

the partition now sought is not between the sons of Netai but between the grandson (the plaintiff) and the [1080] defendant Dharendra, the representative of a predeceased son, in which case it would seem the defendant Bechumonee as the mother of the plaintiff and the grandmother of the defendant Dharendra would on the strength of the text quoted be entitled to a share.

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I hold therefore that the defendant Bechumonee, Debi is also entitled to a share on the partition.

Assuming that the defendants Bissessuree Debi and Bechumonee Debi are entitled to shares, there has been no contention as to the manner in which the shares should be computed. In the first place the property must be divided between the plaintiff Purna Chandra and the representatives of his brother, the defendant Bissessuree Debi, getting a share equal to the share taken by the plaintiff and the representatives of his deceased brother respectively. Accordingly the defendant Bissessuree will take a 3rd share. But the defendant Bechumonee Debi is entitled to have an equal share in the remaining 3rds with her son (the plaintiff and the defendant Dharendra, the representatives of her deceased son.) She will therefore take 1/3rd of 3rds or 1/9th of the estate, while her son and the defendant Dharendra will each take 2/9ths. The defendants Bissessuree Debi and Bechumonee Debi will take their shares for such an estate as is allowed by Hindu Law.

The shares of the parties having thus been declared there will be the usual decree for partition with the usual directions and accounts and order as to costs.

Attorney for the plaintiff: *Amar Nath Ghose.*

Attorneys for the defendants: *M. L. Sen, B. N. Bose and T. N. Bose.*

31 C. 1081 (=9 C. W. N. 123.)

[1081] CIVIL RULE.

*Before Mr. Justice Bodilly and Mr. Justice Mookerjee.*

BHAGWAT RAJKOER v. SHEO GOLAM SAHU. \*

[29th July, 1904.]

*Decree, execution of—Execution, stay of—Appeal—Civil Procedure Code (Act XIV of 1882), ss. 103, 545.*

Section 545 of the Civil Procedure Code has no application where no appeal has been preferred against the decree in the original suit.

It is not competent to an Appellate Court to stay proceedings in execution of a decree of a subordinate Court, merely by reason of an appeal having been preferred against an order of refusal of the Court below to set aside the decree under sec. 103 of the Code of Civil Procedure.

*Pashupati Nath Bose v. Nanda Lal Bose* (1), *Brij Coomaree v. Ramrick Dass* (2), *Balkrishna Sahu v. Musst. Khugno* (3) distinguished.

*Mir Sarwar Jan v. Fiazunnessa Khatun* (4) followed.

[Rel. 35 I. C. 443. Ref. 43 All. 198=18 A. L. J. 112;=60 I. C. 191; 43 All. 203.]

Rule granted to the petitioner, Babui Bhagwat Rajkoer.

A decree was passed against the petitioner and others by the Subordinate Judge of Arrah. The petitioner, a minor, was represented in the

\* Civil Rule No. 2530 of 1904.

(1) (1901) I. L. R. 28 Cal. 734.

(3) (1904) 8 C. W. N. 572.

(2) (1901) 5 C. W. N. 781.

(4) (1902) Unreported.

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Court below by a guardian *at litem* appointed by the Court. She alleged that no notice of this appointment had been served on her, nor any affidavit filed to show that the said guardian had no interest adverse to her. On the ground of these irregularities, she contended, she had not been properly represented in the suit and applied to have the decree set aside, under section 108 of the Civil Procedure Code. This application was rejected and the decree ordered to be executed. She appealed against this order passed under s. 108, and subsequently obtained this Rule calling upon the decree-holder to show cause why the execution should not be stayed pending the appeal.

[1082] Babu *Umakali Mookerjee* and Babu *Makhan Lal*, for the petitioner.

Babu *Rajendra Nath Bose*, for the opposite party.

BODILLY AND MOOKERJEE, JJ. On the 23rd December 1902 one Sheo Golam Sahu obtained a decree for sale upon a mortgagee in the Court of the Second Subordinate Judge at Arrah. On the 2nd January 1904, one of the defendants to the action made an application under section 108 of the Civil Procedure Code, to set aside the decree which so far as he was concerned had been passed *ex parte*; this application was refused on the 3rd February 1904. The defendant applicant on the 4th May last preferred an appeal to this Court against the order dismissing his application, under section 588, cl. 9, of the Civil Procedure Code, and on the 4th July obtained this Rule calling upon the decree-holder to show cause why the sale of the mortgaged property in execution of the decree in the suit should not be stayed pending the hearing of the appeal. The learned Vakil who appears in support of this Rule has relied upon the provisions of section 545 of the Civil Procedure Code, as also upon the cases of *Pashupati Nath Bose v. Nanda Lal Bose* (1), *Musst. Brij Gomari v. Ramrick Dass* (2), and *Balkishen Sahu v. Musst. Khugno* (3). It is quite clear that section 545 of the Civil Procedure Code, has no application to the facts of the present case, inasmuch as no appeal has been preferred against the decree in original suit. The first of the three cases relied upon, *Pashupati Nath Bose v. Nanda Lal Bose* (1), is, in our opinion, of no avail to the petitioner; all that was held in that case was that the appellate Court has power to stay execution, when an appeal from an order in execution proceedings is pending before that Court, and this decision was founded on the ground that by reason of the appeal the appellate Court has seisin of the whole execution proceedings and has as much power to stay proceedings under sub-section (c) of section 244 of the Code of Civil Procedure as the Court of first instance itself possesses. The second case relied upon by the petitioner, *Brij Coomaree v. Ramrick Dass* (2), was decided upon grounds which appear to [1083] us to be wholly inapplicable to the case now before us. In that case it was held that a decree directing the issue of a grant of a probate to the propounder of a will is one that is capable of execution, and stay of execution of such decree can be granted under section 545 of the Civil Procedure Code, pending the hearing of an appeal against the original decree. The last of the three cases referred to, *Balkishen Sahu v. Musst. Khugno* (3) also appears to us to be clearly distinguishable; in that case it was held that when an appeal is pending against a preliminary order made under section 215 A of the Civil Procedure

(1) (1901) I. L. R. 28 Cal. 734.

(3) (1904) 8 C. W. N. 572.

(2) (1901) 5 C. W. N. 781.

Code, the Court which has seisin of the appeal is competent to stay the carrying out of the order appealed against pending the hearing of the appeal. Now in the present case, we think it is impossible to say that this Court has, by virtue of the appeal preferred against the order refusing to set aside the *ex parte* decree, acquire any seisin either of the original suit or of the execution proceedings, as it would undoubtedly have done if an appeal had been preferred either against a preliminary decree in the suit or against an order made in the execution proceedings. In our opinion the proceedings based upon the application of the 2nd January 1904, made with a view to set aside the *ex parte* decree, are not proceedings in the suit which was terminated by the decree, nor can they be rightly regarded as proceedings in execution of that decree. We are constrained to hold, therefore, that it is not competent to this Court to stay proceedings in execution of a decree of a subordinate Court, merely by reason of an appeal having been preferred against an order of refusal of the Court below to set aside the decree under section 108 of the Code of Civil Procedure. The view we take is in accordance with that taken by this Court in the case of *Mir Sarwar Jan v. Faizunnessa Khatun* (1), (Civil Rule No. 2093 of 1902). The Rule will accordingly be discharged. We make no order as to costs.

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*Rule discharged.*

31 C. 1084 (=9 C. W. N. 9.)

[1084] APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, Mr. Justice Harington and Mr. Justice Mitra.

BRIDGE v. MADDEN.\*

[5th August, 1904.]

*Trust property—Debts incurred by trustee—Trustee's Right of Indemnity—Creditor's right to stand in the place of the trustee.*

A, the owner of an hotel, on the occasion of her marriage with B, appointed B trustee by a deed of settlement. The trust deed gave the trustee power through managers and assistants to carry on the business of the hotel, and it was declared that the trustee should be at all times fully indemnified, out of the trust estate, in respect of all liabilities arising from the execution of the trusts. The plaintiffs brought a suit against B, the trustee, for goods supplied to the hotel and claimed B's right of indemnity:

*Held*, that the plaintiffs were entitled in equity to stand in the place of the trustee, if the trustee had not through his own default lost his right of indemnity.

*In the matter of M. A. Shard* (2) referred to.

[Ref. 85 Cal. 320=12 C. W. N. 256=8 M. L. T. 156.]

APPEAL by the defendant, Travers Edward Madden, from a judgment of Henderson, J.

This was a suit brought by the members of the firm of Messrs. G F. Kellner & Co. to recover the sum of Rs. 4,457-2 due for goods sold and delivered for use in the Adelphi Hotel in Calcutta.

This hotel was the property of one Mrs. Cook (now Mrs. Madden), and she on the occasion of her intended marriage with the first defendant, Captain T. E. Madden, on the 6th August 1894 assigned the hotel

\* Appeal from Original Civil, No. 50 of 1904, in Suit No. 301 of 1901.

(1) (1902) Unreported.

(2) (1901) I. L. R. 28 Cal. 574.