Bhoobun Moyee Debia (1), being in conflict with the decisions in

The following judgments were delivered.

COUCH, C.J.—It is possible that the Judge may have been misled by a passage in the judgment in the case of *In re Wooma Churn Mozoomdar* (*a*), where it is said that the application for the rehearing of the case under s. 58, Act X of 1859, could be heard, and he may have supposed that the Court was laying down that the application was one under s. 58, Act X of 1859, and must be dealt with according to that Act. But Macpherson, J., was there only describing the application in the terms in which it had been made by the party. It had been erroneously made to the Munsif under S. 58, Act X of 1859, when it ought to have been made according to the provisions in s. 119, Act VIII of 1859, because it was by that Act that the procedure in the transferred suits was to be regulated.

The provisions of the law appear to me to be clear in the first instance, the suits which were pending in the Revenue Courts were not transferred to the Civil Courts, but suits which were brought after Act VIII of 1869 came into force were to be brought in the Civil Courts and to be regulated by Act VIII of 1859. The suits which remained in the Revenue Courts were naturally allowed to be regulated by the practice of those Courts. The Act of 1870 provided for the transfer from the Revenue Courts of the suits which had been allowed to remain there, and it having been provided by the Act of 1869 that the new suits should be regulated by the Code of Civil Procedure, it was natural that the Bengal Legislature should say that all future proceedings in the transferred suits should be regulated in the same way, and that the Civil Court should not apply to the transferred suits a procedure which it was not accustomed to.

The provisions appear to me to be quite consistent. In this case the application was governed by s. 119 Act VIII of 1859, and the period allowed by that section ought to have been given to the party.

We must reverse the order of the lower Court, and remand the case for rehearing. The appellant will have the costs in this Court.

AINSLIE, J.—I wish to add that in the order granting the rule in *In re Wooma Churn Mozoomdar* (*a*), the only question before Mr. Justice Macpherson and myself was, what Court had jurisdiction to try the case. We did not consider what procedure was to be applied by the Court that might eventually have to try the case, and it was not intended to decide that s. 58, Act X of 1859, would apply.

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

The 2nd July 1872.

RAJA MOHESH CHUNDER SINGH SURMAN AND OTHERS (PLAINTIFFS) *v.* BHOOBUN MOYEE DEBIA (DEFENDANT).*

Beng. Act III of 1870—*Transfer of Decree—Jurisdiction.*

Baboo *Gopal Lall Mitter* for the appellants.

(*a*) *Ante* p. 215.

*Miscellaneous Special Appeal, No. 134 of 1872, against an order of the Officiating Judge of Zilla Mymensingh; dated the 7th February 1872, reversing an order of the Deputy Collector of that district, dated the 4th October 1871.

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KRISHNA KISHORE PODDAR v. WOOMESH CHUNDER ROY.

In re Sreemutty Jaggodumba Dossee (1), and *In re Ramsoonder Bandopadhya* (2), referred for the opinion of a Full Bench the question:

"Whether, after a decree has been transferred for the purpose of execution under the provisions of Beng. Act III of 1870,

Baboos *Romesh Chunder Mitter* and *Lalit Chunder Sen* for the respondent.

THE facts of this case appear sufficiently in the judgment of the Court, which was pronounced by

AINSLIE, J.—In this case judgment was delivered by the Deputy Collector on the 3rd September 1868 against certain defendants, then present before him, and the husband of the present respondent, who has since died, and who was then not present.

On appeal by the plaintiff against so much of the order as disallowed a portion of his claim, the Judge made an order on the 25th November 1868 confirming the decision of the first Court, and that judgment was also affirmed by the High Court on the 17th June 1869. Execution as against the husband of the present respondent was sued out on the 9th May 1870, and on the 13th August following a list of certain moveable property belonging to him was filed in Court, but when the order for attachment issued none of those properties could be found, and a return was made to that effect on the 24th August 1870. On that same day an application was made for the sale of certain immoveable properties, and on the 31st August 1870, the respondent filed a petition applying for a rehearing, on the ground that her husband had received no notice of the suit. This application was refused by the Munsif, to whom it was presented (Beng. Act VIII of 1869 having in the meantime come into force), on the 25th February 1871, on the ground that the rehearing was barred by the institution of an appeal and special appeal.

This was clearly wrong, for if the husband of the respondent really had no notice of the suit, he could not be concluded by anything done in it. The plaintiff ought to have tried the question of due service of summons.

On appeal to the judge that officer held that the Munsif had no jurisdiction in the matter, but that the application should be made in the Revenue Court.

An application having been made to the Deputy Collector on the 12th September 1871, was disallowed on the merits on the 4th October following.

On the 17th February 1872, the order now appealed against was made by the Judge. It says.—"Let the papers be returned to the Collector for disposal with reference to the preceding remarks."

The first ground of special appeal is that the Deputy Collector had no jurisdiction in the matter, and that the Judge was wrong in sending the case to be tried by the Revenue Court.

The jurisdiction of the Revenue Court is now at an end, and it has very recently been determined in *Oodwunt*

(1) 10 B. L. R., App., 22. (2) *Id.*, 21.

such decree having been passed *ex parte*, the application to set the decree aside should be made to the Court to which it has been transferred, or to the Court which originally made it?"

In referring the question the following observations were made by

JACKSON, J. (AINSLIE, J., concurring) :—It appears to us as at present advised that the 2nd and the 5th sections of Beng. Act III of 1870 will not bear the meaning that has been put upon them in the case of *In re Sreemutty Juggodumba Dossee* (1) S. 5 says :—" Nothing in this Act shall affect applications, not being applications in suits, nor applications for execution of, or in relation to, decrees transferred under the provisions aforesaid." Now the application made in this case was—whether it was made under s. 119 of Act VIII of 1859, or under s. 58 Act X of the same year—an application to set aside a judgment, which had been obtained *ex parte*. It appears to me that such an application is most strictly and entirely an application in respect of a decree transferred and that consequently the Act would apply ; and as the Act would apply, it is the Court to which the decree has been transferred that ought to deal with the application.

Baboo *Rash Behari Ghose*, for the appellant, contended, that

Maktoon v. *Biddhi Chand Chowdhry* (*a*), that all proceedings under Act III of 1870 must be heard and disposed of by the Civil Courts, and that the procedure to be followed is that of Act VIII of 1859. Everything that has been done in this case by the Revenue Court, and the order of the Judge remanding the case to the Revenue Court, must be set aside as altogether without jurisdiction.

The second ground of appeal is that the Judge ought to have determined whether the application for revival could be entertained, the said application having been made after expiry of the period presented by law. If the state of the case put before us, and which has not been contested, is correct, it would appear that the first process for the enforcement of judgment was executed within thirty days of the date on which the application for rehearing was filed.

The case will have to go back to the Munsif, in order that he may enquire and determine whether notice of the suit was actually served upon the husband of the respondent. If not, she will be entitled to a rehearing.

The costs of this appeal will follow the result.

(*a*) *Ante*, p. 216.

(1) 10 B. L. R., App., 22.

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the balance of authorities was in favor of the appellant's view. In *In re Sreemutty Juggodumba Dossee* (1), Norman, J., appears to have considered that the decree is transferred for purposes of execution only; but in that case one would expect to find a proviso, such as is contained in s. 288, Act VIII of 1859, that the Court to which the decree is transferred should not have power to enquire into the validity of the decree.

Baboo *Doorga Mohun Doss*, for the respondent, admitted that he must rest his case on the judgments in *In re Sreemutty Juggo dumba Dossee* (1) and in *In re Ramsoonder Bandopadhya* (2). [COUCH, C.J.—This was an application in relation to a decree transferred under Act III. The Act is to affect such applications; see s. 5. How can it do so except by compelling them to be made in the Court to which it has been transferred?]

Baboo *Rash Behari Ghose* was not called on to reply.

The judgment of the Full Bench was delivered by

COUCH, C.J.—It appears to me that the Legislature has used words wide enough to include a case of this kind, doing what might reasonably be supposed to be their intention, and providing that, when a decree has been transferred from the one Court to the other, any application afterwards, whether for the execution of it, or to set it aside, should be made to the Court to which it had been transferred. It would be very inconvenient if one kind of application were to be made to one Court and another kind to another Court.

The 3rd section, after providing for decrees being transferred, says, that "such execution and proceedings may be had in respect of such decrees as if the same were decrees of the Court to which they shall have been so transferred." I do not understand these words as meaning that the proceedings are to be only proceedings in execution, but generaly proceedings relating to the decree. If they were to be limited to proceedings in exe-

(1) 10 B. L. R., App., 22 (2) 10 B. L. R., App., 21.

cution, the words should have been "and such execution and proceedings thereon in respect of such decrees." The words "proceedings in respect of such decrees" are wide enough to include an application to set aside a decree as having been made *ex parte*, and there being ground for setting it aside.

Then in the 5th section it is said that nothing in the Act is to affect "applications not being applications in suits, nor applications for execution of, or in relation to, decrees transferred." These words show that the Legislature considered that applications in suits would be affected by the Act. In fact all applications would be affected by it. An application in a suit where the decree has been transferred to set it aside is an application in the suit. It is also an application "in respect of" the decree. We must consider that those words were intended to include something more than proceedings in execution of the decree. They appear to have been inserted in order to give the Court as large an authority as possible where decrees had been transferred. It is to my mind much the more reasonable construction, that where a decree has been transferred to a Court, any application after that in relation to it should be made to the Court to which it has been transferred. I think our answer to the question should be to that effect.

We shall reverse the decrees of both the lower Courts. The application to set aside the *ex parte* decree will be transferred to the Court of the Subordinate Judge of Backergunge. The plaintiff will have the costs of this appeal, the parties will bear their own costs of the proceedings in the lower Courts, and the costs of the suit will abide the result.