

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

1869
Jan'y. 4.

DHAN BIBI (PETITIONER) v. HARADHAN RAM (OPPOSITE PARTY)*

Appeal—Act XXIII of 1861, s. 11.

The Moonsiff, on the application of a judgment-debtor, set aside a sale held in execution of a decree passed against him, on the ground that the decree was barred by lapse of time. The judgment-creditor appealed to the Judge, who rejected the appeal, on the ground that no appeal was allowed from such an order.

Held, in Special appeal, that, under sec. 11 of Act XXIII. of 1861, an appeal lay from the order of the Moonsiff.

Baboo *Banshidhar Sen* for petitioner.

The respondent did not appear.

The facts sufficiently appear in the judgment of the Court, which was delivered by

JACKSON, J.—This is a special appeal on the part of the decret-holder, who complains that the sale of the judgment-debtor's property, which took place in execution of his decree, has been reversed by the Moonsiff, on the ground that execution was barred, the fact of such bar having been brought to the notice of the Moonsiff subsequent to the sale. He appealed to the Judge, *first*, on the ground that it was not competent to the Moonsiff to take notice of such objections after the sale; and, *Secondly*, on the ground that execution was not, in fact, barred. The Judge held that no appeal was allowed by law, and rejected the application.

It is contended now that the Judge was wrong; that this is a case coming within the provisos of section 11, Act XXIII. of 1861; and that, in such cases, an appeal is expressly allowed. No one appears for the respondent; but it seems clear that the Judge has fallen into error. This was a question arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree; and, consequently, the order passed by the Court was open to appeal. The questions between the parties are questions partly of law and partly of fact.

We are not, therefore, capable of dealing with them effectually in special appeal, and we think that the order of the Judge must be set aside, and the proceedings remitted to him, that he may deal with the appeal as made in his Court.

* Miscellaneous Special Appeal, No. 361 of 1863, from a decree of the Judge of West Burdwan, dated the 22nd May 1863, affirming a decree of the Moonsiff of that district, dated the 31st March 1863.