

*Civil Petition.*1869
Jan. 21.

Hari Vishnu *Petitioner.*
 Gopal bin Ragji, et al. *Opponents.*

Limitation—Execution of decree—Question raised by Court and not by parties—Appeal-Act XXIII. of 1861, Sec. 11.

The question whether the execution of a decree is barred by limitation is a question arising between the parties to the suit; and an appeal lies, under Sec. 11 of Act XX III. of 1861, from a decision on such question, whether it be raised by the Court *proprio motu*, or by the parties.

This was an application to reverse an order made by J. R. Naylor, Acting Senior Assistant Judge at Ratnagiri.

On the 17th of August 1864 the petitioner obtained a decree against the defendants, Gopal Ragji, and others. He now presented an application for its execution to the Munsif of Kharepatan, who rejected the same, on the ground that it was barred by Sec. 21 of Act XIV. of 1859. The petitioner then appealed to the Acting Senior Assistant Judge, who declined to interfere, as he considered that no appeal was open to him, since the dispute was not between the parties to the suit. The following reasons, given by the Acting Senior Assistant Judge in a similar case, decided on the 26th February 1868, were certified by him in this case:—

“This is an appeal from an order passed by the Munsif of Kharepatan upon the appellant’s application for the execution of a decree. The Munsif at once rejected the application, upon the ground of its being barred by the Law of Limitation, without calling upon the judgment-debtor to show cause why the decree should not be executed. In fact, the judgment-debtor did not appear in Court at all. This, therefore, cannot be said to be a dispute arising between the parties to the suit in which the decree was passed within the meaning of Sec. 11 of Act XXIII. of 1861. It was a question that arose between the judgment-creditor and the Court, and to such questions Sec. 11. of Act XXIII. does not apply.

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"It is a well-known rule that the right of appeal exists only where it is clearly allowed by law; and with regard to orders passed after decree, and relating to the execution thereof, Sec. 364 of the Civil Procedure Code distinctly states that: 'No appeal shall lie from any order passed after decree and relating to the execution thereof, except as is hereinbefore expressly provided.' Therefore, if Sec. 11 of Act XXIII. of 1861 (which has taken the place of Sec. 283 of Act VIII. of 1859) does not expressly provide for an appeal against orders such as that now appealed from, the present appeal certainly does not lie.

"It is not the policy of the Code to allow an appeal in every possible instance. Were it so, Sec. 364 of the Code would never have existed, and instead of the complicated language of Sec. 11 of Act XXIII. of 1861, we should have had an enactment to the effect that an appeal shall lie from all orders passed by the Court executing a decree in relation to the execution.

"What we really have, however, is a rule that 'an appeal shall lie from the orders of the Court executing a decree on all questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree.' If these words are interpreted as authorising an appeal in an instance like the present, then it appears to me the obvious meaning of the words 'arising between the parties' is lost sight of, and Sec. 11 is made to mean what, as I have already remarked it certainly does not mean, viz. 'that an appeal shall lie from all orders passed by the Court executing a decree in relation to the execution'. * * *

"The Court is, therefore, of opinion that this appeal is not one of the class expressly provided for by Sec. 11 of Act XXIII. of 1861, and therefore rejects it."

The petition was heard before NEWTON and TUCKER, JJ.

Ganpatrao Bhaskar for the applicant, cited the case of *Anpurnabai v. Gopal Babai*, decided on the 19th of December 1867.

PER CURIAM:—The Court is of opinion that a question whether the execution of a decree is barred by any law of limitation is a question arising between the parties to the suit, and that it is immaterial whether this question be raised by the Court *proprio motu*, or by the defendant.

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The Court, therefore, reverses the order of the Senior Assistant Judge, and directs that he proceed to hear the appeal.

Special Appeal No. 298 of 1869.

Sept. 15.

POLI, Widow.....Appellant.
 NAROTUM BAPU and LALA KESHAVSHET ... Respondents.

Hindu law—Inheritance—Priority amongst daughters.

On this side of India, having male issue does not determine the right to inherit. Comparative poverty is the only criterion for settling the claims of daughters to their father's estate. A *nidhan* (unendowed) daughter has preference over a *sadhan* (dowered) daughter.

Bakubai v. Manohabai (2 Bom. H. C. Rep. 5) followed.

This was a Special Appeal from the decision of A. Bosanquet, Judge of the district of Thana, in Appeal Suit No. 331 of 1868, reversing the decree of the Munsif of Bassein.

The action was instituted by the plaintiff, Poli, to establish her proprietary right to a one-fourth share in a field in the village of Omrale, in the talooka of Bassein, which had belonged to her father Lakshuman, deceased, and which the first defendant had attached and sold in execution of a decree obtained against one Dama Poput, the husband of the plaintiff's sister. The second defendant purchased the property in dispute at the auction sale. The plaintiff claimed as sole heir to her deceased father.

The defendants set up the title of their judgment-debtor, Dama Poput, in right of his wife, the plaintiff's sister, who died after her father, leaving a son, and contended that a daughter with a son had a preferential claim to succeed as heir to her father over a daughter who was a childless widow, as the plaintiff was.