

Procedure does not cover the case in which a time is fixed by the decree for the doing of some act mentioned in the decree, and that order XXXIV, rule 8, would not cover the case as the suit was not one for redemption. On behalf of the respondents it is contended that the order being an order extending time, no appeal whatsoever lies, as order XLIII, rule 1, clause (o), only grants appeals when the court refuses to extend time. The reply to this is two-fold, first that the order granting time is a decree within the meaning of section 47 of the Code, and secondly, that even if it be not a decree, the order passed is without jurisdiction and the court has power to set it aside in revision. In our opinion the order passed by the lower court was with jurisdiction and was justified by order XXXIV, rule 8. It is true that in its inception the suit was not a suit for redemption. It was a suit for sale, but directly the present appellants determined to stand upon their prior rights and demanded redemption, the suit became a compound suit and as a matter of fact the decree was both for sale and redemption, and so far as the decree between the present parties is concerned, it is clearly and simply a decree for redemption. In our opinion the proviso to rule 8 of order XXXIV, clearly applies and the lower court had power to pass the order. So far as the merits of the case are concerned we think the order of the court below is correct. The objection taken by the present appellant was simply as to the amount and the court below was satisfied that there was a *bond fide* mistake in calculation. As to the entry of Bidhi Chand's name the error was pointed out by the plaintiffs themselves. The lower court's order has done material justice. We see no reason to interfere and dismiss the appeal with costs.

*Appeal dismissed.*

*Before Mr. Justice Taddall and Mr. Justice Muhammad Rafiq.*

SATYA SHANKAR GHOSHAL AND OTHERS (DECREE-HOLDERS) v. MAHARAJ  
NARAIN SHEOPURI AND OTHERS (JUDGEMENT-DEBTORS).\*

1912,  
December, 9.

*Execution of decrees—Stay of execution of decrees under appeal—Jurisdiction—  
Procedure.*

*Held* that the court which passed a decree has no power to stay execution thereof whilst the decree is under appeal; neither has a court which has executed

\* First Appeal No. 194 of 1912 from a decree of Srish Chandra Basu, Subordinate Judge of Benares, dated the 25th of April, 1912.

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its own decree awarding possession of immovable property power to restore to possession the party whom it has ejected.

The facts of this case were as follows :—

The plaintiffs obtained a decree against the defendants for possession of a house and for mesne profits on the 26th of January, 1912. In that decree the defendants were allowed one month's time within which to vacate the premises in dispute. The decree-holders applied for execution of their decree for possession, for costs and the mesne profits, on the 11th of April, 1912, and on the 23rd of April, 1912, obtained possession of the house through the court amin and got some movable property of the judgement-debtors attached. In the meantime the judgement-debtors had filed an appeal against the decree in the High Court on the 20th of April, 1912, and without applying for an order for the stay of execution in that Court put in an application on the 24th of April, 1912, in the court which passed the decree, praying for the restoration of possession to them pending the decision of the appeal in the High Court. On the 25th of April, 1912, the Subordinate Judge ordered restoration of possession to the judgement-debtor and accepted Rs. 2,500 as security from them. The decree-holders appealed.

Babu *Harendra Krishna Mukerji* (with him Babu *Jogindro Nath Chaudhri* and Babu *Amulya Chandra Mitra*), for the appellants :—

The order of the lower court is illegal and without jurisdiction on several grounds. An appeal having been filed against the decree, the court which passed the decree had no power to stay execution or restore possession to the judgement-debtors after having once given possession to the decree-holders. The only court where such an application could then be made was the appellate court which had seisin of the suit and no other : *Churini Lal v. Anant Ram* (1). Moreover, there can be an application for stay of execution, only where there is something to stay and not where a decree has been executed : *Dharrum Singh v. Kishen Singh* (2). In the present case, possession having been given by the court to the decree-holders, there was nothing left to be done so far as that portion of the decree was concerned, and the execution court had become *junctus officio*. The execution of the decree having been

(1) (1898) L. L. R., 25 Calc., 898

(2) (1898) 12 C. L. R., 582

completed even the appellate court could not grant a stay order, much less the court whose decree had been appealed against.

Babu *Sital Prasad Ghosh* (with Dr. *Saish Chandra Banerji* and Dr. *Surendro Nath Sen*), for the respondents :—

The lower court may have been technically wrong in superseding its own order passed on a previous occasion. But that court having taken security from the judgement-debtors this Court should not interfere. In any case justice will surely be done if this Court simply upsets the order of the court below which is under appeal without prejudice to the judgement-debtors now applying to obtain a stay order from this Court, which is seised of the matter as the appellate court.

TUDBALL and MUHAMMAD RAFIQ, J.J.:—The circumstances out of which this appeal has arisen are as follows:—The decree-holder, on the 26th of January, 1912, obtained a decree for possession of certain house property together with mesne profits and costs. Under the decree the judgement-debtors were directed to vacate the house within one month, i.e., the judgement-debtors were allowed one month's grace to remove their property. On 11th of April, 1912, the decree-holder applied to execute the decree. He asked to be put in possession of the house by ejection of the judgement-debtors because the latter had not vacated it. They also asked for attachment and sale of movable property in order to recover the costs and mesne profits. On the 20th of April, 1912, the judgement-debtors filed an appeal against the original decree in this Court. No application was made at the time for stay of execution. On the 23rd of April, 1912, the Amin in the court below gave possession to the decree-holders and duly ejected the judgement-debtors. Movable property was also attached. On the 24th of April, 1912, the judgement-debtors filed an application stating that they had filed an appeal in the High Court and had also applied to that Court for stay of execution (which was incorrect), and they asked the court executing the decree to postpone the proceedings until the order of the High Court was received. On the 25th of April they made another application to the court below stating that they had filed the appeal, but the decree-holders had in execution dispossessed them and attached their property; that they had money ready as security; and they asked the court to release the property and restore them

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to possession. The court thereupon ordered the money to be deposited in the treasury as security, released the movable property and passed an order to the Amin to replace the judgement-debtors in possession. Accordingly the decree-holders were dispossessed and the judgement-debtors replaced in possession. It is against this order that the present appeal has been made. In the first place, on filing an appeal against the original decree, if the judgement-debtors wished to secure stay of execution they ought to have applied at once to this Court for that purpose. The lower court had no longer any power to stay execution after the appeal had been filed in this Court. In the next place, the decree having been executed in so far as possession of the house was concerned, that portion of the decree could no longer be stayed, it having been executed. The utmost that the lower court could have done on the 25th of April was to stay its hands and go no further. It had no power whatsoever to go backward, to drive the decree-holders out of possession and replace the judgement-debtors in possession. Its order was clearly passed without jurisdiction and was completely *ultra vires*. We accept the appeal, set aside the order of the court below and direct that the decree-holders be at once restored to the possession which will be theirs until the decree is set aside. The appellants will have their costs in this Court.

*Appeal allowed.*