

Three objections are taken before us in special appeal. The first is, that the plaintiff was not entitled to recover rent at the enhanced rate notwithstanding his previous declaratory decree, without serving the defendants with the written notice as prescribed by Section 13, Act X. of 1859. Upon this point, I think we may safely follow the decision of a Division Bench in the case of Modhoo Soodun Koondoo and others (appellants), to be found at page 81 of Volume VI. of the Weekly Reporter, Act X. Rulings. In that case, it was held that a judgment passed against a ryot in a contested suit would operate as a notice to him, taking effect from the commencement of the year following that in which the decree was passed. This seems to be a reasonable and fair opinion, and I see no reason to differ from it.

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The third objection is that the plaintiff having commenced his suit for rent for the year 1274, and subsequently withdrawn it in order to bring a fresh suit for the years 1273 and 1274, without having obtained previous leave of the Court, the fresh suit was not maintainable under Section 97, Act VIII. of 1859. It has been held in the case of Doyal Chunder Ghose and others (appellants), Marshall's Reports, page 148, that the prohibitory clause of Section 97 does not apply to suits under Act X. of 1859. This objection, therefore, also fails. The special appeal, therefore, I think, must be dismissed with costs.

Markby, J.—I am of the same opinion.

The 4th January 1869.

Present:

The Hon'ble L. S. Jackson and W. Markby,
Judges.

Appeal—Order in execution—Section 11, Act XXII., 1861.

Case No. 361 of 1868.

Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 23rd May 1868, affirming an order of the Moonsiff of that District, dated the 31st March 1868.

Dhun Bibee (Decree-holder),
Appellant,

versus

Haradhun Roy and others (Judgment-debtors), *Respondents.*

Baboo Bungshee Dhur Sein for
Appellant.

No one for Respondents.

The sale of a judgment-debtor's property in execution of a decree was reversed by a 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.

HELD that, as the question was one arising between the parties, and relating to the execution of the decree, the Moonsiff's order was open to appeal.

Jackson, J.—THIS is a special appeal on the part of the decree-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 objection 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 provisions 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 facts. We are not, therefore, capable of dealing with them effectually in special appeal; and I 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.

Markby, J.—I am of the same opinion.

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