

FULL BENCH

*Before Sir John Thom, Chief Justice, Mr. Justice Allsop
and Mr. Justice Ganga Nath*

HAR NARAIN LAL (DECREE-HOLDER) *v.* MATHURA
PRASAD (JUDGMENT-DEBTOR)*

1940
April, 8

Civil Procedure Code, section 2(2), 47—Order staying execution of decree—"Decree"—Appeal—Temporary Postponement of Execution of Decrees Act (Local Act X of 1937), section 3—Decree for costs comes under the Act.

An order staying the execution of a decree, in accordance with the provisions of section 3 of the Temporary Postponement of Execution of Decrees Act, 1937, amounts to a decree and is appealable.

Where an order staying the execution of a decree, under section 47 of the Civil Procedure Code, is a conclusive determination of the rights and liabilities of the parties in a controversy which has arisen between them and which relates to the execution, discharge or satisfaction of the decree, such an order comes within the definition of a decree in section 2(2) of the Code. In the present case the order determined the question whether the judgment-debtor was entitled to claim the statutory right of postponement of execution under section 3 of the Temporary Postponement of Execution of Decrees Act. It therefore amounted to a decree and was appealable.

Section 3 of the Temporary Postponement of Execution of Decrees Act, 1937, does apply to a decree for costs. A decree for costs is a decree for money passed on the basis of an existing liability, incurred by the unsuccessful litigant to pay the costs of the other party; it is not the case that the liability is created by the decree itself.

Mr. *V. D. Bhargava*, for the appellant.

Dr. *M. N. Agarwala*, for the respondent.

THOM, C. J., ALLSOP and GANGA NATH, JJ. :—This is a decree-holder's appeal arising out of execution proceedings.

The respondent filed a suit against the appellant claiming the cancellation of a certain sale deed. The suit was dismissed and the appellant obtained a decree for costs.

*First Appeal No. 73 of 1939, from a decree of R. Saran, Additional Civil Judge of Benares, dated the 29th of October, 1938.

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He sought to put this decree into execution. The respondent, the judgment-debtor, thereupon applied for a stay of the execution proceedings under section 3 of the Temporary Postponement of Execution of Decrees Act, Act X of 1937. The relevant portion of section 3 is as follows:—"3(1). All proceedings in execution of any decree for money passed by a civil court on the basis of a liability incurred before the passing of this Act, in which the judgment-debtor or any one of the judgment-debtors is, at the date of the passing of this Act, an agriculturist shall be stayed during the period this Act shall remain in force, if such judgment-debtor does not pay more than Rs.250 as land revenue or rent, or more than Rs.30 as local rate for revenue-free land, or if the total of the revenue, rent and ten times the local rate payable by him or any two of them does not exceed Rs.250."

The respondent's application was allowed and the learned Civil Judge in the execution court stayed the execution of the decree for costs on the 29th October, 1938.

The decree-holder appeals and contends that the provision of section 3 of the Temporary Postponement of Execution of Decrees Act does not cover the case of a decree for costs.

The respondent has taken a preliminary objection that no appeal lies. We shall deal with this objection first.

It was contended that the order of stay passed by the execution court was not a decree under section 47 of the Code of Civil Procedure and that therefore no appeal lay against the order. In support of this contention learned counsel relied upon the decisions in *Husain Bhai v. Beltie Shah Gilani* (1), *Mangat Rai v. Babu Ram* (2) and *Behari Lal Ram Charan v. Badri Prasad* (3). In *Husain Bhai v. Beltie Shah Gilani* the facts were that the execution court passed an order staying the execution of a decree for a period of roughly ten weeks on payment of Rs.5,000 by the judgment-debtor.

(1) (1924) I.L.R. 46 All. 733.

(2) (1928) 26 A.L.J. 1325.

(3) [1931] A.L.J. 895.

The Bench before whom the order was challenged in appeal held that no appeal lay in respect that there had been no conclusive determination of the rights of parties in a controversy relating to the execution of a decree. In the case of *Mangat Rai v. Babu Ram* (1) SULAIMAN, A. C. J., and BANERJI, J., held that an order of the execution court rejecting an application for stay of sale did not amount to a final judicial decision and was therefore not appealable. In the course of their judgment it is observed in reference to the order under appeal: "It did not involve any question relating to the execution of the decree which would amount to an adjudication conclusively determining the rights of the parties with regard to any of the matters in controversy. Section 47 has to be read with section 2 of the Code of Civil Procedure, and reading the two sections together it is obvious that every order passed by an execution court is not necessarily appealable. It is only appealable when it determines the rights of the parties with regard to any matter in controversy. A refusal to postpone a sale did not determine the rights of the parties within the meaning of that section." In the case of *Behari Lal Ram Charan v. Badri Prasad* (2) a Bench of this Court held that where the execution court ordered that recourse must be had to the property in the hands of certain defendants in the first instance, and if the decree-holder was unable to realise his decree money from such property then he was to be entitled to proceed against the property of other defendants, there, as the order amounted to a temporary stay of execution against the latter defendants and merely decided the mode in which the execution was to proceed, there was no conclusive determination of the decree-holder's right to proceed against them, and therefore the order was not a decree as defined in section 2(2) and was not appealable. In the course of his judgment KING, J., observes: "An order to be appealable must be an order which finally or conclusively determines a question at issue between the parties relating to the execution of a decree."

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These decisions, it will be observed, are no authority for the proposition that all orders staying the execution of decrees under section 47 of the Code of Civil Procedure are not decrees and not appealable. The test to be applied in determining whether an order is appealable or not may be stated thus—does the order conclusively determine the rights and liabilities of parties in a controversy which has arisen between them and which relates to the execution, discharge or satisfaction of a decree? Now in the present instance there was a controversy between the parties as to the judgment-debtor's right to have the execution of the decree postponed during the operation of the Temporary Postponement of Execution of Decrees Act. That Act conferred upon judgment-debtors who were agriculturists a very valuable right. The right conferred by section 3 was one which was in dispute between the parties in the execution court. The order of the court proceeded upon a determination of that question. The court conclusively and finally decided that the judgment-debtor was an agriculturist and entitled to the benefits of section 3 of the Act. Once the judgment-debtor had established that he was an agriculturist then he was of right entitled to stay of the execution of the decree against him. The court had no discretion in the matter. The provisions of section 3 are mandatory and once the court has passed an order staying the execution of a decree in virtue of the provisions of section 3 the decree-holder has no right to apply to the court for the execution of his decree. There was, in the present instance, a conclusive determination of a question arising between the parties and which related to the execution, discharge or satisfaction of a decree. The order therefore in our judgment was appealable. This decision does not imply that every order passed by the execution court staying the execution of a decree is appealable. Innumerable orders including orders of stay, and relating to the execution, discharge or satisfaction of decrees are passed by execution courts under section 47 of the Code of Civil Procedure. A large proportion of these orders are unappealable. But if an order has the

effect of finally determining as between the parties an issue which relates to the execution, discharge or satisfaction of a decree, then such an order is in our judgment appealable under section 47. Whether any particular order is or is not appealable is a question which must be determined upon a consideration of the particular facts and circumstances of the case in which the order is passed.

The appellant contended, as already observed, that section 3 of the Temporary Postponement of Execution of Decrees Act does not apply to a decree for costs. It was urged that section 3 applied only to decrees for money passed by a civil court on the basis of a liability incurred before the passing of the Act and that a decree for costs was not a decree on the basis of such liability. There is no force in this argument. The decree for costs was passed precisely because there was a liability. The plaintiff, judgment-debtor, came into court with a false claim against the decree-holder. His claim was dismissed and he had incurred a liability to indemnify the defendant in respect of the costs of the defendant in the litigation. In passing the decree for costs the court did not, as was contended for the judgment-debtor, create the liability. The decree was passed because there was the liability to pay the successful defendant in the suit his costs. The decree for costs was passed before the Temporary Postponement of Execution of Decrees Act came into force. It was passed upon a liability which had been incurred before the passing of the Act. The judgment-debtor, therefore, was clearly entitled to have the decree stayed under the provisions of the Act.

In the result the appeal is dismissed with costs.

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