APPELLATE CIVIL.

Before Mr. Justice Baguley, and Mr. Justice Mosely.

1938

Feb. 8.

K.M.C.T. CHIDAMBARAM CHETTYAR

v.

R.M.S.M. SOMASUNDARAM CHETTYAR.*

Execution, order refusing stay of—Order not appealable—Civil Procedure Code, ss. 2 (2), 47. O. 21, r. 29.

An order refusing to stay execution proceedings under O. 21, r. 29 of the Civil Procedure Code is not an appealable order, nor does it come within the purview of s. 47 of the Code.

U San Wa v. *U Chit San*, I.L.R. 9 Ran. 354, approved.

Jamardan v. *Gadre*, I.L.R. 45 Bom. 241 ; *Rajendra Kishore* v. *Choudhury*, 25 C.W.N. 555, referred to.

Durga Devi v. *Hans Raj*, I.L.R. 11 Lah. 402, dissented from.

Chakravarti for the appellant.

P. B. Sen for the respondent.

BAGULEY, J.—This is an appeal against an order passed by the Assistant District Judge of Pegu refusing to stay certain execution proceedings under Order XXI, Rule 29, of the Civil Procedure Code. Orders under Order XXI, Rule 29 are not mentioned in Order XLIII, Rule 1. So, if appealable at all, it can only be appealable under section 47.

A preliminary point has been taken that this appeal does not lie. Section 2 (2) of the Civil Procedure Code defines a decree, and all decrees are appealable. The definition of a decree is deemed to include the determination of any question under section 47. Section 47 deals with questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution,

* Civil First Appeal No. 133 of 1937 from the order of the Assistant District Court of Pegu in Civil Ex. No. 21 of 1936.

discharge or satisfaction of the decree. The question is whether an application for stay is a matter relating to the execution, discharge or satisfaction of the decree.

There is authority in this Court—*U San Wa* v. *U Chit San* (1)—that no appeal lies from an order staying or refusing to stay execution of a decree. It is argued that this is incorrect, but in the judgment (which is that of a single Judge) authorities are quoted from Calcutta and Bombay [*Rajendra Kishore Choudhury* v. *Mathura Mohan Choudhury* (2) and *Janardan Trimbak Gadre* v. *Martrand Trimbak Gadre* (3)].

We are asked to hold that this Rangoon ruling is incorrect and that the contrary view taken by the High Court of Lahore in *Mussammat Durga Devi* v. *Hans Raj* (4) is correct. I have studied this Lahore ruling and it seems to me to make it perfectly clear that the Calcutta and Bombay view is correct.

Section 47 of the Civil Procedure Code corresponds with section 244 of the former Code. Section 244, as it first appeared in the Code, referred only to questions "relating to the execution, discharge or satisfaction of the decree." There was a conflict of opinion between the Courts as to whether this phrase included questions relating to stay of execution. So the Legislature took a hand, and in 1888 added the words "or to the stay of execution thereof." It was then perfectly clear that questions relating to stay of execution did come under section 244. When the Code of 1908 was drafted the Legislature definitely removed these words "or to the stay of execution thereof" from section 47 which took the place of old section 244. Now, the Code of 1908 is not merely a consolidating Act which may be presumed to leave the law unchanged. The preamble states that

(1) (1931) I.L.R. 9 Ran. 354.
(2) 25 C.W.N. 555.
(3) (1920) I.L.R. 45 Bom. 241.
(4) (1929) I.L.R. 11 Lah. 402.

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it is expedient to consolidate and amend the laws relating to the procedure of the Courts, and when an amending Act changes the phraseology of the old Act it must, as a rule, be assumed that the Legislature was intending to make some change. The passage at page 406 of the Lahore case which suggests 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 " is one to which I cannot possibly assent. When the phraseology of the law is changed by an amending Act, the presumption will be that some change in the law is intended. Had the words " or to the stay of execution thereof " never been in the Act I would have been inclined to the view that questions as to stay of execution would be questions relating to the execution, discharge, or satisfaction of the decree. But once it was found necessary to put in special words to make it clear that questions of stay were included in the section, and afterwards it is found that these words have been removed, it seems to me clear beyond all doubt that questions relating to stay of execution are no longer within the purview of section 47.

I would therefore hold that no appeal lies in this case and I would dismiss the appeal with costs, advocate's fee three gold mohurs.

MOSELY, J.—I agree.