

1865.
Jan. 16.

Civil petition.

YESHVANTRÁV AMRITRÁV JAMÍN.....*Applicant.*
ISMAEL' ALI' KHÁN.....*Respondent.*

Imprisonment in Execution of Decree—Application for Discharge—Appeal—Jurisdiction—Construction—Act VIII. of 1859, Secs. 273, 274, 275, 283, and 365—Act XXIII. of 1861, Secs. 8, 11, 35, and 44.

Held that the procedure on an application for his discharge, under Sec. 273 of Act VIII. of 1859, by a person arrested in execution of a decree for money, is such a question as comes within the words introduced by Sec. 11 of Act XXIII. of 1861, in addition to the original provision in Act VIII. of 1859, Sec. 283 ; and the order passed thereon, by the court executing the decree, is subject to appeal : notwithstanding that orders as to imprisonment in execution of a decree are excepted from the operation of Sec. 365 of Act VIII. of 1859, as that exception—there being no affirmative prohibition—is removed by the provisions of Secs. 8 and 11 of Act XXIII. of 1861, which Act, as directed by Sec. 44 thereof, is to be read as part of Act VIII. of 1859.

THIS was an application to set aside a decision passed by R. H. Pinhey, District Judge of the Konkan, on appeal against an order made by the Munsif of Kalyán.

Yeshvantráv (the plaintiff), having obtained a decree (No. 324 of 1858) against the defendant, Ismaél, applied for and obtained an order from the Munsif of Kalyán to execute the decree by the arrest and imprisonment of the defendant, who, when arrested and brought before the court, on the 7th of January 1864, applied to the Munsif for his discharge, under Sec. 273 of Act VIII. of 1859, on the ground that he had no present means of paying the debt, either wholly or in part.

The Munsif, Dáji Govind, found, on inquiry, that the defendant had been guilty of concealing his property and therefore, rejected his application, under Sec. 275 of the Act ; on the 28th of July 1864.

Against this order the defendant appealed to R. H. Pinhey, District Judge of the Konkan, who found that there was no concealment on the part of the defendant ; and, therefore reversed the order of the Munsif, on the 22nd of September 1864.

Vishvanath Na'ra'yan Mandlik applied, under Sec. 35 of Act XXIII. of 1861, to have the decision of the District Judge set aside, on the ground that he had no jurisdiction to try the appeal; and a *Rule nisi* was granted, calling on the opposite party to show cause why the decision should not be reversed.

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Kiva'muddin Miya'ruji appeared to support the Judge's order, and stated that the objection of the plaintiff was now raised for the first time.

Mandlik, in support of the rule, relied upon Sec. 365 of Act VIII. of 1859, which had not been repealed; and contended that the Munsif's order, being one for imprisonment in execution of a decree, was not subject to appeal and that the District Judge in hearing the appeal had exercised a jurisdiction not vested in him by law.

COUCH, J. :—In this case the defendant made an application to the Munsif of Kalyán under Sec. 273 of Act VIII. of 1859. The Munsif, not being satisfied, rejected it, and granted an order for the imprisonment of the debtor. The District Judge, on appeal, reversed this order of the Munsif; and the question we are now called upon to decide is, whether the District Judge had jurisdiction to try the appeal.

Sec. 11 of Act XXIII. of 1861 enacts that—

"All questions regarding the amount of any mesne profits which by the terms of the decree, may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable, in respect of the subject-matter of a suit, between the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree, or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate suit; and the order passed by the Court shall be open to appeal."

This section, in introducing the words "*and any other questions arising between parties to the suit in which the decree was passed, and relating to the execution of the decree*"

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goes beyond the original provision in Act VIII. of 1850, Sec 283. In the present case it appears to us that the question involved is a question arising between the parties, as is contemplated by Sec. 11 of Act XXIII. of 1861. For when we look at Sec. 273 (a) of Act VIII. of 1859 in conjunction with Sec. 11 of Act XXIII. of 1861, the question clearly arises, whether the law will allow the alternative offered by Sec. 273, and oblige the plaintiff to be satisfied with the defendant's property, or will compel the defendant to suffer imprisonment.

Sec. 274 prescribes the procedure on an application for his discharge by a person arrested in execution of a decree for money ; and this is repealed by Sec. 1 of Act XXIII. of 1861, and Sec. 8 (b) substituted for it, which last clearly shows that the procedure on an application by a defendant for his discharge under Sec. 273 is such a question as comes within the words above cited from Sec. 11 of Act XXIII. of 1861 ; and a decision by a Munsif on such a question is open to appeal.

(a) "Any person arrested under a warrant in execution of a decree for money, may, on being brought before the Court, apply for his discharge on the ground that he has no present means of paying the debt, either wholly or in part, or, if possessed of any property, that he is willing to place whatever property he possesses at the disposal of the Court. The application shall contain a full account of all property, of whatever nature, belonging to the applicant, whether in expectancy or in possession, and whether held exclusively by himself or jointly with others, or by others in trust for him (except the necessary wearing apparel of himself and his family, and the necessary implements of his trade), and of the places respectively where such property is to be found, or shall state that with the exceptions above mentioned the applicant is not possessed of any property, and the application shall be subscribed and verified by the applicant in the manner hereinbefore prescribed for subscribing and verifying plaints."

(b) "When a person arrested under a warrant in execution of a decree for money shall, on being brought before the Court, apply for his discharge on either of the grounds mentioned in Section 273 of Act VIII. of 1859, the Court shall examine the applicant, in the presence of the plaintiff or his pleader, as to his then circumstances, and as to his future means of payment, and shall call upon the plaintiff to show cause why he does not proceed against any property of which the defendant is possessed, and why the defendant should not be discharged; and should the plaintiff fail to show such cause the Court may direct the discharge of the defendant from custody. Pending any inquiry which the Court may consider it

Moreover, if we look at Sec. 365 (c) itself, we find that orders as to imprisonment in execution of a decree are only excepted from the operation of that section. There is no affirmative prohibition. And this is such an exception as is removed by the provisions of Secs. 8 and 11 of Act XXIII. of 1861. Sec. 365 being merely exceptive, we find no difficulty whatever in reconciling it with the provisions of Act XXIII. of 1861, which are a part of the Civil Procedure Code.

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It also appears to us that, if the decision of a question respecting the execution of a decree against a man's property be open to appeal, there is the greater reason why a question as to execution against his person should be open to a like remedy.

Both upon the reason of the thing and the words of the Code itself, we are of opinion that an appeal against the Munsif's order will lie. The rule must, therefore, be discharged.

NEWTON and WARDEN, JJ., concurred.

Rule discharged.

necessary to make into the allegations of either party, the Court may leave the defendant in the custody of the officer of the Court to whom the service of the warrant was intrusted, on the defendant depositing the fees of such officer, which shall be at the same daily rate as the lowest rate charged in the same Court for serving process; or if the defendant furnish good and sufficient security for his appearance at any time when called upon while such inquiry is being made his surety or sureties undertaking, in default of such appearance, to pay the amount mentioned in the warrant. the Court may release the defendant on such security."

(c) " All orders as to fines or the levying thereof, or as to imprisonment, under this Act (except when the imprisonment is in execution of the decree), shall be subject to appeal."