

statement recorded by the police and in relying on it that it was able to maintain the conviction.

The result is that the application must be allowed, and I therefore set aside the order of conviction and sentence passed by the Sessions Judge of Moradabad and direct that the applicant be acquitted.

1933

---

 EMPEROR  
 v.  
 KHAIYAT
 

---

## APPELLATE CIVIL

Before Justice Sir Lal Gopal Mukerji and Mr. Justice Bennet

RAM KATORI AND ANOTHER (DECREE-HOLDERS) v. SHAFIQ AHMAD AND ANOTHER (JUDGMENT-DEBTORS)\*

---

 1933  
 July, 24
 

---

*Civil Procedure Code, order XLI, rule 6(2)—Appeal from preliminary decree for sale—No appeal filed from final decree—Application for execution of final decree may be stayed pending decision of the appeal from preliminary decree—"Such decree" includes the preliminary decree.*

During the pendency of an appeal from a preliminary decree for sale on a mortgage the final decree was passed and the decree-holder applied for execution, praying for sale of the properties. *Held* that the sale could be stayed, under order XLI, rule 6(2) of the Civil Procedure Code, until the disposal of the appeal. Although no appeal was pending from the final decree which was being executed, yet the sub-rule would apply, because if the appeal from the preliminary decree was allowed, not only that decree but also the final decree would be set aside.

A final decree is based on a preliminary decree and contains within itself the adjudication between the parties which has already been made in the preliminary decree, and to that extent an appeal against a preliminary decree is also by implication an appeal against a final decree, although it is not an appeal in express terms against a final decree.

Mr. *Vishwa Mitra*, for the appellants.

Mr. *Panna Lal*, for the respondents.

MUKERJI and BENNET, JJ. :—This is an execution first appeal by the decree-holders against an order of the execution court dismissing the application for

---

\*First Appeal No. 191 of 1932, from a decree of P. N. Aghe, Additional Subordinate Judge of Moradabad, dated the 27th of February, 1932.

1933

RAM KATORI  
v.  
SHAFIQ  
AHMAD

execution by sale of the mortgaged property. The facts are that there was a preliminary decree for sale on a mortgage deed, and a first appeal has been taken against that preliminary decree. Subsequently a final decree had been prepared for sale and the decree-holders applied for execution of this final decree. The order in question is that as an appeal was pending from the preliminary decree and further property in addition to the mortgaged property had been attached by the decree-holders, the sale should not be allowed, and the execution application for sale was dismissed with costs. A preliminary objection was taken that no appeal lay. As the order definitely states that the execution application is dismissed, we consider that it is an order under section 47 of the Civil Procedure Code and an appeal does lie. The proper procedure for the execution court would be to act under the provisions of order XLI, rule 6, sub-rule (2). That rule states that the court may stay execution "on such terms as to giving security or otherwise as the court thinks fit until the appeal is disposed of". It was, however, argued that there is no appeal against the final decree. The language used in the sub-rule is "and an appeal is pending from such decree". We consider, however, that the sub-rule will apply, because if the appeal is allowed, not only the preliminary decree will be set aside but the final decree will also be set aside. This, no doubt, is giving an extension to the literal meaning of the words quoted. But we consider that by implication those words must be taken to govern the present case. A final decree is based on a preliminary decree and contains within itself the adjudication between the parties which has already been made in the preliminary decree, and to that extent an appeal against a preliminary decree is also by implication an appeal against a final decree, although it is not an appeal in express terms against a final decree.

We consider that the order of the execution court is not correct in dismissing the execution application, as order XLI, rule 6, sub-rule (2) only empowers the court, against whose decree an appeal is pending, to stay the application for execution and not to dismiss it. And the order of costs is not justified.

Accordingly we allow this appeal to this extent that we set aside the order of the lower court dismissing the execution application with costs and instead we grant an order for stay of the execution application and we direct that that stay will be granted on such terms as to giving security or otherwise as the lower court thinks fit, having regard to the terms of order XLI, rule 6, sub-rule (2)

1933  
RAM KATORI  
v.  
SHAFIQ  
AHMAD

## APPELLATE CRIMINAL

Before Mr. Justice King and Mr. Justice Collister

EMPEROR v. TOHFA AND OTHERS\*

1933  
August, 1

*Indian Penal Code, section 186—Obstructing public servant in making an attachment—Threats accompanied by show of physical force—Civil Procedure Code, order XXXVII, rule 5—Warrant of attachment before judgment not accompanied by notice to show cause or furnish security—Warrant illegal—Resistance thereto no offence.*

A commissioner appointed by a civil court to make an attachment before judgment went to the house of the defendant, accompanied by the plaintiff and his pairokars, to effect the attachment. The warrant of attachment, issued under order XXXVII, rule 5 of the Civil Procedure Code, neither contained nor was accompanied by a notice to the defendant to furnish security or to show cause against the attachment. When the party reached the defendant's house, he and his sons came out of the house armed with lathis; they adopted an offensive attitude and said they would never allow attachment to be made and would break the head of any one who should point out the

\*Criminal Appeal No. 14 of 1933, by the Local Government, from an order of Tirloki Nath, Sessions Judge of Meerut, dated the 26th of October, 1932.