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was wholly unnecessary to remand the case for ascertaining the custom.

I concur in all the views to which the learned Chief Justice has given expression. I have no doubt that those views will be greeted by the entire Hindu and Muhammadan population of these Provinces; and I hope that his Lordship's exhaustive judgment will place the law, as adminstered by this Court, upon a firm and ascertainable footing, rendering ineffective the rulings to the contrary, which have unfortunately done much to disturb the comfort of neighbours in towns, and have, I am afraid, encouraged unnecessary invasion of the immemorial right of privacy, and consequent litigation.

Appeal decreed.

Before Mr. Justice Mahmood.

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January 30.

KASSA MAL (DEFENDANT) *v.* GOPI (PLAINTIFF) *

Execution of decree—Stay of execution pending suit between decree-holder and judgment-debtor—Appeal from order staying execution—Civil Procedure Code, s. 243—"*Such Court*"—*Civil Procedure Code, ss.* 235 *(d)*, 581, 583.

An appeal lies from an order passed under s. 243 of the Civil Procedure Code staying execution of a decree pending a suit between the decree-holder and judgment-debtor.

The words "such Court" in s. 243 of the Civil Procedure Code do not limit the exercise of the powers given by that section only to decrees passed by the Court in which the suit is pending, but with reference to ss. 235 (*d*), 581 and 583 that Court is empowered to stay execution of decrees transferred to it for execution from either a Court of co-ordinate jurisdiction or a Court of appeal.

The plaintiff instituted a suit against defendant for recovery of money and other reliefs which was ultimately dismissed in appeal by the High Court, and he was ordered to pay defendant Rs. 1,000 as cost of the litigation. Plaintiff then brought this suit against defendant in the Court of the Subordinate Judge of Farukhabad, and while it was pending defendant applied to the Court to execute his decree for costs. Plaintiff then applied for stay of the execution, and his application was refused by the first Court but granted by the District Court. On appeal by defendant to the High Court *held* that an appeal lies from the order, and the Judge's order was correct.

Mittun Bibi v. *Buzloor Khan* (1) disapproved.

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* Second Appeal, No. 865 of 1887, from a decree of W. H. Hudson, Esq., District Judge of Farukhabad, dated the 16th April, 1887, reversing a decree of Maulvi Muhammad Sami-ullah Khan, Subordinate Judge of Farukhabad, dated the 25th January, 1887.

(1) 8 W. R. 392.

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THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Munshi *Kashi Prasad* and Babu *Jogindro Nath*, for the respondent.

MAHMOOD, J.—The facts necessary for the disposal of this appeal are the following :—A suit was instituted by Musammat Gopi, plaintiff-respondent, judgment-debtor, for recovery of money and other reliefs of a cognate character to which I need not refer. The suit was finally dismissed in appeal by this Court on the 27th November, 1886, by which decree a sum of about Rs. 1,000 was found due by the said Musammat Gopi to Kassa Mal, the decree-holder, appellant, before me.

Thereupon, it is admitted before me by Pandit *Sundar Lal* on the one hand and Mr. *Kashi Prasad* on the other, that a suit was instituted by the aforesaid Musammat Gopi against the aforesaid Kassa Mal in the Court of the Subordinate Judge of Farukhabad, and during the pendency of the suit an application was made by the decree-holder, Kassa Mal, on the 4th January, 1887, for the recovery of the above-mentioned item of Rs. 1,000, costs of the former litigation. Thereupon, Musammat Gopi, by her application of the 25th January, 1887, applied under s. 243 of the Civil Procedure Code for stay of execution of the decree, but the application was rejected by the Court in which the second suit was pending, namely, the Court of first instance, on the 25th January, 1887, that is, the same day as the one upon which the application was made.

From this order Musammat Gopi preferred an appeal to the learned Judge of the lower appellate Court, and, by his order of the 16th April, 1887, he held that, under the circumstances of the case, the execution of the decree of the 27th November, 1886, should have been stayed pending the decision of the new suit.

From that order, this second appeal has been preferred, and in supporting it Pandit *Sundar Lal* has argued, in the first place, that inasmuch as the order of the Subordinate Judge of the 25th January, 1887, was passed under s. 243 of the Civil Procedure Code, no appeal lay to the learned Judge of the lower appellate Court·

and in support of this contention he relies upon a ruling of a Division Bench of the Calcutta High Court in *Nehal Chand* v. *Rameshari Dassee* (1), in which it was held that in a case such as this no appeal would lie, because the order passed under s. 243, Civil Procedure Code, was not such an order as would fall within the purview of cl. (c), s. 244 of the Code, so as to render it appealable as a "decree" within the meaning of the definition of the word in s. 2 of the Code.

The ruling is no doubt in favour of the learned pleader's contention, but in a judgment of my own in the case of *Ghazidin* v. *Fakir Bakhsh* (2) I, with the concurrence of my brother Straight, held an opposite view of the law; and that view, I find, was adopted by another Division Bench of the Calcutta Court itself in *O. Steel & Co.* v. *Ichhamoyi Chowdhrain* (3), in which the view laid down in the case of *Nehal Chand* v. *Rameshari Dassee* (1) was repudiated. I still adhere to the views which I expressed in the case of *Ghazidin* v. *Fakir Bakhsh*, (2) and I have no doubt that an appeal did lie to the lower appellate Court.

And holding this view, I need not deal with the contention pressed upon me by Mr. *Kashi Prasad*, on behalf of the respondent, that if an appeal did not lie to the lower appellate Court, this appeal would, *a fortiori*, not lie, and the only possible remedy for the appellant, in that event, would have been, perhaps, an application under s. 622 of the Civil Procedure Code for revision.

The next point which has been argued before me at considerable length by Pandit *Sundar Lal* on behalf of the appellant, is that the words "*such Court*" as they occur in s. 243, Civil Procedure Code, limit the exercise of the powers contemplated by that section to decrees passed by the Court in which the suit is pending; and upon this ground the learned pleader goes further and contends that the decree sought to be executed, namely, the decree of the 27th November, 1886, being a decree passed in appeal by the High Court, the Court of first instance, even as a Court executing this Court's appellate decree, could not apply the provisions of s. 243 to such a case. The reason of the contention put before me by the learned pleader is that a Full Bench of this Court in *Shohrut Singh*

(1) I. L. R., 9 Calc. 214. (2) I. L. R., 7 All. 73.
(3) I. L. R., 13 Calc. 111.

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v. *Bridgman* (1) has held that the decree of the Court of last instance is the only decree susceptible of execution, and the specifications of the decrees of the lower Court or Courts, as such, may not be referred to and applied by the Court executing such decree. Taking the Full Bench ruling as the central point of the argument, the learned pleader contends that the decree of the 27th November, 1886, could not be dealt with under s. 243, as it was not a decree passed by the Court in which the suit was pending.

I cannot accept this contention. There is no doubt that I am bound to accept the authority of the Full Bench ruling upon which the learned pleader relies, but it is not inconsistent with that ruling to say that the decrees of the Courts of appellate jurisdiction are, by reason of ss. 581 and 583 of the Civil Procedure Code, subject to the same rules as those decrees which have been passed by the Court of original jurisdiction. S. 581 of the Code simply specifies how appellate decrees are to be dealt with, and *inter alia* it goes on to say that such decree "shall be filed with the original proceedings in the suit, and an entry of the judgment of the appellate Court shall be made in the register of civil suits."

Now the next matter which has to be considered is, how such decrees are to be executed; and upon this point, I think Mr. *Kashi Prasad* was right in calling my attention to s. 235, cl. (*d*), which in stating the contents of application for execution of decree, directly contemplates that the application for execution is to state any modifications or reversals, &c., which the appellate Court's decree may have introduced in the decree. What Pandit *Sundar Lal* contends is that, notwithstanding the provisions of ss. 581 and 583 of the Code, a Court in exercising the powers under s. 243 of the Civil Procedure Code is limited to *its own* decrees, and that such powers do not apply to decrees passed either by a Court of co-ordinate jurisdiction, or by a Court of appeal, even though such decrees may, under the rules of procedure, have to be executed by the Court to which an application under s. 243 is presented. In supporting this contention the learned pleader has, in the first place, called my attention to s. 228 of the Code, which relates to the execution of decrees transmitted by other Courts for execution to a Court, and he argues that it is only because that section specifi-

(1) I. L. R., 4 All. 376.

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cally states that the powers possessed by the Court to which the decree is sent, are to be co-extensive and similar in respect of such decrees that the provisions of s. 243 would be applicable, and he contends that because s. 243 does not contain any specification of such a character with reference to appellate decrees, therefore that section would not be applicable to this case. But it seems to me that this contention is somewhat inconsistent, because as Mr. *Kashi Prasad* has contended, provisions corresponding to s. 228, so far as their application to the general rules as to execution of decrees is concerned, are to be found in s. 583 of the Code.

That section, in stating how an appellate Court's decree is to be executed, goes on to say that "such Court shall proceed to execute the decree passed in appeal according to the rules hereinbefore prescribed for the execution of decrees in suits."

Just as I have before now held that the provisions of s. 582 of the Civil Procedure Code render the earlier rules as to original suits applicable *mutatis mutandis* also to the procedure in appeals, so I also hold that the effect of the provisions of s. 583 is to render all the antecedent rules as to execution of decrees in Courts of original jurisdiction, applicable also to the execution of decrees passed by Courts of appellate jurisdiction.

And once this view is accepted, not only the provisions of s. 243 but of various other parts of the Code become applicable. For instance, the proviso to s. 246, which in stating how cross-decrees are to be dealt with for the purposes of setting off one decree against another, goes on to say (consistently with the principle which I have accepted as the basis of the rule), that "the decrees contemplated by this section are decrees capable of execution at the same time, and by the same Court." I think it is clear that by reason of this rule, the provisions of s. 228, as also of s. 243, as also of s. 583, would become applicable, and the Court executing its own decree could set off that decree against the decree passed by another Court, if that decree has been transmitted to it or is a decree of the appellate Court, when such decree is before the Court for execution. This reasoning, however, is applicable only by analogy, because the exact point before me is simply whether or not, within the meaning of s. 243 read with s. 583 of the

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Code, are included the decrees not only of the Court in which the suit is pending but also decrees of appellate Courts. As I have already said, I hold that the suit being pending before the Subordinate Judge of Farukhabad, and the High Court's decree of the 27th November, 1886, being before the Court for execution, that Court or the Court to which an appeal would lie for the purpose of the decree, had jurisdiction to stay execution within the meaning of s 243 of the Civil Procedure Code.

The only ruling against this view which Pandit *Sundar Lal* has cited to me is the case of *Mittun Bibi* v. *Bazloor Khan* (1), which turned upon the interpretation of s. 209 of the old Code of Civil Procedure (Act VIII of 1859), which section corresponds to s. 243 of the present Code of Civil Procedure. It was in interpreting that section that Jackson, J., laid down the rule that "when an application to stay execution of a decree is made to a Court in which a suit is pending against the decree-holder, the Court's competency under s. 209, Act VIII of 1859, to grant the application depends on the decree being its own decree." The other learned Judge before whom the case was argued was Hobhouse, J., who began his judgment by stating that he had some doubts in consequence of the provisions of s. 362 of the same Code (Act VIII of 1859) which section corresponds to s. 583 of the present Code upon which Mr *Kashi Prasad* has relied. It seems to me that the doubts of Hobhouse, J., were well founded, and although he deferred to the views of Jackson, J., the rule of law laid down in the case is, as I respectfully think, unsound, opposed as that rule seems to me to the broad and fundamental principles of the equitable doctrines of compensation and set-off upon which I dwelt at some length, with the approval of my brother Straight, in *Ishri* v. *Gopal Saran* (2), which, though a suit for pre-emption, involved considerations not dissimilar to those in the case, so far as the question of principle is concerned. It is doubtful whether the ruling of Jackson, J., has since been followed by the Calcutta Court itself, because Pandit *Sundar Lal* has not been able to show me any such ruling. On the contrary, the general *ratio decidendi* upon which the ruling of my brother Straight and myself in *Ghazidin* v. *Fakir Bakhsh* (3)

(1) 8 W. R., 392. (2) I. L. R., 6 All. 351.
(3) I. L. R., 7 All. 24.

proceeded, and the *ratio decidendi* of the cases to which it refers, are opposed to the ruling of Jackson J., in the case above cited, and the ruling of my brother Straight and myself, as I have already said, was adopted by the Calcutta Courts in the latest case of *O. Steel & Co.* v. *Ichhamoyi Chowdhrain* (1).

The only other point which I have got to deal with is whether or not, upon the merits of the case, the learned Judge of the lower appellate Court was right in staying execution of decree pending the decision of the present suit. Upon this point I think I need not say much, because it is admitted before me that the suit which ended in dismissal by this Court on the 27th November, 1886, was a suit filed by Musammat Gopi, the present judgment-debtor respondent, that the suit failed on a technical point of law as to whether or not the suit in its then form was maintainable, that the suit now pending before the Subordinate Judge of Farakhabad is a suit by the same Musammat Gopi against the same Kassa Mal, for purposes of a remedy which is now prayed for in lieu of that which was prayed for in the former unsuccessful litigation; that the costs awarded by the decree of the 27th November, 1886, are costs in the former decree of the older litigation, and that if the suit now pending before the Subordinate Judge succeeds, the costs might not have to be paid by Musammat Gopi, but on the contrary, she might have to recover considerable sums of money from the present decree-holder appellant, Kassa Mal, or at least, might be entitled to claim set-off for her decree against the decree for costs held by the appellant.

If the costs were a simple debt instead of being a judgment debt, the defendant might possibly have pleaded the amount as a set-off under s. 111, Civil Procedure Code, against the claim of Musammat Gopi in the suit now pending; but without deciding this question, I may add, that whilst it is not shown that the stay of execution will materially prejudice the decree-holder appellant, there are indications in the circumstances of the case, to suggest the suspicion that the execution has been prayed for by the decree-holder, mainly with the object of hampering the respondent Musammat Gopi, in prosecuting the suit now pending against the decree-holder.

(1) I. L. R., 13 Cal., 111.

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I think, under these circumstances, the learned Judge of the lower appellate Court exercised a sound discretion in staying execution of the decree of the 27th November, 1886. I dismiss the appeal with costs.

Appeal dismissed.

1888 *February* 9.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

NAGAR MAL AND OTHERS (PLAINTIFFS) *v.* ALI AHMAD AND OTHERS (DEFENDANTS).*

Act XXIII of 1871 (*Pensions Act*), *ss.* 3, 4, 6, 9—*Grant of land revenue—Suit by assignees zamindárs for arrears—Right of plaintiffs admitted by Government—Suit not barred for want of Collector's certificate.*

The sections of the Pensions Act (XXIII of 1871) restricting the jurisdiction of the Civil Courts to entertain suits relating to pensions of grants of money or land revenue must be construed strictly.

Held that a suit by the assignees from Government of land revenue, whose rights were admitted by Government, to recover arrears from persons admittedly liable to pay revenue to somebody, but who disputed plaintiffs' right thereto, came within section 9 of the Pension Act (XXIII of 1871) and was not barred by sections 4 and 6 by reason of no certificate having been obtained as therein provided.

By a proceeding of the Special Commissioner for the districts of Meerut, Agra, Bareilly and Delhi, held on the 26th of July, 1843, the lands described in the plaint filed in the suit, as also other lands which together formed the area of mauza Damchan l-pur in pargana Deoband, were released from payment of revenue to Government in perpetuity, such revenue being assigned by Government to certain persons who were muafidárs of the village, among whom the assignors of the plaintiffs in this suit were some. In the year 1861, when the settlement of the village was renewed, the zamíndárs of the village in their engagement with Government promised to pay the revenue assessed on it to the muafidárs according to a separate statement prepared at the time.

The defendants, who are some of the zamíndárs of the village, did not pay to the plaintiffs for the three fasli years from 15th November, 1882, to 15th June, 1885, the portion of revenue payable to them, and so the sum of Rs. 301-8-9, became due. The

* Second Appeal, No. 1481 of 1886, from a decree of T. Benson, Esq., District Judge of Saháranpur, dated the 28th June, 1886, reversing a decree of Maulvi Shah Amjad-ullah, Munsif of Deoband, dated the 22nd March, 1886.