

APPELLATE CIVIL.

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Before Mr. Justice White and Mr. Justice Mitter.

SOBHA BIBEE (DECREE-HOLDER) v. MIRZA SAKHAMUT ALI AND
 OTHERS (JUDGMENT-DEBTORS).*

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 Jan'y. 4.

*Act VIII of 1859, ss. 208 and 364—Application for Execution of Decree—
 Right of Appeal—Act XXIII of 1861, s. 11.*

Where a decree had been purchased *benami*, and the party alleging herself to be the real purchaser had not been put upon the record as a party, and an application for execution made by her under s. 208 of Act VIII of 1859 had been refused, and there was a dispute as to who was the real purchaser of the decree,—*Held*, that the applicant was not a party to the suit within the meaning of s. 11 of Act XXIII of 1861, and had no right of appeal against the order refusing her application (1).

Abidunnissa Khatoon v. Amirunnissa Khatoon (2) followed.

APPLICATION under s. 208 of Act VIII of 1859.

The applicant, alleging herself to be the purchaser of a certain decree, applied to the Subordinate Judge of Dacca to be placed on the record as decree-holder and also for execution of the decree. It appeared that the decree had been purchased *benami* by a mukhtear for and on behalf of some person or persons whose names did not appear on the record; and that there had been a litigation between the applicant and certain other parties, in which it was decided by the High Court, on the 6th of January, 1875, that the applicant had no interest in the decree. The Subordinate Judge rejected the application.

On appeal to the High Court :

Baboo *Mohini Mohan Roy* appeared for the appellant.

Munshi *Serajul Islam* for the respondents.

* Miscellaneous Regular Appeal, No. 263 of 1877, against the decree of Baboo Gunga Churn Sircar, Subordinate Judge of Zilla Dacca, dated the 16th of June, 1877.

(1) Compare s. 244 of the Civil (2) I. L. R., 2 Calc., 327; S. C., L. R., Procedure Code (Act X of 1877). 4 I. A., 66.

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The following judgments were delivered:—

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WHITE, J.—The appellant in this case applied, under s. 208 of the Code of 1859, for leave to execute a decree, which she alleged she had purchased at an auction-sale. The Court below, taking into consideration a certain judgment that had been passed by this Court in a suit to which the present appellant was a party, has decided that she is not entitled to take out execution of the decree, and, accordingly, has refused her application.

Now, by the 364th section of the Code, no appeal lies against this order, unless an express provision can be found in the Code which allows of an appeal. The only express provision is contained in s. 283 of the Code. This section has been repealed by Act XXIII of 1861 and s. 11 of the latter Act has taken its place. Hence, unless the appellant has a right of appeal under s. 11 of Act XXIII of 1861, she cannot carry the case further so far as the present suit is concerned. The only part of s. 11 which we need consider is that which directs that 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.” It is perfectly clear that Sobha Bibee, the appellant, is not technically a party to this suit. She purchased, according to her statement, the decree on the 16th June 1870, and on the 5th July she applied to be made a party, but her application was refused.

It is argued, however, upon the authority of *Hurro Lall Dass v. Soojawut Ali* (1), that although she has not been made a party to the suit, she is yet within the meaning of the 11th section, because she has by her purchase become the assignee of the decree, and as such is entitled to be made a party. We think that the doctrine laid down in *Hurro Lall Dass v. Soojawut Ali* (1), if it be not taken to be overruled by the recent decision of the Privy Council in *Abidunnissa Khatoon v. Amirunissa Khatoon* (2), must at least be considered as confined to

(1) 8 W. R., 197.

(2) Compare s. 244 of the Civil Procedure Code (Act X of 1877).

cases in which there is no dispute as to the assignment of the decree having taken place, or as to the person who is the assignee. Their Lordships in dealing with the case before them, which in principle is substantially the same as the present, and in considering the judgment of the late Chief Justice of this Court, expressed their concurrence with the view which he had taken, *viz.*, that the 208th section of Act VIII of 1859 was not intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. That being so, it is clear that where such a contest existed, a party claiming to be the assignee of the decree would not be entitled to succeed in an application for execution made under s. 208 of the Code, and for the same reason would not be entitled to be made party to the suit. In no sense therefore could he be considered as coming within the meaning of s. 11 of Act XXIII of 1861. That there is a serious contest in this case as to the party who is the real transferee of this decree there cannot, we think, be a shadow of doubt, for it appears upon the proceedings that the purchase was originally made by a mukhtear *ben mi* for somebody else. Who that somebody else is, whether the present applicant or not, has been the subject of litigation, and is not yet finally determined. The certificate of sale was issued in the name of Fukeerunnissa, one of the defendants. She has tried to establish her title, and has failed. Her case came before this Court in 1875, in a suit to which the present applicant was a party, and this Court whilst negating Fukeerunnissa's claim pronounced a very strong opinion that the present appellant had no title to be considered a *bonâ fide* transferee of the decree, but that a third person was the real purchaser. It is not necessary to determine now who is the real assignee of the decree. It is sufficient to say that it is a question which admits of very considerable doubt.

It appears to us, therefore, that the appellant who has neither been made a party to the suit nor is entitled to be made a party, cannot in any view of the case be treated as coming within the purview of s. 11. That being so by force of the 364th section of the Code of 1859, she has no right of appeal, and her case, so far as the proceedings in this suit are concerned, must rest where it is left by the lower Court.

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The appeal, therefore, will be dismissed with costs.

MITTER, J.—I am also of the opinion that, in this case, Sobha Bibek has no right of appeal. She applied under s. 208, Act VIII of 1859, as a transferee, to execute a decree which was obtained by a third party, and which she alleged she had purchased in execution of a decree against that third party. For reasons stated in the judgment of the lower Court, her application to execute the decree as a transferee under s. 208 of the Procedure Code of 1859 has been refused. The question before us is, whether this order is open to appeal under s. 11 of Act XXIII of 1861, as it has been pointed out by my learned brother. S. 364 of the Code distinctly prohibits an appeal, unless there is an express provision in that Code. The contention of the appellant is, that that express provision is to be found in the section mentioned above, viz., s. 11 of Act XXIII of 1861. The Privy Council, in the case already quoted, have distinctly decided against that contention. They, after referring to the fact that the case before them was not a case in which the Court executing the decree should have entertained an application under s. 208, observe, that “they are further fortified in this view by the consideration that, under s. 364 of this Act, no appeal would lie from any judgment or decision given in a proceeding under s. 208.” They have distinctly, therefore, held in that case that no appeal lies from any judgment or decision given in a proceeding under s. 208 of Act VIII of 1859. One of the reasons given by their Lordships for coming to this conclusion is, that in no sense is an applicant who applies to be put upon the record on the ground that he has acquired a title to the decree by transfer a party to the suit unless his application is actually granted. Referring to the position of the applicant in that case, they say, “he was not on the record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree, but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit.” The same observations will apply here. An alleged transferee by merely applying for execution of the decree does not constitute himself a party to the suit.

I am, therefore, of opinion that, in this case, the judgment of

the lower Court under s. 208 of Act VIII of 1859, is not open to appeal.

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Appeal dismissed.

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

BOONJAD MATHOOR AND OTHERS (PLAINTIFFS) v. NATHOO SHAHOO
(DEFENDANT).*

1877
Jan'y. 17.

Arbitration, matter referred to—Arbitrators doubting correctness of their decision—Award, validity and finality of—Appeal, right of—Act VIII of 1859, ss. 325, 327.

Matters in dispute were referred to the arbitration of five persons, of whom four made their award on 27th August 1875. On 3rd September, the same arbitrators granted an application for rehearing. Before the matter was reheard one of the four died, and an order striking off the application was made by two of the surviving arbitrators. On 21st February 1876, an application was made to the Court to have the award filed, which was opposed. The Court overruled the objection, and ordering the award to be filed gave a decree to the plaintiffs. *Held*, that the award was not a valid and final award, that the decree passed thereon was not final, and that an appeal would lie (1).

Sashti Charan Chatterjee v. Taruck Chandra Chatterjee (2) considered.

THE facts in this case are as follows:—

The parties appeared to have referred certain matters in dispute between them to arbitration by five persons named in the plaint. The course of proceedings before the arbitrators was not very clear, but it would seem that four of them made an award on the 27th August 1875. On the 3rd September, or five

* Special Appeal, No. 746 of 1877, against the decree of J. M. Lewis, Esq., Judge of Zilla Bhagalpore, dated the 19th March 1877, reversing the decree of Baboo Barhma Dutt, First Sudder Munsif of Monghyr, dated the 19th April 1876.

(1) See also *Gunga Narain Ghose v. Ram Chand Ghose*, 12 B. L. R., 48.

(2) 8 B. L. R., 315.