LETTERS PATENT APPEAL.

Before Tek Chand and Johnstone JJ.

1929

Nov. 29.

MUSSAMMAT DURGA DEVI—Appellant

versus

HANS RAJ AND OTHERS—Respondents.

Letters Patent Appeal No. 56 of 1929.

Civil Procedure Code, Act V of 1908, sections 2 (2), 47—Order staying execution—whether appealable.

Held, that an order staying execution till the decision of the appeal clearly falls under section 2 (2), read with section 47 of the Civil Procedure Code of 1908 and is appealable.

Sardar Khan v. Fateh Din (1), followed.

Kanhaya Lal v. *Ram Gopal-Ram Sarup* (2), *Parma Nand* v. *Mst. Raj Devi* (3), and *Janardhan* v. *Mastand* (4), differed from.

Saraswati Barmania v. *Golap Das Barman* (5), and *Rajendra Kishore* v. *Mothura Mohan* (6), distinguished.

Husain Bhai v. *Beltie Shah* (7), explained.

Case law discussed.

Appeal under clause 10 of the Letters Patent from the judgment of Bhide J., dated the 30th January 1929.

V. N. SETHI, for Appellant.

M. L. PURI, S. L. PURI and QABUL CHAND, for Respondents.

TEK CHAND J.

TEK CHAND J.—This is an appeal under clause 10 of the Letters Patent from the judgment of Bhide J., reversing on appeal the order of the Senior Subordinate Judge, Amritsar, whereby he had granted the judgment-debtors' application for stay of execution of a decree pending disposal by the High

(1) (1922) 68 I. C. 751.
(2) (1922) 68 I. C. 49.
(3) 1927 A. I. R. (Lah.) 852.
(4) (1921) I. L. R. 45 Bom. 241.
(5) (1914) I. L. R. 41 Cal. 160.
(6) (1920) 55 I. C. 228.
(7) (1924) I. L. R. 46 All. 733.

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Court of their appeal against that decree. Before the learned Judge, it was objected that no appeal lay against the order staying execution, but this objection was overruled, and the order set aside, as having been obtained on a fraudulent suppression of the fact that an application under Order XLI, rule 5, Civil Procedure Code, for stay of execution had already been rejected by the High Court before the judgment-debtor moved the executing Court for the same relief.

Before us, counsel for the appellant (judgment-debtor) has not attempted to support the order of the Senior Subordinate Judge on the merits, but has strenuously argued that the learned Judge in chambers acted without jurisdiction in entertaining the appeal against the order of the executing Court.

The question whether an order staying execution is or is not appealable under the Civil Procedure Code of 1908 has been the subject of consideration by the Courts in India, and there is no doubt that there is a serious divergence of judicial opinion on it. In our own Court the consensus of authority is in favour of the right of appeal, though there are a few cases on record in which a contrary opinion has been expressed.

The real question for determination is whether such an order falls within section 2 (2), read with section 47 of the Code of Civil Procedure. If it does, it will be appealable under section 96 as a decree; otherwise it will be one of those orders against which no appeal is allowed by the Code. According to section 2 (2) " decree " means the " formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the right of the

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parties with regard to all or any of the matters in controversy in the suit. It shall be deemed to include * * * *the determination of any question within* section 47 * * * ". Section 47 lays down that " *all* questions arising between the parties to the suit in which the decree was passed, or their representatives, and *relating to the execution*, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

The combined effect of these sections is that an order passed in execution proceedings will be tantamount to a " decree " if—

(*a*) so far as regards the Court passing it, it *conclusively determines* a question;

(*b*) *arising between the parties* to the suit, in which the decree was passed, or their representatives; and

(*c*) *relating* to the execution of a decree.

It is conceded that an order of the kind under consideration satisfied condition (*b*), but it is contended that it does not fulfil the requisites (*a*) and (*c*). It is argued, in the first place, that an order staying execution does not *relate* to the execution of a decree but that it merely *suspends* it and, therefore, does not fall under section 47. This contention was raised as far back as 1884 in *Ghazidin* v. *Fakir Bakhsh* (1) which dealt with a case under the Code of 1882 as originally enacted and before its amendment in 1888, and was effectively disposed of by Mahmood J. in the following words:—

" It is true that the object of an order staying execution is to suspend execution, but this circumstance is far from showing that such an order is not

(1) (1885) I. L. R. 7 All. 73, 77.

a question *relating to the execution* of the decree within the meaning of section 244 (*c*) of the Civil Procedure Code. If the argument were sound *a fortiori* would the proposition be true that an order dismissing an application for execution as barred by limitation is a matter not relating to the execution of the decree, for whilst, in one case, execution of the decree is temporarily suspended, in the other it is absolutely prohibited; and, whilst the learned pleader does not go to the extent of contending that the latter proposition is tenable, his argument falls short of explaining the anomaly which the logical consequence of his reasoning involves."

The same view was taken in *Kristomohiny Dossee* v. *Bama Churn Nag* (1), *Luchmeeput Singh* v. *Sita Nath Dass* (2), *Udeyadeta Deb* v. *Gregson* (3), *O. Steel and Co.* v. *Ichchamoyi Chowdhrian* (4), and *Mahant Ishwargar* v. *Chudasama Mamabhoi* (5), in the first of which Field J. observed that an order which stays execution for an indefinite time and prevents a decree-holder from availing himself of the benefit of the decree is " according to all common sense, a question *relating* to the decree." This interpretation of section 244 of the Code of 1822 was accepted in all the Courts at the time, except that a Division Bench of the Calcutta High Court had in the case reported as *Nihal Chand* v. *Rameshari Dassee* (6), expressed the contrary opinion. In a brief judgment, in which the previous rulings of that Court or of the other Courts were not referred to, it was held that an order staying execution is " not one which comes within the purview of section 244," nor " is it a determination of any question mentioned in that section." The legisla-

(1) (1881) I. L. R. 7 Cal. 733, 735.
(2) (1882) I. L. R. 8 Cal. 477.
(3) (1886) I. L. R. 12 Cal. 624.
(4) (1886) I. L. R. 13 Cal. 111.
(5) (1888) I. L. R. 12 Bom. 30.
(6) (1883) I. L. R. 9 Cal. 214.

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ture, however, intervened to put the matter beyond dispute, and accepting the prevailing view, affirmed the right of appeal against orders staying execution, by Act VII of 1888, which amended section 244 by specifically inserting in clause (*c*) thereof the words "or to stay of execution thereof."

When the Code was revised in 1908 this section was wholly recast and re-enacted as the present section 47. But in this section the words which had been introduced by Act VII of 1888 were omitted and this omission is mainly responsible for the serious divergence of opinion in the various Courts. In some cases it has been held that the deliberate omission of these words clearly establishes that the intention of the legislature was to take away the right of appeal which had been given by the aforesaid Amending Act [see *Janardhan v. Mastand* (1), *Rajendra Kishore* v. *Mothura Mohan* (2) and *Husain Bhai* v. *Beltie Shah* (3) per Daniels J.]. In other cases, the view has been expressed that the Act of 1888 merely made clear what was already implicit in section 244 of the Code, as originally enacted in 1882, that the amendment was made merely to nullify the effect of *Nihal Chand* v. *Rameshari Dassee* (4), and that after the law had been well-settled and the right of appeal generally acknowledged, it was no longer considered necessary to retain the words, which were really superfluous (see *Subramania Pillai* v. *Kumaravelu Ambalam* (5) and *Srinivas Prosad Singh* v. *Kesho Prosad Singh* (6) *per* Mukerjee J.). In *Sardar Khan* v. *Fateh Din* (7) LeRossignol J. was of the same opinion and

(1) (1921) I. L. R. 45 Bom. 241.
(2) (1920) 55 I. C. 288.
(3) (1924) I. L. R. 46 All. 733.
(4) (1883) I. L. R. 9 Cal. 214.
(5) (1916) I. L. R. 39 Mad. 541.
(6) (1911) 14 Cal. L. J 489, 495.
(7) (1922) 68 I. C. 751.

observed that " specific reference to stay of execution in section 47 of the Code was rendered unnecessary by the alteration of the opening words of the section as compared with section 244 of the old Code. Under the present law, all questions without exception, *i.e.*, all questions which determine the rights and liabilities of the parties in the matter of the execution of the decree are appealable. Now, a decision that execution shall not take place does determine a right for the time being and may have very far-reaching results. Stay of execution is a question relating to executions: it stops execution dead."

After giving the matter my best consideration, I venture to think, that these observations of the learned Judge summarise the law correctly, and also completely and effectively dispose of the argument, which was much pressed before us, that even if an order staying execution is one relating to a matter falling within the purview of section 47, it is not a " conclusive determination " of such matter with in the last clause of section 2 (2) and, therefore, is not a " decree." I respectfully and wholeheartedly agree with the learned Judge that an order, which stays execution of a decree pending disposal of the appeal against that decree, finally and conclusively determines (so far as the Court passing such order is concerned), the very important right of the decree-holder to reap forthwith the fruits of that decree. It is no doubt true, that the execution proceedings may, and will be revived after the disposal of the appeal. But in that event, and from that stage, the execution will really be that of the decree of the appellate Court which will have superseded the decree of the trial Court of which execution was stayed by the order in question.

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This view has been accepted as correct by other Judges of this Court in *Fitzholmes* v. *Waryam Singh* (1), *Phallu Mal* v. *Hira Lal-Banarsi Das* (2), *Shankar Das* v. *Kasturi Mal* (3), *Gobind Ram-Ram Chander* v. *Rulia Ram-Naurta Ram* (4), and *Muhammad Fazal Azim* v. *Mutsaddi Mal* (5), and in numerous other decisions, which have not found their way into the law reports. The only cases of this Court, *per contra*, which have been brought to our notice, are *Kanhaya Lal* v. *Ram Gopal-Ram Sarup* (6), and *Parma Nand* v. *Mst. Raj Devi* (7). In the former case, however, the judgment is very brief and contains no discussion of the question; in the latter case, Zafar Ali J. dismissed the appeal on the merits, and at the close of his judgment observed that the order would not be appealable. The remark is in the nature of an *obiter dictum*, and it appears that the previous decisions of this Court were not brought to the notice of the learned Judge.

Of the rulings of the other High Courts, the one which was much relied upon is *Husain Bhai* v. *Beltie Shah* (8). The actual decision of that case, given on its peculiar facts, is really not against the view which has prevailed in this Court. It is important to note that in that case execution of the decree had not been stayed till the decision of the appeal but for a definite period, *i.e.*, *from* 23rd of July 1923 to the 6th September 1923, on payment of a certain sum by the judgment-debtor. This order was obviously not one staying execu-

(1) (1923) 75 I. C. 419.
(2) (1923) 75 I. C. 615.
(3) (1923) 75 I. C. 789.
(4) (1923) 76 I. C. 174.
(5) (1927) 102 I. C. 25.
(6) (1922) 68 I. C. 49.
(7) 1927 A. I. R. (Lah.) 852.
(8) (1924) I. L. R. 46 All. 733.

tion outright, but was interlocutory both in its form and its effect and, therefore, not a "decree." There are, however, observations in the judgments of both the learned Judges (who were not agreed as to the reasoning), which lend support to the appellant's contention. Daniels J. took the view that an order staying execution whether for a time or till the disposal of the appeal, cannot fall under section 47, and, therefore, was not appealable. Boys J. on the other hand, thought that the wording of section 47 was very wide and comprehensive and did cover the order in question, but he held that it was not the determination of a question within section 2 (2) of the Code. With all respect I venture to think, that this is a strained interpretation on the section which its phraseology does not bear.

Of the other rulings cited *Saraswati Barmania* v. *Golap Das Barman* (1) and *Rajendra Kishore* v. *Mothura Mohan* (2), are distinguishable as the orders under consideration in them were not those staying execution by the executing Courts. In the first of them the order had been passed by the High Court staying execution of the trial Court's decree conditional on the judgment-debtor furnishing security to the satisfaction of the executing Court, and in pursuance of this order the trial Court had accepted security. An appeal was filed against the order of the executing Court accepting security, which merely gave effect to the direction of the High Court. In *Rajendra Kishore* v. *Mothura Mohan* (2), the order was one not staying execution but refusing to stay. Both the cases are, therefore, distinguishable, though it

(1) (1914) I. L. R. 41 Cal. 160. (2) (1920) 55 I. C. 228.

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must be said that they contain remarks which lend some strength to the contention of the appellant.

TEK CHAND J.

The decision reported as *Janardhan* v. *Mastand* (1) fully supports the appellant, but I venture to think, that the learned Judges were unduly influenced by the consideration that it was not "desirable to extend the number of appealable orders unless there is distinct authority of this extension." In my opinion an order staying execution till the decision of the appeal clearly falls under section 2 (2) of the Code and is appealable as a "decree." I would, therefore, dismiss the appeal with costs.

JOHNSTONE J.

JOHNSTONE J.—I agree.

N. F. E.

Appeal dismissed.

APPELLATE CIVIL.

Before Tek Chand and Agha Haidar JJ.

1930

Jan. 6.

GHULAM MURTAZA (DECEASED) THRO. HIS REPRESENTATIVES (DEFENDANT) Appellant.

versus

NAGINA AND OTHERS (PLAINTIFFS) Respondents.

Civil Appeal No. 2536 of 1924.

Adverse possession—Malikan qabza—*exercising all rights of ownership on shamilat, wrongfully taken possession of by them—Admission—when may be used, against a party making it.*

The plaintiffs were *malikan qabza* in the village Jundla in the Karnal district and as such were not entitled to any share in the *shamilat*, but they managed to take possession of portions of the *shamilat* before 1880 and continued to hold it till the institution of the present suit, *i.e.*, for over 40 years. Though entered in the revenue records as tenants-at-will under the defendants, they were not shown to have acknowledged the defendants, as landlords by attornment, payment of rent

(1) (1921) I. L. R. 45 Bom. 241.