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and therefore there was nothing improper in his making the purchase. And it would appear upon the evidence noticed by the Munsif that the plaintiff was aware of the sale and was watching the proceedings to see whether the judgment-debtors would pay up the decree. That being so, we do not think that this is a case in which we should direct that the sale be set aside.

Upon all these grounds we are of opinion that the decree of the Court below should be set aside and that of the Court of first instance restored. This order carries costs in all Courts.

Appeal allowed.

J. V. W.

ORIGINAL CIVIL.

Before Mr. Justice Sale.

YAMIN-UD-DOWLAH AND OTHERS (PLAINTIFFS) *v.* AMED ALI KHAN AND OTHERS (DEFENDANTS).*

1894 *March* 14.

Practice—Dismissal of suit—Staying Proceedings—Application to restrain Receiver parting with funds, pending appeal—Power of Court.

Under the Code of Civil Procedure, once a suit has been dismissed the Court dismissing it is *functus officio*, save that it may stay execution of its own decree or order for costs.

An application therefore made to a Court of first instance after dismissal of the suit, but before appeal filed, asking that the receiver may be restrained from parting with funds in his hands pending an appeal, cannot be granted.

ON the 6th April 1893, a consent decree was passed by Mr. Justice Norris in a suit brought for a declaration, (1) that the will of Nawab Ikbalud Dowlah, deceased, was invalid and inoperative under Mahomedan law, (2) that the plaintiffs in the suit were the lawful heirs of the deceased; and in the alternative, that the will might be construed and a scheme framed thereunder. In that suit a receiver was appointed.

On the 9th September 1893, a suit was filed by some of the heirs of the deceased who alleged that they were unaware of

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the terms of the compromise, that they never gave instructions to the attorney to consent to the decree, and were therefore not bound by it, and prayed that the consent decree might be set aside, and that their suit might be taken as supplemental to the former suit in which the consent decree was passed, and that execution of that decree might be stayed and an injunction granted restraining the receiver from parting with the properties in his hands.

This suit was dismissed by Mr. Justice Sale, and the injunction which had been granted became therefore dissolved. The plaintiffs thereupon applied to that learned Judge for an order on the receiver staying him from parting with the funds in his hands pending an appeal; the appeal at that time had not been filed, the filing thereof having been delayed for the purposes of the application.

Mr. *Phillips* for the plaintiffs:—I am not applying for stay of execution, as execution has not been asked for by the decree-holders. The Code makes no provision for such an application as this, but the case being still before the Court, no appeal being filed, the application must be made in this Court. It is left to the Court, as a Court of equity, to deal with it. Stay of execution does not arise when a suit has been dismissed; it only arises where a decree has been made. What is to be done when a suit involving the title to property is dismissed? What is to be done during the time necessary to prepare an appeal? The Court must have some means of placing the property out of jeopardy during this time and up to the decision on appeal. Section 545 of the Civil Procedure Code gives an analogous power to stay execution; the present is a stronger case than that of a proceeding in execution of decree; it is more summary. I am still asking the Court to adjudicate upon the suit, and I can do so till the time for filing an appeal has expired. I have stated that I intend to appeal, and the only question is whether I am to be driven to apply to the Appellate Court. The original decree is not final so long as the opportunity to appeal remains. Section 503 is wide enough to allow the Court to appoint a receiver during the whole of the litigation, and I am entitled upon principles of equity to have the property kept safe. The sole question is whether the

consent decree is good, and I submit that the Court ought to withhold the property until it is decided whether the decree is good.

Mr. *Pugh* (with him Mr. *Garth*) for the principal defendants. This is really an application to prevent the paying of the costs of the suit. The consent decree is a final decree till set aside; "final decree" is used as distinguishing it from one of an interlocutory character. The Court would have power to act under section 545, but that power is not invoked. It has been decided in this country that after a suit is dismissed an injunction comes to an end—*Mohecooddeen* v. *Ahmed Hosscin* (1), *Gossain Money Puree* v. *Guru Pershad Singh* (2).

I rely on *Wilson* v. *Church* (3). *Otto* v. *Lindford* (4) refers to a stay of proceedings for costs pending appeal. *Polini* v. *Gray* (5) is distinguishable as being a case under special and peculiar circumstances.

Mr. *Jackson*, Mr. *Bonnerjee*, and Mr. *T. A. Apear*, for others of the defendants.

SALE, J.—This suit, the object of which was to set aside the decree in a former suit between the same parties purporting to be a consent decree, was dismissed with costs, it being held that the compromise embodied in the decree is binding upon all the parties to the suit. An application is now made by the plaintiffs in this suit for an order to prevent the disposal, pending an appeal, of funds in the hands of the receiver appointed in the former suit. The question which I have to consider is whether, under the circumstances, I have jurisdiction to make the order asked for.

In the case of *Wilson* v. *Church* (3), where an action had been dismissed by a Divisional Court, it was held by Sir George Jessel, M.R., with the concurrence of Brett and Cotton, LL.J., that that Court had no jurisdiction to entertain an application for an injunction to prevent funds in the hands of trustees from being parted with pending an appeal, and that such an application could only be made to the Court of appeal.

(1) 14 W. R., 384.
(2) I. L. R., 11 Calc., 146.
(3) L. R., 11 Ch. D., 576.
(4) L. R., 18 Ch. D., 394.
(5) L. R., 12 Ch. D., 438.

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In the later case of *Otto* v. *Lindford* (1), where an action had been dismissed with costs, it was held by the Court, consisting of the same Judges who had decided the former case, that the Divisional Court had jurisdiction pending an appeal to stay proceedings for costs under the order of dismissal, and that that question differed entirely from the question which had been determined in the previous case of *Wilson* v. *Church*.

The practical result of these two cases is to establish the rule, that when an action has been dismissed with costs, the Court of first instance can, pending an appeal, stay proceedings for costs, under the order of dismissal, but that it cannot, pending an appeal, restore and maintain by a further order the state of things which existed previous to the dismissal of the action.

In this country the power which the English Courts have of staying proceedings for costs under an order of dismissal is given by section 545 of the Civil Procedure Code. No doubt in the case of *Polini* v. *Gray* (2) the Court of Appeal, consisting of the same Judges who decided the other cases to which I have referred, assisted by Lord Justice James, though it dismissed the suit which had been brought for establishing the claimants' right to share in a fund, yet, on a subsequent application, made an order for preserving the fund pending an appeal to the House of Lords. There are in that case circumstances which serve to distinguish it from the preceding case of *Wilson* v. *Church*, one of the circumstances being that in order to enable an application to be made for an *interim* injunction, the Court stayed the drawing up of the order of dismissal. But apart from this, it is, I think, sufficient to say that in the later case of *Otto* v. *Lindford* the case of *Wilson* v. *Church* is expressly referred to and is treated as a continuing authority. Reading, therefore, the case of *Polini* v. *Gray* with the later case of *Otto* v. *Lindford*, the proper conclusion is that the jurisdiction exercised by the Appeal Court in the former case must be taken to be a jurisdiction of an exceptional and limited character, and one which is confined to the Appeal Court in matters which are appealed or intended to be appealed to the House of Lords: see *Hamill* v. *Lilley* (3). No procedure exists under

(1) L. R., 18 Ch. D., 394. (2) L. R., 12 Ch. D., 438.
(3) L. R., 19 Q. B. D., 83.

which an application for an *interim* injunction can be made to the House of Lords direct. The jurisdiction exercised by the Appeal Court in *Polini* v. *Gray* in respect of an application which could not be made to the higher tribunal was therefore one strictly of necessity. The other cases which have been cited in support of this application, of which *Brewer* v. *Yorke* (1) may be referred to as an example, deal with the power of the Court to stay execution of its own order, and have, I think, no bearing on the present question.

A point has also been made of the fact that in this case no appeal has as yet been filed, and that the filing of the appeal has been purposely delayed in order to admit of the present application being made to this Court. In *Wilson* v. *Church* it is true an appeal would seem to have been filed, which was followed by an application to the Appellate Court for an injunction. But this distinction appears to me to be immaterial. The decision in *Wilson* v. *Church* proceeded on the ground that the Court of first instance had no power to interfere, not because an appeal had been filed, but because the suit had been dismissed. It appears to me that under the Civil Procedure Code, once a suit has been dismissed, the Court dismissing it is *functus officio*, except that it may stay execution of its own decree or order for costs. Its jurisdiction extends no further in regard to a suit which has ceased to be a pending suit. This view is, I think, supported by the Indian cases which have been cited, *viz.*, *Moheeooddeen* v. *Ahmed Hossein* (2), and *Gossain Money Puree* v. *Guru Pershad Singh* (3). The result is that the application must be refused with costs.

Application refused.

Attorneys for plaintiffs: Messrs. *Morgan & Co.*

Attorneys for defendants: Messrs. *Harris & Simmons*, Mr. *M. Dover*, and Mr. *E. O. Moses.*

T. A. P.

(1) L. R., 20 Ch. D., 669. (2) 14 W. R., 384.
(3) I. L. R., 11 Calc., 146.