

absolute estate, and being, as she was, without issue, had complete power to execute the deed of gift (Ex. 8) in favour of the defendants.

We must accordingly reverse the decrees of the Courts below, and make a decree for the defendants, with costs of suit and of both appeals.

Decree reversed.

5 B 673 (F.B.).

APPELLATE CIVIL—FULL BENCH.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice,
Mr. Justice Melvill and Mr. Justice Kembal.*

BHIKAMBHAT (*Original Applicant*), Appellant v. JOSEPH FERNANDEZ, DECEASED, BY HIS SONS AND HEIRS ANDREW FERNANDEZ AND OTHERS (*Respondents*).* [29th and 30th August, 1881.]

Decree on bond specially registered—Execution—Registration Act XX of 1866, ss. 53 and 55—Summary decision—Civil Procedure Code (Act X of 1877), ss. 2.244 (c), 591—Right of appeal—Limitation Act, IX of 1871, sch. II, arts. 166 and 167—Decree or order in regular suit—Act XIV of 1859, ss. 20 and 22—Applications for execution in suits instituted before 1st April, 1873.

An appeal lies from an order in execution of a decree made under s. 53 of Act XX of 1866.

An application for the execution of a decree made under s. 53 of Act XX of 1866 falls within art. 166, and not within art. 167, sch. II of Act IX of 1871. *Jai Shankar v. Tetley* (1) dissented from.

A proceeding under s. 53 of Act XX of 1866, though in the nature of a suit, is not a regular suit, and a decree made in such a proceeding is a decision of a Civil Court other than a decree passed in a regular suit.

The ruling of the Privy Council in *Mungal Pershad Dicit v. Gria Kant Lahiri Chowdhry* (2)—that Act XIV of 1859, and not Act IX of 1871, applied to applications in suits instituted before the 1st April, 1873—followed.

On the 13th July, 1872, the appellant obtained a decree, under s. 53 of Act XX of 1866, on a bond specially registered under s. 52 of that Act. He applied for the execution of it,—first on the 2nd September, 1872, and, again, on the 18th August, 1875. The Court made an order on the 15th November, 1874, dismissing the proceedings on his second application for execution. The decree not being fully satisfied, he again applied for its execution on the 11th September, 1878.

[674] *Held*—that the application of the 11th September, 1878, was barred both under s. 22 of Act XIV of 1859 and art. 166 of sch. II of Act IX of 1871, no proceeding having been taken to enforce the summary decree within one year next preceding the said application.

[F., 12 O. 511; R., 6 B. 54 (62); 10 C. 196 (P.C.) = 13 C.L.R. 385 = 10 I.A. 113 = 4 Sar. P.C.J. 421.]

THIS was a second appeal from an order made in an execution proceeding by A. L. Spens, District Judge of Kanara, affirming the decision of Munjunathaya Shantapa, Subordinate Judge of Honore.

On the 13th July, 1872, the appellant, Bhikambhat, obtained a decree against the defendant, Joseph Fernandez (deceased), for Rs. 2,064 and costs, under s. 53 of Act XX of 1866, on a bond specially registered under s. 52 of that Act. On the 2nd September, 1872, he applied for the execution of the decree, and recovered Rs. 1,150 by the attachment and sale of certain immoveable property in the possession of Andrew Fernandez, one of the sons and heirs of the deceased defendant. On the 18th

* Second Appeal No. 2 of 1879 from order.

(1) 1 A. 586.

(2) 8 I.A. 123.

1881
AUG. 30.
—
FULL
BENCH.
—
5 B. 673
(F.B.).

August, 1875, the appellant again applied for execution against Andrew Fernandez for the balance of the money due under the decree, and the Court ordered a notice to be issued to him. But as he could not be found, the Court, at the request of the appellant's pleader, struck off the application from the file on the 15th November, 1875. On the 11th September, 1878, the appellant made the present application for the execution of the decree against Andrew Fernandez and four others.

The Subordinate Judge, on the 16th June, 1879, dismissed the appellant's application, as barred under Act IX of 1871, sch. II, art. 166. On appeal, the District Judge upheld the order of the first Court on the 8th August, 1879.

The appellant thereon appealed to the High Court.

The appeal first came before a Division Bench (Westropp, C.J., and Pinhey, J.) on the 11th July, 1871.

Shamrav Vithal, for the appellant.

Ghanasham Nilkanth, for the respondents, took a preliminary objection that an appeal did not lie in the present case.

The cases, relied upon by the pleaders in support of their respective contention, are mentioned in the order of reference.

[675] The Division Bench referred the case to a Full Bench on the two questions stated in the following order:—

WESTROPP, C.J.—The High Courts of Calcutta and Allahabad being at issue on the question, whether an appeal lies from an order in execution of a decree made under s. 53 of Act XX of 1866, we refer that point to a Full Bench.

We also referred to the same Full Bench the question, whether an application for execution of such a decree falls within art. 166 or art. 167 of sch. II of Act IX of 1871.

On the above points the following cases have been cited:—*In re Rash Beharee Baboo* (1); *Ram Narain Doss Biswas v. Sreemunth Poddar* (2); *Hurnath Chatterjee v. Futtick Chunder Sumaddar* (3); *Radha Kristo Dutt v. Gunga Narain Chatterjee* (4); *Huro Soonduree Debia v. Punchoo Ram Mundal* (5); *Girish Chandra Dutt v. Buzul-ul-hug* (6); *Gora Chand Misser v. Raja Baykanto Narain Singh* (7); *Bhyrub Chunder v. Golap Coomary* (8); *Ramanand v. The Bank of Bengal*; *Wilayat-un-Nissa v. Najib-un-Nissa* (9); *In re Ganpat Manikji Patil* (10).

The case was heard by the Full Bench on the 22nd August, 1881.

Shamrav Vithal appeared for the appellant.

Ghanasham Nilkanth, for the respondents.

The following cases were cited in addition to those mentioned in the order of reference:—*Syud Emam Momtazuddeen Mahomed v. Raj Coomar Doss* (11); *Jai Shankar v. Tetley* (12).

JUDGMENT OF THE FULL BENCH.

The judgment of the Full Bench was delivered on the 29th August, 1881, by

MELVILLE, J.—The first question referred to the Full Bench is, whether an appeal lies from an order in execution of a decree made under s. 53 of Act XX of 1866.

(1) 7 W.R.C.R. 130.

(3) 18 W.R.C.R. 512.

(5) 34 W.R. 225.

(8) 3 C. 517.

(11) 23 W.R.C.R. 187.

(6) 3 B.L.R.A.C.J. 68.

(9) 1 A. 377, 583.

(2) 9 W.R.C.R. 498.

(4) 23 W.R.C.R. 328.

(7) 12 B.L.R. F.B. 261.

(10) 6 B.H.C.R.O.C.J. 64.

(12) 1 A. 586.

In several cases cited in the order of reference the Calcutta High Court has decided the above question in the negative.

[676] The ground of these decisions appears to be that s. 55 of the Act enacts that no appeal shall lie against any decree or order made under ss. 53, 54 and 55; that by s. 53 a decree made under that section "may be enforced forthwith under the provisions for the enforcement of decrees contained in the Code of Civil Procedure"; that the effect of the last quoted words is virtually to incorporate into s. 53 the provisions for the enforcement of decrees contained in the Code of Civil Procedure; and that, consequently, an order made under any of those provisions is an order made under s. 53, and, as such, comes within the prohibition against appeal contained in s. 55.

The above construction is, no doubt, logically admissible, but it is not, as it appears to us, a necessary construction. And, restrictive as it is of the ordinary right of appeal, we should not be disposed to adopt it, if we can see our way to any other construction, equally in harmony with the words of the statute, and more consonant to what may reasonably be supposed to have been the intention of the Legislature. It is clearly just that a party who has covenanted to submit to a summary decree should not be allowed to appeal against such a decree. But in the execution of such a decree, both parties are exposed to all the ordinary risks and possible injury arising from an erroneous order; and there would appear to be no just cause why the sufferer should be deprived of any of the ordinary remedies which the Code of Civil Procedure provides for a decree-holder or a judgment-debtor.

A majority of the Judges of the Allahabad Court in *Wilayat-un-Nissa v. Najib-un-Nissa* (1) have held that, according to a strict and proper construction of s. 55 of Act XX of 1866, the parties to a decree made under s. 53 are not deprived of such rights of appeal as the Code of Civil Procedure declares to attach to orders in execution passed under the provisions of that Code. In this view we concur; but we should have some difficulty in following the opinion of the learned Judges that the proceedings under s. 53 of Act XX of 1866 are not in the nature of a suit, and yet that an appeal against an order in execution is [677] permissible under the Code of Civil Procedure. Having regard to the terms of s. 591, and of s. 244 (c), read in conjunction with the definition of the term "decree" in s. 2 of the Code, it appears to us that an appeal is not allowed in regard to a question arising in execution of a decree, unless such question arises between parties to a *suit*. We accept, however, the decision of the Calcutta Full Bench in *Syud Emam Momtazuddeen Mahomed v. Raj Coomar Doss* (2), that proceedings under s. 53 of Act XX of 1866 are in the nature of a suit; and on this ground we hold that an order made in the execution of the decree comes within the definition of a "decree" contained in the Civil Procedure Code, and is, therefore, subject to appeal.

The second question referred to the Full Bench is, whether an application for the execution of a decree made under s. 53 of Act XX of 1866 falls within art. 166 or art. 167 of sch. II of Act IX of 1871.

In *Jai Shankar v. Teiley* (3) the Full Bench of the Allahabad Court has held that such an application falls within art. 167, and not art. 166 of the schedule. We should have been glad if we could have adopted this view; but it does not appear to us to be in accordance

(1) 1 A. 583.

(2) 23 W. R. 187.

(3) 1 A. 586.

1881
AUG. 30.
—
FULL
BENCH.
—
S. B. 678
(F. B.)

with a proper construction of the provisions of Act IX of 1871. Article 166 provides a period of one year "for the execution of a decision (other than a decree or order passed in a regular suit or an appeal) of a Civil Court or of a Revenue Court." Then follows art. 167, which provides a period of three years "for the execution of a decree or order of any Civil Court not provided for in art. 169." Now, of course, the words "decree or order" in art. 167 are sufficiently wide, if the fullest effect be given to them, to embrace every description of decision, and, therefore, to include the decisions provided for in art. 166. It is manifest, therefore, that the words "decree or order" in art. 167 must be read with some limitation; for, otherwise, they would include the decisions mentioned in art. 166, which article would, consequently, have no operation. On the principle that *generalia specialibus non derogant*, the general words "decree or order" in art. 167 must be read [678] as including only such decrees and orders as have not been already specially provided for in art. 166,—that is to say, only such decrees or orders as have been "passed in a regular suit or an appeal." The question, then, as regards a decree made under s. 53 of Act XX of 1866, is whether it is a decree in a regular suit; for, if it be not so, it must be held to fall within art. 166, and not art. 167 of the Limitation Act of 1871. Now, even if the Registration Act were silent on the subject, we should hesitate to hold that an *ex parte* proceeding, consisting of nothing beyond a petition and a decree, could properly be regarded as a regular suit. But, in fact, the Act itself in ss. 52 and 53, speaks of the proceeding as a mode of recovering money "in a summary way," and directs that the petition shall be presented "to any Court which would have had jurisdiction to try a regular suit on the obligation for the amount secured thereby." So that, unless we are to suppose the Legislature to use technical terms in different senses at different times, it is quite clear that a proceeding under s. 53 of Act XX of 1866, though in the nature of a suit, is not a regular suit, and that a decree passed in such a proceeding is a decision of a Civil Court, other than a decree passed in a regular suit, and, as such, comes within the operation of art. 166 of the Limitation Act.

We are confirmed in this view by comparing arts. 166 and 167 with ss. 22 and 20 of the previous Limitation Act No. XIV of 1859. Section 22 provided a period of one year for "any summary decision or award of any of the Civil Courts not established by Royal Charter, or of any Revenue authority"; while s. 20 prescribed a period of three years for "any judgment, decree, or order" of any Court not established by Royal Charter. It seems clear that arts. 166 and 167 of the Act of 1871 were intended to reproduce, without alteration, the above provisions of the Act of 1859, and that, consequently, any "summary decision" (which s. 53 of Act XX of 1866 expressly declares a decree made under that section to be) falls within art. 166 of Act IX of 1871, as it would have fallen within s. 22 of Act XIV of 1859.

Our reply to the second question referred to the Full Bench must, therefore, be that, in our opinion, an application for execution [679] of a decree made under s. 53 of Act XX of 1866 falls within art. 166, and not within art. 167 of sch. II of Act IX of 1871.

On the return of the case by the Full Bench, it came again before the Division Bench for final disposal on the 30th August, 1881.

Shamrav Vithal, for the appellants.

Ghanasham Nilkanth, for the respondents.

JUDGMENT OF THE DIVISION BENCH.

The following is the judgment of the Court :—

WESTROPP, C. J.—The Full Bench has found on the questions referred to it by this Division Court—

1. That an appeal does lie from an order in execution of a decree made under s. 53 of Act XX of 1866.

2. That an application for execution of such a decree falls within art. 166, and not art. 167, of sch. II of Act IX of 1871.

Mr. Shamray Vithal (for the appellant) now, on the cases coming before this Division Bench for final disposal, has drawn our attention to the case of *Mangal Pershad Dichit v. Grija Kant Lahiri Chowdhry* (1) where Her Majesty's Privy Council have held that Act XIV of 1859, and not Act IX of 1871, is applicable to applications in suits instituted before the 1st of April 1873, and to the fact that the suit, in which the order is under appeal in the present case, was instituted in 1872. He observes that, under s. 22 of Act XIV of 1859, his client's application for execution, made on the 11th September 1878, is as fully barred as by art. 166 of Act IX of 1871, no proceeding having been taken to enforce the summary decision or order of the 13th July 1872 within one year next preceding the present application for its execution. This Court, concurring in that view, affirms, with costs, the orders of the Court below whereby the application of the plaintiff for execution was dismissed.

5 B. 680.

[680] APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and
Mr. Justice Pinhey.

BALAJI RANCHODDAS AS MANAGER OF THE ESTATE OF MOHANLAL
DALSUKHRAM, DECEASED (*Applicant*). * [30th August, 1881.]

Decree—Execution—Power of the District Court to withdraw applications for execution—Mofussil Courts of Small Causes—Jurisdiction—Civil Procedure Code (Act X of 1877), ss. 25 and 647, sch. II.

Sections 25 and 647 of the Civil Procedure Code, Act X of 1877, are both applicable to Courts of Small Causes in the Mofussil, and the former section is extended by the latter to execution proceedings in such Courts.

Under s. 25 of the Civil Procedure Code, Act X of 1877, the District Judge has power to withdraw an application for execution of a decree from a Subordinate Court (such as a Mofussil Court of Small Causes) and to dispose of it himself, or to transfer it to another Subordinate Court competent to deal with it.

The distinction made for the purposes of limitation between suits, appeals, and applications by the Limitation Acts has no bearing upon a question of jurisdiction.

[N.F., 15 C. 177; F., 22 B. 778 (782); R., 16 C. 457 (463); 13 Ind. Cas. 542 (543); Cons., 18 B. 61 (64).]

THIS case was referred for the opinion of the High Court by S. H. Phillpotts, District Judge of Ahmedabad, under s. 617 of the Civil Procedure Code, Act X of 1877.

The applicant Balaji Ranchoddas, as manager of the estate of Mohanlal Dalsukhram, deceased, presented an application to the District

* Civil Reference, No. 23 of 1881.

(1) 8 I. A. 123.