APPELLATE CIVIL.

Before Mr. Justice Ainslie and Mr. Justice Birch.

1876 *May* 12.

RUNGLALL MISSER (PLAINTIFF) *v.* TOKHUN MISSER AND ANOTHER (DEFENDANTS).*

Act VIII of 1859, *s.* 119—*Ex parte Decree—Rehearing granted after expiration of time limited for application.*

The plaintiff obtained an *ex parte* decree on the 5th July 1873, of which he took out execution on the 9th August. On the 11th of November, the defendant applied for and obtained a rehearing under s. 119, Act VIII of 1859. On the rehearing, his suit was dismissed by both the lower Courts on the merits. *Held*, on a special appeal to the High Court, that, although s. 119 provides that an order for rehearing shall be final, it is final only in the sense that it is not by itself open to appeal, and that the plaintiff was not precluded by that section from raising the objection that the order for rehearing was made after the time limited therein, and therefore ought to be set aside as made without jurisdiction.

SUIT for possession of land, in which the plaintiff obtained an *ex parte* decree on the 5th of July 1873, in execution of which he obtained possession, the execution being taken out on the 9th August. On the 11th November 1873, the defendants made an application under s. 119, Act VIII of 1859, to set aside the *ex parte* decree and for a rehearing. This application was refused by the Munsif, but on appeal his decision was reversed by the Judge, who, without determining whether the application was within time, held that the defendants were entitled to a rehearing.

On the rehearing before the Munsif, the plaintiff failed to make out his case, and his suit was dismissed on the merits, the order being confirmed by the Judge on appeal. The plaintiff, thereupon preferred this special appeal to the High Court, on the ground that the application for rehearing under s. 119

* Special Appeal, No. 2049 of 1875 against a decree of the Subordinate Judge of Zilla Gya, dated the 17th of August 1875, affirming a decree of the Munsif of Aurangabad, dated the 3rd of October 1874.

having been presented after the expiry of the 30 days therein limited, the Courts below were in error in granting the application and hearing the case on the merits. He also appealed on the facts of the case.

Baboo *Abinash Chunder Banerjee* for the appellant.

Mr. *Younan* for the respondents.

The contentions and cases cited appear in the judgment of the Court, which was delivered by

AINSLIE, J. (who, after stating the facts, continued):—The points which have been urged before us are, that, whereas s. 119 provides a definite limit of time, beyond which an application for a rehearing shall not be entertained by the Court, the order of the Judge admitting the application, and all the proceedings following thereon, have been done without sanction of law; and that in this appeal from the decree, the appellant has a right to question every order of the subordinate Courts leading up to the decree objected to.

S. 119 of the Code of Civil Procedure says, that, in all cases in which the Court shall pass an order under this section for setting aside a judgment, the order shall be final. But it is contended on the strength of a Full Bench judgment in *Bhyrub Chunder Surmah Chowdhry* v. *Madhubram Surmah* (1), that the word "final" does not mean final absolutely, but final for the time; that the order by itself shall not be open to appeal; but that whenever the case is opened by an appeal from the decree, that order, as well as every other interlocutory order, may form the subject of appeal.

There can be no doubt that, if a case under s. 119 cannot be distinguished in principle from a case under s. 378, we ought to follow the ruling of the Full Bench. Though we are not constrained by a positive rule of the Court, we ought not to refuse to be guided by a decision on a matter which appears to us to be strictly analogous; it is for the respondent to satisfy us that the supposed analogy does not really exist, and that he has failed to do.

(1) 11 B.L. R., 423.

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Independently of this, there is a reported case exactly in point —*Bimola Soonduree Dossee* v. *Kalee Kishen Mojoomdar* (1)— decided by Jackson and McDonell, JJ., and the view taken by Jackson, J., is this, that a Court acting under s. 119 has jurisdiction to act under the particular conditions specified by the section, but unless an application can be shown to be within those conditions, the Court has no jurisdiction whatever to entertain it.

After referring to that portion of the section which I have read above, he says :—" Therefore if it appears that the Court had passed an order otherwise than under this section, there would be no finality, and it has been held in a matter very much analogous to this, *viz.*, where an application to review a judgment has been admitted, and where a decision afterwards takes places on rehearing, and that decision comes to the lower Appellate Court on appeal, that the lower Appellate Court is competent to look into the question whether the admission of the review has been in accordance with the restrictions imposed by the law."

On the face of these proceedings, it is manifest that s. 119, which strictly limits the period for making an application for rehearing to thirty days, to be computed from definite starting points, absolutely barred the hearing of the application by the first or any other Court.

It has been argued that the plaintiff had a remedy by motion in this Court under s. 15 of the Charter Act. It may be conceded that he had a remedy, but no authority has been shown to us for the proposition that, if a man has two remedies, and does not choose to take the one, he shall forfeit the other. If the plaintiff has a right to appeal against this order, the fact that he had a right to question it by motion under s. 15 cannot take away the former right. It was also urged that it is a matter of discretion with the Court to give or withhold from the plaintiff the advantage of the limitation prescribed in s. 119. But if this is a point that he may fairly and properly

(1) 22 W. R., 5. See also *Radha Doorga Churn Paul*, 15 W. R., 175; *Binode Chowdhry* v. *Juggut Shurnokar*, 6 W. R., 300; *Toolsee Dossee* v. [illegible]*bak*, 8 Bom. H. C. Rep., A. C., 44.

raise in special appeal, it is not a matter of discretion with the Court. Our judgment is claimed on this point, and we can neither refuse to decide it in favor of the plaintiff, nor having decided it in his favor, can we refuse to give him the benefit of the decision.

The result is, that the order made for the rehearing of the case, and dated the 25th of June 1874, and all the proceedings subsequent thereto, must be quashed, and the whole of the costs of these proceedings must be paid by the respondents.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Mitter.

IN THE MATTER OF PURSOORAM BOROOAH, PETITIONER.

1876
June 10.

Powers of Magistrates—Summary Jurisdiction—Transfer—Criminal Procedure Code (Act X of 1872), ss. 56 & 222—Furlough.

The petitioner had been convicted by Mr. Carnegy, the Assistant Commissioner of Kamroop, in the exercise of a summary jurisdiction, under s. 222 of Act X of 1872. This Officer was, in the year 1872, in charge of the Jorehaut Division in the District of Seebsaugor, "with first-class powers and powers under s. 222" of the Act. In 1874 he proceeded on furlough to England, and, on his return in 1875, was posted to the District of Kamroop, and invested with the powers of a Magistrate of the first-class.

Held, that s. 56 of Act X of 1859 did not apply, and that Mr. Carnegy had no summary jurisdiction in Kamroop—

Per MARKBY, J., on the ground that, by the terms in which the Government had conferred that jurisdiction on Mr. Carnegy, it had in effect "directed," within the meaning of s. 56 of Act X of 1872, that he should not exercise that jurisdiction anywhere but in Seebsaugor.

Per MITTER, J., on the ground, that the office to which Mr. Carnegy was appointed in Kamroop was not equal to or higher than that which he had held in Seebsaugor.

Quære per MARKBY, J., whether the posting of Mr. Carnegy to Kamroop, after his return from furlough, was a transfer from Seebsaugor within the meaning of s. 56 of Act X of 1872.

* Criminal Motion, No. 92 of 1876, against an order of the Assistant Judicial Commissioner of Kamroop, dated the 3rd December 1875.