Before Mr. Justice Piggott and Mr. Justice Walsh.

1921
January 4.

MADHO PRASAD AND OTHERS (DECREE-HOLDERS) *v.* DRAUPADI BIBI.
(JUDGMENT-DEBTOR)*.

Civil Procedure Code, 1908, *order XXXIX, rule* 1—*Execution of decree—Limitation—Temporary injunction granted by High Court on appeal "pending final decision of the suit"—Meaning of "final decision."*

A stay of execution granted by the High Court on appeal "pending the final decision of the suit" does not imply that execution is to be suspended until the period of limitation for an appeal has expired or until such appeal has been decided, but means no more than until the decision of the suit by the court of first instance. So *held* by PIGGOTT, J., with whom WALSH, J., agreed with hesitation, being inclined to the view that the words "pending the final decision of the suit" meant until the disposal of the suit by a final unappealable order. *Shaikh Mooheeooddeen* v. *Shaikh Ahmed Hossein* (1), *Balharan Rai* v. *Gobind Nath Tiwari* (2) and *Shri Vishvambhar Pandit* v. *Shri Vasudev Pandit* (3) referred to.

THE facts of this case are fully set forth in the judgment of PIGGOTT, J.

Pandit *Baldeo Ram Dave* and Munshi *Damodar Das*, for the appellants.

Pandit *Ladli Prasad Zutshi*, for the respondent.

PIGGOTT, J. :—This is a second appeal by a decree-holder. There are two connected cases, but it is admitted that the facts are identical and that the same decision will govern both appeals. The decree under execution is an old one, of the 14th of February, 1911, and it must be conceded to the appellant that his case is a hard one and that he has been badly obstructed in the execution of his decree. As long ago as the month of May, 1912, he attached certain landed property in execution of the decree. Objection was taken by one Lachmi Narain, that the property belonged to him and not to the judgment-debtor. The objection was disallowed by an order of the 28th of September, 1912. On the 16th of November, 1912, the objector filed a regular suit, asking for a declaration that the property in question was his and was not liable for sale in execution of the decree. He asked the trial court to

* Second Appeal No. 565 of 1920 from a decree of Lal Gopal Mukerji, Additional Judge of Allahabad, dated the 1st of March, 1920, reversing a decree of Shekhar Nath Banerji, Subordinate Judge of Allahabad, dated the 5th of February, 1918.

(1) (1870) 14 W. R., C. R., 384. (2) (1890) I. L. R., 12 All., 129.
(3) (1892) I. L. R., 16 Bom., 708.

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issue an injunction restraining the decree-holder from bringing the property to sale pending the execution of this decree, and his application to this effect was disallowed by the trial court He appealed to the High Court against this order and this appeal was disposed of by a Bench of this Court, in a case which may be found reported in *Lachmi Narain* v. *Ram Charan Das* (1). The decision turned mainly upon the question whether an appeal lay against the order refusing to issue an injunction. This point having been decided in favour of Lachmi Narain, the learned Judges go on to remark that the application for an injunction was not strongly opposed on the merits and that in their opinion the injunction asked for ought to have been granted by the court below. Then follow the words the interpretation of which forms the real point for decision now before us. They are :—" We allow the appeal, set aside the order of the court below and grant a temporary injunction restraining the sale pending the final decision of the suit." The filing of the appeal in the High Court had been immediately followed by the issue of a temporary injunction *ex parte*, restraining the decree-holder from proceeding with the execution until the decision of the appeal This order having reached the execution court, that court, on the 28th of March, 1913, passed an order that the pending proceeding in execution should be struck off, the attachment, however, being maintained, and the decree-holder be informed that after the decision of the High Court (*i e*, in the appeal from the order refusing to grant an injunction) he would be at liberty to proceed with the matter further by means of a proper application. This Court's decision granting the injunction is dated the 25th of May, 1913. The declaratory suit was decided on the 25th of November, 1913. The decision was against Lachmi Narain, *i. e.*, it affirmed the right of the decree-holder to bring this property to sale in execution of this decree. There was an appeal to the High Court and this appeal was not decided until the 2nd of May, 1917, when it was dismissed and the decision of the trial court affirmed. On the 28th of May, 1917, the decree-holder applied to the

(1) (1913) I. L. R., 35 All., 425.

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execution court to take up the execution proceedings, at the stage where they had been left by the order of the 28th of March, 1913, and to proceed to bring the property to sale. Objection was taken that this application was time-barred. This objection was disallowed by the first court, but has been given effect to by the lower appellate court; hence the second appeal now before us. The case of *Qamar-ud-din Ahmad* v. *Jawahir Lal* (1) is good authority for the proposition that in a case of this sort, where the execution of a decree has been suspended through no act or default of the decree-holder, the latter has a right to ask the court to revive and carry through the execution proceedings which have been thus suspended. He can, however, only do this by means of a proper application to that effect, and in this particular case the execution court's order of the 28th of March, 1913, gave him express warning that the court would not take up the matter again, or proceed further with the execution, except upon his application. The application in question would be one for which no period of limitation is expressly provided by the schedule to the Indian Limitation Act, and would, therefore, fall under article 181 of the schedule, requiring to be made within three years of the date on which the right to make it accrued. The contention for the judgment-debtor, which has found favour with the lower appellate court, is that the right to make this application accrued to the decree-holder on the 25th of November, 1913, the date on which the declaratory suit brought by Lachmi Narain was dismissed by the trial court. The contention before us in appeal is that the injunction issued by this Court was intended to enure until the suit instituted by Lachmi Narain should have been finally disposed of, in the sense that, either the prescribed period of appeal from the decree passed in the same should have expired, or any appeal actually brought against the decree should have been determined. Hence, the decree-holder's contention is that he was restrained by the injunction of the High Court from making any application to the execution court right up to the 2nd of May, 1917, when Lachmi

(1) (1905) I. L. R., 27 All., 334.

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Narain's appeal to this Court from the decree in the declaratory suit was dismissed. In the main, therefore, the question before us turns on the interpretation of the words "pending the final decision of the suit" in the injunction order issued by this Court. In their plain and ordinary meaning, as they stand, those words seem to refer to the passing of the final decree in the declaratory suit then pending. The intention of this Court, as expressed in its judgment, clearly was to issue such an injunction as the trial court could have issued; and this Court could not have issued an injunction enforceable beyond the date of its own final decree. This point seems obvious enough on the wording of order XXXIX, rule 1, but it is also covered by an authority in *Shaikh Mooheeooddeen* v. *Shaikh Ahmed Hossein* (1). Indeed, looked at in one way, the point is almost beyond argument. The injunction directing the decree-holder to refrain from bringing this property to sale could only proceed upon a finding that there was a danger that the property in question might prove to be Lachmi Narain's, and might therefore be "wrongfully" sold if brought to sale in execution of a decree against somebody else. Once the trial court had come to the conclusion that the property was not Lachmi Narain's but that of the judgment-debtor, it could not possibly be of opinion that the property was in danger of being wrongfully sold in execution of that decree and it could not conceivably issue an injunction restraining the decree-holder from proceeding with the execution of his decree. If, therefore, the order of this Court is to be understood as amounting to nothing more than the issue of such injunction as in the opinion of the Hon'ble Judges ought to have been issued by the trial court itself, then it was an injunction which only remained in force up to the 25th of November, 1913, and a right to apply for the further execution of his decree by the fixing of a date for the sale of the property under attachment accrued to the decree-holder on that date. It has been contended in argument that there are reported cases in which the words "final decision" or "final determination" have been held to extend

(1) (1870) 14 W. R., C. R., 384.

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up to the conclusion of a particular litigation by orders of the final court of appeal, and from this it is contended that the learned Judges who pass this Court's order were using the words "final decision" in this particular sense, having in their minds the possibility that any decree which the trial court might pass in the declaratory suit might be challenged in appeal. I can only say that taking the order as a whole, that is not the impression which it conveys to my mind. Moreover, I am much impressed with the argument that this Court's order should, if possible, be interpreted so as to make it a legal and proper order. As I have already pointed out, the proper time limit for any injunction issued under the circumstances was the determination of the suit then pending by the passing of a decree in that suit. If the learned Judges of this Court really intended to issue an injunction covering the period allowed by law for the filing of an appeal from the decree of the trial court, they would have been straining their jurisdiction by passing in appeal an order which the court against whose decision the appeal before them was pending would have had no authority to pass. There seems to me a strong presumption against the theory that the learned Judges of this Court intended to pass such an order. I feel driven, therefore, to the conclusion that the effect of the injunction issued by this Court came to an end with the dismissal of Lachmi Narain's suit on the 25th of November, 1913, that a right to apply for an order bringing the attached property to sale accrued to the decree-holders on that date, that time having thus been set running against them was not suspended by the filing of an appeal to this Court against the decree in the declaratory suit, and consequently that the application which has given rise to these connected appeals has been rightly held by the lower appellate court to have been made beyond the prescribed period of limitation. I would, therefore, dismiss both these appeals with costs.

WALSH, J:—I concur in the order dismissing the appeal, though I do so with considerable doubt and hesitation. The case seems to me one of such hardship that I distrust the view

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which I am disposed to take of the legal merits, finding myself in disagreement both with my brother and the Judge in the court below. But if I had had to decide this question unobscured by any other decision, I should, I think, have come to the same conclusion as the first court. My first difficulty is one arising out of a long series of decisions in this Court on the meaning of the word "final," and particularly the Full Bench decision in *Balkaran Rai* v. *Gobind Nath Tiwari* (1), where five Judges decided that the ordinary legal sense of the word "final," and in particular as used in the Court Fees Act, was "unappealable." That view has also been taken in, I think, *Shri Vishvambhar Pandit* v. *Shri Vasudev Pandit* (2). If it were not for the presence of the word "final" in this order, and if the language had merely been "pending the decision of the suit," I might have had no difficulty in agreeing with my learned colleague, but if my opinion had been asked, after looking at those authorities, I think I should have come to the conclusion that the use of the word "final" by two Judges of this Court must have meant the disposal of the suit by a final unappealable order. My second difficulty is this. I agree with the court below that this Court's jurisdiction under order XXXIX, rule 1, is limited to the powers conferred upon the lower court and that it cannot grant an injunction beyond the maximum period for which the lower court can grant it, namely, the decree in the trial court. That may be so. I ask myself first what the order meant, and I will assume that if it meant what the appellant contends for, it was an order made without jurisdiction. I think it cannot be denied that these orders for stay of execution and for injunctions under order XXXIX, rule 1, are granted by this Court with some levity. I am conscious that I have been a party to such orders myself, and I think they are apt sometimes to go even further than the court below could have gone. But the order of the court in such a matter being final, it does not seem to me to be sufficient to say that it was an order which this Court could not have thought fit to pass. It was an order which this Court did in fact pass, and whether it was or was not in excess of its jurisdic-

(1) (1890) I. L. R., 12 All., 129. (2) (1892) I. L. R., 16 Bom., 708.

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tion, I feel a difficulty in holding that it was not a case in which the execution of the decree had been stayed by an injunction. There are two grounds which I desire to mention in respect of which it seems to me that this case is one of exceptional hardship. It is clear from the order under reference that the present respondent did not seriously resist the application for an injunction. A question was raised as to the right of appeal, but on the question of staying his own hand in the matter of execution, it is quite clear that he was willing to abide by any view the High Court took of the matter, and I have not the slightest doubt that he *bonâ fide* withheld his hand after the decree of the lower court, because he thought that that was the view to which he had acceded when he appeared before the High Court. The second point is that this difficulty would never have arisen were it not for the lamentable state of the business of this Court. It so happens that this appellant finds himself by our decision statute-barred, simply because it has taken three years and a half to obtain a decision in appeal from this Court against the decision of the court below in the declaratory suit, and for that reason alone he is punished by having this appeal dismissed.

Appeal dismissed.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad.

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DALIP SINGH (DEFENDANT) *v.* MAN KUNWAR (PLAINTIFF) AND LAJJA AND OTHERS (DEFENDANTS.)*

Arbitration—Mutation of names—Mutation proceedings referred to arbitration—Award based on finding as to title of one of the parties—Award no bar to suit for possession in a Civil Court.

The parties to proceedings for mutation of names in a Court of Revenue referred the matters in dispute between them to arbitration. The arbitrators made their award declaring a certain person to be entitled to mutation upon the finding that he was the adopted son of the last holder. *Held* that this award was no bar to the other party to the mutation proceedings suing in a Civil Court to recover possession of the property upon the ground that the adoption of the defendant was not established. *Girdhari Chaube* v. *Ram Baran Misir* (1) followed.

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* First Appeal No. 183 of 1918 from a decree of Man Mohan Sanyal, Subordinate Judge of Meerut, dated the 23rd of March, 1918.

(1) (1916) 14 A. L. J., 85.