APPELLATE CIVIL.

Before Sir S. Subrahmania Ayyar, Officiating Chief Justice, and Mr. Justice Benson.

1904. February 10, 25.

RAMANADHAN CHETTI (FOURTH DEFENDANT), APPELLANT,

v.

NARAYANAN CHETTY (PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *ss.* 540, 623—*Practice—Review petition followed by appeal—Decision of review petition during pendency of appeal—Position and power of Court of First Instance after an appeal has been filed against its decree.*

A plaintiff sued by an agent, who compromised the suit, one of the terms of the compromise being that the agent should withdraw the suit. The agent failed to do this, whereupon the defendant brought the compromise to the notice of the Court and the suit was dismissed on 10th September 1901. Plaintiff on the succeeding day applied for a review (alleging fraud and collusion on the part of his agent) and, on 13th December 1901, preferred an appeal to the High Court against the decree dismissing the suit. While that appeal was pending, namely, on 17th March 1902, the Subordinate Judge heard and allowed the review petition, set aside the decree and restored the suit to the file:

Held, that the order was *ultra vires*. A pending appeal, without annulling the judgment appealed against, leaves it subsisting as a valid adjudication governing the rights of the parties, but the further litigation and all matters connected with it are transferred to and placed under the control of the Appellate Court. The power of the inferior Court in any way to deal with the litigation is completely in abeyance, except to carry out the decree, which it is the duty of the Court to do, as section 545 of the Code of Civil Procedure provides that the execution of the decree is not stayed by the mere fact that an appeal has been preferred against it.

Held, also, that an appeal lay against the order of the Subordinate Judge.

REVIEW PETITION and subsequent appeal. Plaintiff sued fourth defendant, with others, through an agent who held a general power of attorney from him. Whilst the suit was pending, the agent entered into a compromise, one of the terms of which was that the suit was to be withdrawn. The agent failed to withdraw the suit, whereupon the fourth defendant brought the compromise

* Civil Miscellaneous Appeal No. 80 of 1902, presented against the order of T. Varada Rao, Subordinate Judge of Madura (East), on Miscellaneous Petition No. 496 of 1901 and Civil Revision Petition No. 344 of 1901, also presented against the same order (in Original Suit No. 14 of 1901).

to the notice of the Court and the suit was dismissed on 10th September 1901. On the next day, plaintiff applied for a review of this order dismissing the suit. On 13th December 1901, whilst the review petition was still pending, plaintiff preferred an appeal to the High Court against the same order. On 17th March 1902, the lower Court heard and allowed the review petition and the suit was restored to the file. Against that order, the fourth defendant preferred this appeal and revision petition. The facts are more fully set out in the judgment. The chief question raised was whether it was competent to the lower Court to pass the order on the review petition, having regard to the existence of the appeal from the order which was in fact reviewed.

S. Srinivasa Ayyangar for appellant (fourth defendant).

P. R. Sundara Ayyar and *C. V. Anantakrishna Ayyar* for plaintiff (respondent).

JUDGMENT.—The respondent, Narayanan Chetti *alias* Renganadhan Chetti, while residing in Saigon, brought a suit in the Subordinate Court of Madura (East) through Venkusami Aiyangar who held a general power of attorney from him, and who was his recognised agent, against, among others, the appellant Ramanadhan Chetti as fourth defendant, with reference to certain disputes connected with the temple in Ariyakudi in the Sivaganga Zamindari, of which institution the respondent claimed to be one of the Managers. Pending the suit the recognized agent and the appellant entered into a compromise, in accordance with one of the terms of which the suit was to be withdrawn. The recognised agent not having in accordance with the compromise applied for the withdrawal of the suit, the appellant, under section 375 of the Civil Procedure Code, brought the compromise to the notice of the Subordinate Judge, who thereupon dismissed the suit on the 10th September 1901.

On the succeeding day the respondent applied for a review on the grounds that the recognised agent had no authority to enter into the compromise and that he acted fraudulently and in collusion with the respondent in the matter.

On the 13th December following, the respondent preferred an appeal to this Court against the decree dismissing the suit, which appeal is still pending.

The application for review of the decree came on finally before the Subordinate Judge on the 17th March 1902 and was allowed,

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he being of opinion that the recognised agent had exceeded his authority in entering into the compromise though the allegation of fraud and collusion between the agent and the appellant had been given up. The decree was set aside and the suit was restored to the file with a view to its being proceeded with.

This order is impeached in the present appeal and in Revision Petition No. 344 of 1902 which it is necessary to consider with it.

The first point for determination is whether it was competent to the Subordinate Judge to pass the order in question, having regard to the existence of the appeal preferred by the respondent against the decree to which the order related and this question depends upon the view to be taken as to the effect of an appeal against a final decree, duly filed and pending, upon the power of the Court passing the decree, in connection with the litigation which is the subject of the appeal.

One and, as it would seem, a somewhat extreme theory in the matter is that adopted in the New Hampshire Statute referred to in *Stalbird* v. *Beattie*(1), according to which such an appeal actually vacates the judgment appealed from, leaving the case with its incidents as it stood before rendition of judgment, the pleadings and evidence remaining unaffected and it being the duty of the Appellate Court to hear and try the case as if no judgment had been pronounced or rendered in the Courts below.

The case of the United States Court of Claims is peculiar in another way as that Court is empowered to grant a new trial pending an appeal against its decision, thereby in effect putting an end to the appeal and resuming jurisdiction over the cause. This "anomalous" power, as Chief Justice Waite of the Supreme Court of the United States described it in *United States* v. *Young*(2), is one conferred by an express enactment of the Legislature with reference apparently to the very special character of the claims capable of being brought before that Court, viz., claims founded upon any law of the Congress or upon any regulation of an executive department or upon any contract with the United States.

But the more generally received theory and the one which has hitherto been acted on in this country, is that a pending appeal,

(1) 72 Am. Dec., 317; 36 N.H., 445. (2) 49 U.S., 258.

without annulling the judgment appealed against, leaves it subsisting as a valid adjudication governing the rights of the parties, but that the further litigation and all matters connected therewith are transferred to and placed under the control of the Appellate Court. In this view it follows that when an appeal has been duly filed the lower Court has, pending the decision of the appeal, no jurisdiction over the cause and can, as a rule, pass no order therein. In other words, the action of the inferior Court is, of necessity, suspended by the appeal until the Appellate Court has disposed of it, for, as observed in *Helm* v. *Boone*(1) "there could not be a greater absurdity in judicial proceeding than that a cause should be progressing at the same time in the inferior and appellate tribunals of the country."

The dictum of Lord Eldon in *Huguenin* v. *Baseley*(2) cited on behalf of the respondent, referring, as it does, to a bill of review, which is the commencement of litigation distinct from that in which the appeal has been preferred, is not in point. As to the observation of Sir James Bacon, Chief Judge in Bankruptcy, in *Ex parte Keighley*(3) to the effect that the pendency of the appeal to himself from the order of the County Court Judge did not affect the latter Judge's jurisdiction to re-hear the case in the County Court, that opinion was expressed with reference to the very wide terms of section 71 of the Bankruptcy Act (32 and 33 Vict., Cap. 71), viz., "every Court which has jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it in pursuance of this Act." Moreover in *Ex parte Banco de Portugal*(4), whether, notwithstanding the provision quoted above, the Court of Appeal had power to re-hear a bankruptcy case after an appeal therein to the House of Lords, was treated as an open question.

So far as appears, then, there seems to be no direct English authority available with reference to the point under consideration. The ruling of the Judicial Committee in *In the matter of Candas Narrondas Navivahu* v. *Turner*(5) to which Mr. Srinivasa Aiyangar drew our attention, that the amendment by the High Court (though not upon a review) of the order appealed against, after the appeal to Her Majesty had been presented was beyond

(1) 22 Am. Dec., 75; 6 J. J. Marshall, 351.
(2) 15 Ves., 180.
(3) L.R., 9 Ch., 667.
(4) L.R., 14 Ch. D., 1
(5) I.L.R., 13 Bom., 520 at p. 533.

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the competence of the High Court, is one which, so far as it goes, is distinctly in favour of the view taken above as to the position of an inferior Court after an appeal, in regard to the matter under appeal. Sections 545 and 546 of the Civil Procedure Code clearly imply that an appeal incapacitates the inferior Court from dealing with the litigation since even the power of staying execution is, once an appeal is made, taken away from the Court and is exercisable by the Appellate Court only. Section 623 of the Code, relating to review, even more plainly points to this view instead of, as contended for the respondent, to the contrary. Not only is an application for review by a party who has already appealed disallowed by that section, but even in the case of a party not appealing no review lies when there is an appeal by some other party on a common ground, or where the former as a respondent is in a position to bring before the Appellate Court the matter to be reviewed. The manifest intention of the provision is to avoid a conflict of jurisdiction and to prevent any action on the part of the inferior Court which would have the effect of controlling the powers of the higher Court with reference to the matter actually under appeal. Though a party who has applied for a review is, for obvious reasons, not precluded from appealing, the Code does not provide for the procedure to be followed when an appeal is preferred after the review. Of course both proceedings could not go on simultaneously. If the review proceeding is to be continued and the appeal stayed, expediency would require that the party affected by the final order in the review should be enabled to obtain a remedy in the pending appeal notwithstanding that such remedy would be in respect of what was not in existence on the date of the appeal. Anomalous as such a course would be with reference to what was said by Brett, L.J., in *Ex parte Banco de Portugal*(1) already cited, it may be open to the Legislature to introduce it into our procedure by a provision like that proposed in clauses 3 and 4 of section 623 in the Civil Procedure Code Bill now before the Viceroy in Council and referred to in the argument before us on behalf of the respondent. But in the absence of such an express enactment it must on principle be held that after the due filing of the appeal and during its pendency, the power of the inferior Court in any way to deal with the litigation is completely in

(1) L.R., 14 Ch. D., 1 at pp. 4, 5.

abeyance, except to carry out the decree which, of course, it is the duty of the Court to do, as section 545 of the Civil Procedure Code in terms provides that the execution of the decree is not stayed by the mere fact that an appeal has been preferred against it.

The two cases relied on on behalf of the respondent are clearly distinguishable. In *Bharat Chandra Mazumdar* v. *Ramgunga Sen*(1), when the matter of review was finally dealt with by the lower Court no appeal was pending, as the one which had been presented had already been withdrawn. In *Thacoor Prosad* v. *Baluck Ram*(2) though an application for leave to appeal to the Judicial Committee had been made, yet it had not been granted at the time of the disposal of the review and therefore no appeal can be said to have been then pending. It follows, therefore, that the order of the Subordinate Judge granting the review, setting aside the decree and re-opening the litigation in his Court was *ultra vires*.

In this view it remains to decide whether an appeal against the order granting the review is sustainable on the ground that the order was passed without jurisdiction in circumstances such as those of the present case. Notwithstanding that this ground is not one of those referred to in section 629, Civil Procedure Code, the answer to the question must, it would seem, be in the affirmative, for the reason that where an appeal is allowed the question of jurisdiction is necessarily an appealable ground. Compare observations of Jessel, M.R., in *In re Padstow Total Loss and Collision Assurance Association*(3). Should this view not be correct, it must be held that this Court has power to revise the order of the Subordinate Judge in question under section 622 of the Civil Procedure Code, for if the words of section 629, Civil Procedure Code, viz., "such objection (*i.e.*, any of those mentioned in the section) may be made at once by an appeal against the order granting the application or may be taken in any appeal against the final decree or order in the suit," would preclude an objection as to jurisdiction being taken in an appeal against an order granting the review, they would equally preclude such objection from being urged in an appeal preferred against the final decree or order made in the suit (see *Baroda Churn Ghose* v. *Gobind Proshad Tewary*(4)) and if it

(1) B.L.R., F.B., 362.
(2) 12 Calc. L.R., 64.
(3) L.R., 20 Ch.D., 137 at p. 142.
(4) I.L.R., 22 Calc., 984.

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be held that he is not entitled to apply for revision under section 622, the party will be altogether without a remedy.

For these reasons the order of the Subordinate Judge in question must be set aside. The respondent will pay the costs of the appellant in this and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Davies and Mr. Justice Boddam.

1904. February 18.

KUPPUSAMI CHETTY (PETITIONER), APPELLANT,

v.

RENGASAMI PILLAI AND ANOTHER (COUNTER-PETITIONERS), RESPONDENTS.*

Limitation Act XV of 1877, s. 20—Application to execute decree.

The provisions of section 20 of the Limitation Act are not applicable to applications in execution of a decree. *Rama Rau v. Venkatesa Bhandari* (I.L.R., 5 Mad., 171), followed.

EXECUTION PETITION. The petition was presented on 27th September 1902, the decree being dated 31st August 1899. This was the first petition for execution. It was contended *inter alia* that the petition was not barred by limitation inasmuch as fourth defendant had made a payment of Rs. 58 towards the decree on 23rd April 1901. The District Munsif held that it was barred. He said :— "The pleader for the representatives of the plaintiff relies on an alleged payment by fourth defendant. His contention is that the suit payment will save limitation even in the case of a decree-debt. The rulings in *Rama Rau* v. *Venkatesa Bhandari*(1) and *Kader Buksh Sarkar* v. *Gour Kishone Roy Chowdry*(2) are clear authorities for the proposition that the provisions of sections 19 and 20 of the Limitation Act do not apply to decree-debts. The pleader for the plaintiffs-representatives quoted a number of rulings relating to decrees providing for payments in instalments. As those rulings do not apply to the facts of this

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* Appeal No. 66 of 1903 under article 15 of the Letters Patent presented against the judgment of Mr. Justice Bhashyam Ayyangar in Civil Revision petition No. 115 of 1903.

(1) I.L.R., 5 Mad., 171. (2) 6 Calc., W.N., 766.