Before Mr. Justice Kemp and Mr. Justice Pontifex.

QUEEN *v.* SOFFIRUDDI PALWAR AND ANOTHER.*

1874
April 22.

Criminal Procedure Code (Act X of 1872), s. 280—Enhancement of Punishment.

In this case Noimuddi, Soffiruddi, and Basiruddi were committed to take their trial for the murder of one Shomasdi. The Sessions Judge, in concurrence with the opinion of the Assessors, convicted the prisoner Noimuddi under s. 325 of the Penal Code, and sentenced him to be rigorously imprisoned for seven years and to pay a fine of Rs. 100; convicted the prisoner Soffiruddi under s. 201, and sentenced him to five year's rigorous imprisonment; and acquitted Basiruddi on account of his youth, and because he believed he acted under the coercion of his father, the prisoner Soffiruddi.

Noimuddi and Soffiruddi appealed from prison, and their appeal now came on for hearing, but no one appeared on their behalf.

The judgment of the Court was delivered by

Kemp, J. (who, after stating the facts as above, continued.)—The Sessions Judge observes that he considers "that it has been established by the evidence that the prisoner Noimuddi caused the death of Shomasdi by throttling him," but he convicts him of "grievous hurt" because the body of Shomasdi has not been found. In another part of his judgment, in remarking upon the case of the prisoner Soffiruddi, the Sessions Judge observes that it is clearly proved that this prisoner assisted Noimuddi to make away with the body of the deceased, and from the circumstance of his death he, the prisoner Soffiruddi, must have believed that the offence committed was murder; but this is wholly inconsistent with the Judge's finding that Noimuddi has committed the offence of grievous hurt.

It appears clear to us, after a careful consideration of the evidence, that the prisoner Noimuddi is guilty of the offence of murder. It is proved that he went to the house of the deceased at night, and that there was a squabble and a struggle between the prisoner, the deceased and the witness Hakima; that they were separated by the prisoners Soffiruddi and Basiruddi; and that the whole party, including the deceased, then went to the house of Soffiruddi, where the deceased threatened the prisoner Noimuddi with reporting his conduct the next morning to their zemindar. Upon this words ensued between Noimuddi and the deceased when the former pressed the latter down upon a log of wood which was lying in the court-yard of the house and throttled

* Criminal Appeal against an order of the Sessions Judge of Jessore, dated the 11th February 1874.

1874

QUEEN v. SOFFIRUDDI PALWAR.

him. When it was found that Shomasdi was dead, the witness Idrale, whose evidence before the Deputy Magistrate has been put in under s. 33, Act I of 1872, was sent for and consulted as to what was to be done. After ascertaining that Shomasdi was dead. he declined to have anything to do with the matter. Upon this the body of the deceased was taken by Noimuddi, Soffiruddi, and Basiruddi to a river, described by the Deputy Magistrate who committed the case, as flowing near the house of the prisoner and with a rapid stream, and thrown into it. The body has not been found, but from the evidence and the admission of the two prisoners, Soffiruddi and Basiruddi, before the Deputy Magistrate, it is clear that the dead body of Shomasdi was disposed of as stated above.

We therefore think that this is a case in which we ought to exercise the powers conferred upon us by s. 280 of the Code of Criminal Procedure and to alter the finding of the Court below, and also to enhance the punishment awarded by it. We convict the prisoner Noimuddi of murder under s. 302 and sentence him to be transported for life. We convict the prisoner Soffiruddi under s. 201, and, inasmuch as he knew that the offence which was committed was punishable with death, we sentence him to seven years' rigorous imprisonment.

IN THE GOODS OF E. L. BEAKE, DECEASED.

1874
March 26.

Court Fees Act (VII of 1870), *Sch, I, No.* 11—*Letters of Administration—Doubtful Debt—Financial Notification No.* 2025.

The uncertainty of recovering a debt due to the estate of a deceased person is not a sufficient ground for a proportinate reduction of the fee payable in respect of letters of administration to such estate.

CASE referred by Mr. Belchambers, the Taxing Officer, for the decision of the Chief Justice, under s. 5 of the Court Fees Act, 1870 :—

"In this case the petition of the Administrator-General for letters of administration of the property and credits of Edward Lane Beake, deceased, contains the following statement as to assets :—

" 'The amount or value of assets which are likely to come to your petitioner's hands in the event of such letters of administration being granted will not, to the best of your petitioner's belief, exceed Rs. 18,500, and are as follows :—

In the High Court, deposit as security for costs in suit, Beake *v.* Happerfield Rs. 2,000; now payable by Mr. Landray, Rs. 3,500; balance payable by Mr. Landray by instalments, besides interest, Rs. 8,700; claim

1874

IN THE GOODS OF E. L. BEAKE.

gainst persons at Lucknow (payment being made by instalments), Rs. 950; claim against Lane & Co., Meerut, Rs. 13,000.

Out of which last-mentioned sum it is doubtful whether more than Rs. three thousand and five hundred will be realized.

"Upon the doubt expressed as to whether the claim against Lane & Co. for Rs. 13,000 is good for more than Rs. 3,500, it is submitted, on behalf of the Administrator-General, that the difference (Rs. 9,500) between those two sums is not liable to the stamp duty prescribed by the Court Fees Act, 1870, Sch. I, cl. 11.

"There is no provision in the Court Fees Act authorizing exemption in respect of a claim supposed to be doubtful: nor is there any such provision in the Acts by which the payment of probate duty in England is regulated.

"If duty be paid on an exaggerated valuation of an estate, a refund of the amount paid in excess may be obtained, in England, under 35 Geo. III, c. 184, s. 40, and in this country, under the Financial Notification No. 2025, dated 15th August 1872, which provides that the Local Governments may sanction refunds of stamp duty when the estimate of the assets of an estate is shown to have exceeded the amount on which the Act says that duty shall be paid, namely, the actual value of the property in respect of which the letters of administration are granted." (1)

The following was the decision of

COUCH, C.J.—No sufficient ground is shown for the duty not being payable on the Rs. 9,500.

Before Mr. Justice Macpherson.

IN THE MATTER OF RAJNARAYAN PAL AND ANOTHER (INSOLVENTS).

1874
June 19 & 2

Insolvent Act (11 & 12 Vict., c. 21), s. 9—Revocation of Adjudication—Notice to Creditors—Practice.

THE insolvents who carried on business as shopkeepers in Calcutta had been adjudged insolvent under the provisions of s. 9 of the Insolvent Act upon the petition of certain creditors.

Baboo *Kally Nath Mitter*, on behalf of the insolvents, now applied, on notice to the Official Assignee and to the attorney for the petitioning creditors, for an order that the adjudication might be set aside upon such notice

(1) *Gazette of India*, 17th August 1872, Pt. i, p. 782.

1874

IN THE MATTER OF RAJNARAYAN PAL.

to their creditors as the Court might deem proper. In their petition for this order, the insolvents stated that they had come to a settlement with all their creditors who had agreed to accept 7½ annas in the rupee; that the adjudicating and some of the other creditors had already received the amount of their composition, and that the remaining creditors had agreed to receive the amounts respectively due to them under the settlement out of the sale proceeds of the insolvents' property in the hands of the Official Assignee.

The insolvents had not filed any schedule, and no claims had been proved against their estate. The property had been advertized for sale by the Official Assignee.

Mr. *Dignam* for the Official Assignee contended that notice must be given to all the creditors before the adjudication could be annulled. When an insolvent applies to with draw his petition, the practice has been to file the consent of all the creditors, together with an affidavit of their signatures, following the English practice as laid down in 2 Archb. Bcy., p. 803; see *In re Pyarichand Mitter* (1.) If the application of the insolvent be to annul an adjudication made on the petition of a creditor, he must show that the original adjudication was bad, otherwise the proceedings in insolvency must continue—*In re Sreenarain Bysack* (2.) As to the procedure on such an application, see Archb. Bcy., pp. 791 to 793.

Baboo *Grish Chunder Chunder* for the petitioning creditors consented to the prayer of the insolvents.

MACPHERSON, J., stated that he thought Mr. Dignam's objection must prevail; and that he would speak to Pontifex, J., as to the order to be passed.

On the following morning the learned Judge said he would make no order: if the adjudication were improper, it could be set aside; but if it were proper, the usual course of filing a schedule must be followed.

(1) 6 B. L. R., 558. (2) 2 Hyde, 180.

Before Mr. Justice Phear and Mr. Justice Morris.

IN THE MATTER OF THE PETITION OF SUMAT DAS.*

1874
Feby. 25.

Execution—Transfer of Decree—Jurisdiction—Appeal—Limitation—Act VIII of 1859, s. 284.

An order passed by a Court to which a decree has been transferred for execution is not open to appeal, unless the order has been made in the course of the ctual execution of the transferred decree.

The Court to which a decree has been transferred can take cognizance of a question of limitation, but the question must be one arising from facts which are egitimately before the Court in the course of execution, and not a matter of limitation arising antecedent to transfer (1).

Quære,—Whether, where a decree has been transferred to the Munsif's Court or execution, an appeal will lie to the Judge from the Munsif's order in the matter of the executoin ?

Moonshee *Mahomed Yusuff* in support of the rule.

Baboo *Gopal Lal Mitter*, contra,

THE judgdment of the Court was delivered by

PHEAR, J.—This is a rule obtained by one Sumat Das, calling upon Bhuban Lal and others to show cause why an order made by the Judge of Shahabad on appeal in the matter of the execution of a decree, which Sumat Das had obtained in the Small Cause Court of Arrah against Rameshur Lal deceased, father of the respondents, should not be set aside on the groun that it was made without jurisdiction ?

The principal facts of the case are as follows:—The decree was given on the 11th of July 1864 for a sum of Rs. 104-10. After several intermediate proceedings, upon the decree-holder's application made on the 31st of August 1872, the Small Cause Court of Arrah, under the provisions of s. 20, Act XI of 1865, granted him a certificate to the following effect:—"Certified that an *ex parte* decree was given for the plaintiff in the above case on the 11th of July 1864, and that satisfaction of that decree has not been obtained." . . . .

The judgment-creditor, the present petitioner before us, filed this certificate in the Munsif's Court at Arrah, and sought execution of the decree, when the judgment-debtor appeared and raised the plea that the decree is barred by limitation. The Munsif, by his judgment and order dated the 14th of February 1873, held that the decree was not barred by limitation, and rejected the objection of the judgment-debtor. The judgement-debtor preferred an

* Rule No. 1044 of 1873.

(1) See *Leake* v. *Daniel*, B. L. R., Sup, Vol., 970.

1874

IN THE MATTER OF THE PETITION OF SUMAT DAS.

appeal against the order of the Munsif to the Judge of Shahabad, who, on the 31st of March 1873, reversed the Munsif's order and held that the decree was barred by limitation. This last decision is the judgment which is now sought to be set aside.

The question which has been raised in its broadest sense is whether or not an appeal lay to the Judge from the order of the Munsif in the matter of this execution? It is admitted that the Judge of the Small Cause Court, before sending his certificate to the Munsif, had, on the report of his amla, considered the question whether or not the execution was barred by lapse of time, and holding that it was not, had ordered execution to issue; and it is not disputed that this order, had it been made *inter partes*, would, by reason of s. 21, Act XI of 1865, have been final, and could not have been appealed against if the execution had been proceeded with within the Munsif's jurisdiction. And it would be an extraordinary anomaly if by the mere removal of the decree to the Munsif's Court for the purpose of execution only, a right of appeal which otherwise did not exist, should spring up.

As to the question whether an appeal, under circumstances such as those of this case, will lie from the order of the Munsif to the Judge, a decision of the High Court, North-Western Provinces, in the case of *Mobaruck Ali* v. *Soomee Runga Charee* (1), has been cited. It certainly lays down without qualification that an appeal will lie. The grounds of the decision of the High Court are stated in the report very concisely indeed, and we are not prepared at this moment to say whether we entirely concur in it or not. But the matter of appeal in that case which the Judge decided had reference solely to the interpretation of the decree; it had no similitude to the matter of appeal which the Judge has decided in the case before us. And abstaining from expressing any opinion whether or not the decision of the High Court is correct to its full extent, we think that the order of the Court to which a decree has been transferred for the purpose of execution, which is open to appeal if any such order is open to appeal, must be an order made by the Munsif in the course of the actual execution of the decree which has been sent to him for execution.

In the present case the Judge has entertained a question which did not arise in any way out of the Munsif's proceedings in the matter of executing the decree; it was a question between the parties, actually existing if not determined before the copy decree was sent to the Munsif for execution: and we think that the Judge had no power to take cognizance of and determine a question of that kind. It appears from the papers which are before us that the judgment-debtor was arrested on the 2nd October 1871 in execution of this decree, and brought before the Judge of the Small Cause Court; that on that occasion he said that he was not prepared to pay the decree, and asked for time. If the execution of the decree was even barred by limitation at all, it must have been barred at that time; because three years had not elapsed

(1) 3 Alla. H. C. Rep., 168.

1874

IN THE MATTER OF THE PETITION OF SUMAT DAS.

between the date 2nd of October 1871, and the date when this application for execution in the Munsif's Court was made. Therefore, the judgment-debtor ought, if he desired to avail himself of this objection, to have made it when he was on that occasion brought before the Small Cause Court. Had he made it, and had the Small Cause Court Judge come to a decision upon it, then that decision would not have been subject to appeal, and must have been treated by all Courts as final between the parties. And the fact that the judgment-debtor did not make the objection when he might and ought to have made it before the Court which could have decided it finally between him and the judgment-creditor, does not give authority to another Court to entertain it afterwards.

We think it right to add that it appears to us that the Judge's irregularity has been brought about by an irregularity on the part of the Small Cause Court itself. Even if the section of Act VIII applied to the case, neither the Judge nor the Munsif ought to have had before him, for the purpose of executing this decree, anything in the shape of a record other than a copy of the decree, and a copy of any order which the Small Cause Court Judge might have made authorizing the party to have execution, together with a certificate stating how much is due and unpaid upon the decree. S, 286, Act VIII of 1859, directs that these should be sent from the Court which had made the decree to the Court which is to execute the decree, and nothing more. And s. 287 provides further that this copy decree shall "have the same effect as a decree or order for execution made by such Court, and may, if the Court be the principal Civil Court of original jurisdiction in the district be executed by such Court, or any Court subordinate thereto to which it may entrust the execution of the same."

So that if this section be applicable to the present case, the Court to which the decree was transmitted for execution ought not to have had any other papers or documents than these before it. And if, as is more probably the case, Act XI of 1865 is the enactment which is really operative in this case that Court would have had even less before it. And it seems to be sufficiently apparent from these provisions of the Legislature that it never could have been intended that the Courts to which a decree or order has been transmitted for the purpose of execution should take cognizance of any matter which requires them to have at least the record of the whole of the execution proceedings before them. And we may add that s. 290 of the Civil Procedure Code seems to have been enacted by the Legislature with the immediate intention of meeting the case of an objection being raised in the Court to which a decree is transmitted for the purpose of being executed, and properly belonging to the Court from which the decree came. That section says:—"The Court to which such application is made may, upon good and sufficient cause being shown, stay the execution of the decree for a reasonable time to enable the defendant to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order

1874

IN THE MATTER OF THE PETITION OF SUMAT DAS.

relating to the decree or the execution thereof, which such Court of first instance or Court of Appeal might have made, if execution had been issued by such Court of first instance, or if application for execution had been made to such Court."

We by no means desire to say anything which shall conflict with a decision of a Division Bench of this Court holding that the Court to which a decree is transmitted for execution may, under the provision of the Civil Procedure Code, entertain even a question of limitation. But it must, we apprehend, be a question of limitation arising upon facts which come legitimately in the proceedings before the Munsif in the course of his carrying out the execution of the decree, and not a matter of limitation which could have been heard and determined by the Court from which the decree is transmitted for the purpose of execution. In this view of the case we think that the decision of the Judge was *ultra vires*, and must be aside. The rule therefore will be made absolute with costs (1).

1874
March 16.

Before Mr. Justice Phear and Mr. Justice Morris.

LUTFULLAH (JUDGMENT-DEBTOR) *v.* KIRAT CHAND (DECREE-HOLDER).*

Execution —Transfer of Decree—Jurisdiction—Limitation Act VIII of 1859, s. 284.

The transfer of a decree from one Court to another under s. 284 and the following sections of the Civil Procedure Code does not give the latter Court a jurisdiction to entertain and determine any question with regard to limitation or otherwise which arose between the parties antecedent to the date of transfer (2).

THE facts in this case were as follows:—One Aghori Biswas recovered a decree in the Court of the Munsif of Purneah against the judgment-debtor on the 19th of February 1864. In February 1871, one Hirarat Ali purchased this decree from the original decree-holder, and made an application to the Purneah Court for substitution of his name in place of Aghori Biswas, and for realization of the decree, in which he did not succeed. Hirart Ali subsequently sold the decree to Kirat Chand, the respondent. Kirat Chand obtained an order from the Munsif of Purneah to transfer the decree to the Court of the Munsif of Kishengunge for execution. On the case coming on

*Miscellaneous Special Appeal, No. 393 of 1873, against an order of the Officiating Judge of Zilla Purneah, dated the 8th September 1873, reversing an order of the Munsif of Kishengunge, dated the 8th July 1873.

(1) See next case.

(2) See *Leake v. Daniel*, B. L. R., Sup. Vol., 979.