond the 30 days allowed by law in section 119. If it is so, the application would propably be an application beyond time, on which the Moonsiff could not have acted.

The law seems to me to be clear. The application to set aside an *ex parte* decision must be made within a "reasonable time, not exceeding 30 days, after any process for enforcing the judgment has been executed." Now, if the plaintiffs, the holders of the *ex parte* decree, had actually and *bona fide* executed the process of attachment, the defendant was bound to come in within a reasonable time of the execution of that process, not exceeding 30 days. The Legislature does not say that the application should be made within 30 days of the knowledge of the judgment-debtors of the execution of any process for the enforcement of the *ex parte* decree. If, therefore, a process for enforcing the judgment is duly executed, I apprehend that section 119 requires that the application to set aside the *ex parte* judgment must be preferred within 30 days of the execution of that process, whether the judgment-debtors were or were not actually aware of the execution of such process. If a property of the judgment-debtor is duly attached, he is presumed to be aware of the judgment in execution of which that attachment was made. The law requires he should know of it, and he must come in within a reasonable time from that attachment, but that time is not to exceed 30 days.

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Under this view of the law, I am of opinion that if the process of attachment was duly executed, and if the application has not been made within the time limited by the law, the application could not, and should not, have been entertained by the Moonsiff.

In this case, the objection now urged not having been taken in any of the Courts below, there is no clear finding at all as to whether the process, of attachment had been executed or not. The case will, therefore, go back to the Court of the Moonsiff. The Moonsiff will lay down an issue as to whether any process to enforce the decree was duly and *bona fide* executed or not. He will give full opportunity to the parties to adduce any evidence they desire to produce, to show whether any process, and more especially a process of attachment, had been duly executed. The present finding of the Moonsiff does not meet the requirements of the case. He simply finds that the summons had not been served, and that the plaintiff was not aware of the sale, as it had not taken place at the spot. But whether the summons was served or not, which is a point which affects the merits of the application under section 119, he is bound to see whether the application is in time, which is a condition precedent to the entertainment of the application itself. I would, therefore, remand the case to the Court of the Moonsiff to try this point, and to decide the case anew according to the result of the enquiry directed.

Though we entertain this objection raised for the first time before us, yet, considering that this plea ought to have been raised when the application was made under section 119, I think the applicant must pay the whole of the costs of the defendants incurred up to this stage of the proceedings.

Owing to the difference between the learned Judges an appeal was preferred to three Judges under clause 15 of the Letters Patent, on the ground chiefly that the question involved being one of jurisdiction, it ought to have been allowed to prevail, though not urged in an earlier stage of the case.

Baboo *Anandagopal Palit*, for the appellant, contended that the question was one of jurisdiction, and should not be overlooked. The petition of the defendant not having been preferred in due

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time, the Moonsiff had no jurisdiction to entertain it, and the lower Appellate Court should have decided this point before entering into a consideration of the merits of the case.

Baboo *Bamacharan Banerjee*, for the respondents, was not called upon.

The judgment was delivered by

NORMAN, J.—We have no doubt whatever that the judgment of Mr. Justice E. Jackson is perfectly correct, and it must be affirmed with costs.

Appeal dismissed.

[ORIGINAL CIVIL.]

Before Mr. Justice Phear

GANESHLAL AND ANOTHER *v.* AMIR KHAN.

1872
Jan 8,

Forfeiture—Conviction—Attachment—Act XXV of 1857, s. 3.

In execution of a decree against the defendant, the plaintiffs on 17th July 1871 attached certain property in Calcutta belonging to the defendant. On 26th July 1871, the defendant was convicted under section 1 of Act XI of 1857, and also under section 121 of the Penal Code, of abetting the waging of war against the Queen, and sentenced to transportation for life, and forfeiture of all his property. The offence for which he was convicted was committed in September 1861. *Held*, that the forfeiture took effect from the date of the commission of the offence, and therefore any attachment subsequently made was invalid.

The words of section 3, Act XXV of 1857, "such an offence as aforesaid" refer to the offences mentioned in section 2, as well as to the offence of mutiny mentioned in section 1.

In this suit the plaintiffs had obtained a decree for Rs. 7,566 with costs. The suit was brought by the plaintiffs as endorsees of certain hundis. In execution of the decree, the plaintiffs on 17th July 1871 attached certain property in Calcutta belonging to the defendant. The defendant on 26th July 1871 was convicted under section 1 of Act XI of 1857 and section 121 of the Penal Code, of abetting the waging of war against the Queen, and sentenced as follows:—"The Court, differing from three of the four assessors, finds Amir Khan guilty of the offence specified in the charge,—namely, that he (Amir Khan) during