

## PRIVY COUNCIL.

VASUDEVA MODELIAH AND OTHERS, DEFENDANTS,

v.

SHADAGOPA MODELIAH, PLAINTIFF.

P. C.\*  
1906.  
May 17.[On appeal from the High Court of Judicature  
at Madras.]

*Appeal to Privy Council—Stay of execution of decrees pending appeal—To what Court application should be made—Power of High Court to grant stay of execution up to determination of Privy Council appeal—Order of Judicial Committee granting stay of execution where High Court had not done so.*

Application for stay of execution of a decree pending an appeal to His Majesty in Council should always be made, in the first instance at any rate, to the Court in India which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of details which the Judicial Committee cannot possess on an interlocutory application.

In this case the High Court were of opinion that they had no power to grant a stay of execution up to the determination of the appeal by the Privy Council, but their judgment showed that they thought it ought to be granted; and the Judicial Committee allowed such stay of execution upon terms.

THIS was a petition for stay of execution under the following circumstances:—

On 23rd September 1883 the petitioners Vasudeva Modeliah and Iyyappa Modeliah executed a bond in favour of one Krishna Modeliah Avergal in consideration of a debt to him of Rs. 8,000, and charged certain immoveable property as security for the repayment of the said sum with interest, such repayment to be made by instalments of Rs. 1,000 per annum, and the first payment to be made on 23rd September 1884. Krishna Modeliah Avergal entered into the transaction as managing member of a joint Hindu family of which the plaintiff was a member; and in a suit for partition of the estate of the joint family a Receiver Sreeniyasa Pillay was appointed who, on 23rd September 1899, brought a suit in the Court of the Subordinate Judge of Nega-patam to recover the principal and interest due on the bond. In that suit the petitioners raised the defence of limitation, and the

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\* Present.—THE EARL OF HALSBURY, Lord MACNAGHTEN, Sir ARTHUR WILSON and Sir ALFRED WILLS.

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Subordinate Judge on 17th February 1902 held that the suit was barred so far as the first three instalments were concerned, but not barred so far as it related to the recovery of the last five instalments. He gave the plaintiff simple interest at 9 per cent. per annum, and made a decree against the petitioners for Rs. 10,605-12-6 by sale of the mortgaged property. On appeal the High Court on 13th March 1905 held that article 147 of schedule II of Act XV of 1877 governed the suit which was consequently not barred; and they allowed the plaintiff compound interest at  $10\frac{1}{2}$  per cent. per annum and gave him a decree for sale of the mortgaged property as default in payment of Rs. 46,341-12-0 on or before 13th August 1905.

From that decree the defendants applied to the High Court for leave to appeal which was granted on 19th January 1906. The plaintiff however applied to execute his decree by sale of the mortgaged property whereupon on 30th January the petitioners made an application to the High Court for stay of execution pending the decision of the appeal. They alleged that the value of the property was Rs. 70,000 (the plaintiff alleged it to be Rs. 35,000); that under the circumstances it would be sold at a great sacrifice and involve the petitioners in heavy loss and trouble; and that the plaintiff could not be prejudiced by a stay of execution.

On 23rd February 1906 the High Court made an order on the application "that execution be stayed for three months from this date so as to give the defendants an opportunity to apply to the Privy Council for stay of execution."

In their petition the petitioners submitted that the order of the High Court was not a refusal to stay execution; that a stay of execution was under the circumstances of the case reasonable and proper; and that the High Court appeared to consider that an order for stay of execution ought to be made by His Majesty in Council and not by the High Court. On the termination of the suit for partition above referred to the debt in suit fell to the share of the respondent who was accordingly put on the record in place of the Receiver.

*L. DeGruyther* for the appellant in support of the petition referred to *Chattrapat Singh Durga v. Dwarkanath Ghose*(1).

(1) L.R., 21 I.A., 170; I.L.R., 22 Cal., 1.

*Kenworthy Brown* for the respondent.

1906, *May 17th*.—The judgment of their Lordships was delivered by Lord MACNAGHTEN.

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JUDGMENT.—Their Lordships desire to repeat what has been often stated by this Board before, namely, that applications of this sort ought always to be made, in the first instance at any rate, to the Court in India, which has ample power to deal with the matter according to the circumstances of the particular case, and has knowledge of details which this Board cannot possess on an interlocutory application. In the present case their Lordships know no more than what is brought before them by affidavits not altogether satisfactory. There is, however, an indication in the judgment of the High Court showing that in their opinion an extension of the stay of proceedings ought to be granted. Acting upon that suggestion their Lordships will humbly advise His Majesty to grant a stay of proceedings on the appellants giving an undertaking by their Counsel to lodge the Petition of Appeal and their case within a fortnight from the time the Record arrives in England, and also at the same time to give the respondent leave to apply to the High Court at Madras either for the appointment of a Receiver, or for payment of a reasonable amount into Court, or any other relief which he may be advised to apply for. The appellants must pay the costs of this application in any event.

*Application granted.*

Solicitor for the appellants—*Douglas Grant.*

Solicitors for the respondents—*Lawford, Waterhouse & Lawford.*