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HOE MOH v. I. M. SEEDAT.

RUTLEDGE, C.J., AND BROWN, J.

competent to try, it is quite clear that the transaction relating to the document in issue in the present suit was not decided on in the earlier litigation. It was referred to by the present respondent in his written statement, but although claiming a set-off with regard to other items, he did not do so with regard to this note which he left for adjudication in a separate suit. We are clearly of the opinion that no question of *res judicata* arises.

The plaintiff's suit must therefore fail.

We set aside the decree of the trial Court and pass a decree dismissing the suit of the plaintiff-respondent with costs in both Courts.

APPELLATE CIVIL.

Before Mr. Justice Heald and Mr. Justice Mya Bu.

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June 9.

PADAYACHI AND ONE

v.

R.M.K.M.S. CHINNAYA CHETTIAR.*

Civil Procedure Code (Act V of 1908), ss. 2 (2), 47—Order for stay of execution or for security for stay of execution is neither a decree nor an appealable order.

Held, that an order for security to stay execution is not an order determining any rights of the parties and is neither an order under section 47 of the Civil Procedure Code, nor is it a decree, and is therefore not appealable.

Husainbhai and another v. *Bellie Shah Gilani*, 46 All. 733; *Janardan Triumbak Gadre* v. *Martand Triumbak Gadre*, 14 Bom. 241; *Mukhtar Ahmad* v. *Muqarrub Husain*, 34 All. 530; *Rajendra Kishore Choudhury* v. *Mathura Mohun Choudhury and others*, 25 C.W.N. 555; *Saraswathi Barmania* v. *Golap Das Barman*, 41 Cal. 160—*referred to.*

Sastry—for Appellant.

Doctor—for Respondent.

HEALD AND MYA BU, JJ.—In Civil Regular No. 11 of 1926 of the District Court of Hanthawaddy, the

* Civil Miscellaneous Appeal No. 56 of 1927.

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respondent sued the appellant for recovery of a certain sum of money being the value of rental paddy alleged to be due to him by the appellant.

On the 4th of October 1926 the suit was dismissed and the respondent was ordered to pay the appellant a certain sum of money as costs of the suit. The respondent obeyed the order and deposited the amount in Court. It appears from the explanation of the learned counsel for the respondent that on or after the making of the deposit, the respondent applied to the Court that in view of other suits which he instituted in respect of the subject-matter of the unsuccessful suits the appellant might not be permitted to withdraw the amount in deposit without furnishing security. The District Court made an order on the 10th December 1926 granting the respondent's prayer.

The appellant has now appealed objecting to this order.

The first and foremost question for determination is whether an appeal lies from an order such as this.

The learned counsel for the appellant relies on the provisions of section 47 of the Civil Procedure Code and contends that the order under appeal relates to the execution of the decree in the suit between the appellant and the respondent and is a decree within the meaning of section 2 (*2*).

It should be noted that there was, in fact, no application for execution. The money was paid into Court under the Court's order of the 27th July 1926, so that no application for execution was necessary.

In any case, the learned counsel's contention appears to us to be quite untenable.

In *Sarasvathi Barmania* v. *Golap Das Barman* (1), it was pointed out that every order passed in relation

(1) (1914) 41 Cal. 160.

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to execution need not necessarily be deemed to come within the scope of the definition in section 2 (2) of the Civil Procedure Code and held that "an order for security to stay execution is not an order determining any rights of the parties, and is neither an order under section 47 nor it is a decree."

In 1921 a Bench of the Bombay High Court held that an order for stay of execution could not in anyway be considered as in the nature of a decree and should not therefore be deemed to be included within the term "decree" and ruled that an order for stay of execution of a decree was not an appealable order [*Janardan Triumbak Gadre* v. *Martand Triumbak Gadre* (1)].

The decision in *Rajendra Kishore Choudhury* v. *Mathura Mohan Choudhury and others* (2), is also to the same effect.

In *Husainbhai and another* v. *Beltie Shah Gilani* (3), a Bench of the Allahabad High Court following the principles laid down in an earlier case of the same Court (*Mukhtar Ahmad* v. *Muqarrub Husain* (4), held that "no appeal will lie from an order staying execution of a decree for a definite period therein specified."

In our opinion an order such as the one under appeal merely determines an incidental question as to whether execution is to be carried out in a certain way and does not amount to one which conclusively determines the rights of the parties with regard to any matters in controversy in the proceeding.

We therefore hold that the order sought to be reserved is not appealable.

The appellant's advocate urges that the case may be regarded as a revision and the order in question

(1) (1890) 14 Bom. 241.
(2) 25 C.W.N. 555.
(3) (1924) 46 All. 733.
(4) (1912) 34 All. 530.

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set aside by us in exercise of our revisional powers.

The respondent's advocate explained to us how the District Judge came to make the order, and we think that the explanation is correct. It appears to us that though the order is not strictly justifiable by the rules of procedure it is not at all improper, unjust or inequitable in substance. In these circumstances we do not feel called upon to exercise our discretion to interfere with it in revision.

In the result we dismiss the appeal with costs, advocate's fee two gold mohurs.

FULL BENCH (CIVIL).

Before Sir Guy Rutledge, Kt., K.C., Chief Justice, Mr. Justice Carr, Mr. Justice Maung Ba, Mr. Justice Mya Bu, and Mr. Justice Brown.

MA NYUN
MA SAW AYE *v.* MAUNG SAN THEIN
U SHWE SOE AND SIXTEEN.*

1927

June 10.

Buddhist Law—Desertion—Divorce whether automatic after the lapse of three years or one year—Expressed act of volition whether necessary to effect dissolution.

Held, that where a Burmese Buddhist husband deserts his wife and for three years neither contributes to her maintenance nor has any communication with her, the marriage is automatically dissolved on the expiration of the three years from the date of desertion ; neither is any further and expressed act of volition on the part of the deserted party necessary to effect such dis solution.

Hurpurshad v. *Sheo Dyal*, L.R. 8 I.A. 259; *Ma Hnin Bwin* v. *U Shwe Gon*, 8 L.B.R. 1 ; *Ma Thet* v. *Ma San On*, 2 L.B.R. 85 ; *Ma Thin* v. *Maung Kyaw Ya*, 2 U.R.B., (1892-96) 56 ; *Maung Ko* v. *Ma Me*, S.J. 19 ; *Maung Po Me* v. *L.H.R.L.*

* Civil Reference No. 2 of 1927.