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they, we think, deny that Bholanath had not in terms of the agreement an equity against the plaintiffs to carry out the agreement," and they were of opinion that he had a right to specific performance of the agreement and to compel the plaintiff to give him a legal title. Their Lordships have some difficulty in following or understanding the observation of the learned Judges. They can only say that they do not agree with it, and, indeed, they think the idea that Bholanath had any such equity is altogether erroneous. There was no ground for modifying the decree of the District Judge and their Lordships will humbly advise His Majesty to affirm it and to reverse the decree of the High Court ordering instead of it that the appeal to it be dismissed with costs. The respondents will pay the costs of this appeal.

*Appeal allowed.*

Solicitors for the appellants : Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents : Messrs: *Gordon, Dalbiac Pugh.*

J. V. W.

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## APPELLATE CIVIL.

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*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Banerjee.*

1901  
 April 26.

PASUPATI NATH BOSE . . . . . JUDGMENT-DEBTOR.  
 v.  
 NANDA LAL BOSE . . . . . DECREE-HOLDER.\*

*Decree, execution of—Appellate Court, power of, to stay execution when an appeal from an order in execution proceedings is pending before the Court—Civil Procedure Code (Act XIV of 1882) ss. 244, sub-s. (c), 545 and 647.*

The Appellate Court has power to stay execution, when an appeal from an order in execution proceedings is pending before that Court.

ONE Nand Lal Bose obtained a decree for money against his brother one Pasupati Nath Bose. The decree-holder made an application for execution of the said decree to the Court of the Subordinate Judge at 24-Parganas and the judgment-debtor

\* Civil Rule No. 5114 of 1900.

objected to it on various grounds. The objection having been disallowed the judgment-debtor preferred an appeal to the High Court against the decision of the learned Subordinate Judge. On filing the appeal the judgment-debtor applied for and obtained a Rule upon the decree-holder to show cause, why the execution should not be stayed, pending the disposal of the appeal to the High Court, from the order passed in the execution proceedings.

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Dr. *Ashutosh Mookerjee* for the petitioner.

Dr. *Rash Behary Ghose* and Babu *Shiva Prosanna Bhattacharjee* showed cause.

APRIL 26. MACLEAN, C. J.—This is an application to make absolute a Rule obtained by the judgment-debtor, calling upon the opposite party to show cause why, upon the petitioner furnishing sufficient security to the satisfaction of the Lower Court, execution of the decree in this case should not be stayed, pending the disposal of the appeal to this Court. The pending appeal is from a certain order in certain execution proceedings under a decree in the suit, and the judgment-debtor applies to have execution stayed pending the hearing of that appeal. The Rule is opposed by the opposite party upon the ground that there is no power in this Court under s. 545 of the Code of Civil Procedure, or otherwise, to stay execution in a case of this class. I am glad we are not constrained to take this view, which, I fear, might result in very grave inconvenience, if not injustice, to suitors in this country. Now what is the position? There is an appeal from an order in execution proceedings pending before this Court; the record has been sent up here and this Court has now seisin of the matter. That being so, this Court has as much power to stay proceedings in these execution proceedings as the Lower Court itself would have, and it is reasonably clear that under sub-s. (c) of s. 244 of the Code of Civil Procedure the Lower Court has jurisdiction in all matters relating to stay of execution. It seems to me that, from this point of view, the Court has jurisdiction to deal with the matter. The inconvenience, possibly injustice, of the opposite view would be extreme, though, in making this observation, I

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am not unmindful of what has been said for the opposite party, that, if there be this inconvenience, and the Court has no power to interfere, it is a matter for the Legislature to make the requisite change in the law. I may add, too, that in practice, what we are now doing has continually been done without objection. But, apart from this view, it is at least open to contention that the words in s. 545 of the Code of Civil Procedure, *viz.*, "the Appellate Court may for sufficient cause order the execution to be stayed;" are not controlled by, or merely confined to, the case of an appeal against the decree itself. It is not necessary to decide this, but the words are wide, and I do not know that it would be necessary for the Court to put too narrow a construction upon them. The Rule must be made absolute.

BANERJEE, J.—I concur with the learned Chief Justice in holding that this Court has power to stay execution in this case. The contention on behalf of the decree-holder, who shows cause, is, that the Appellate Court has no power, under s. 545 of the Code of Civil Procedure, to order stay of execution in this case, because there is no appeal pending against the decree sought to be executed, the only appeal pending being one against the order under s. 244 of the Code of Civil Procedure, disallowing certain objections raised by the judgment-debtor, the petitioner before us, to the execution of the decree in the Court below. That may be so. Section 545 may not govern this case. But that does not necessarily show that this Court has no power to allow stay of execution. The appeal that is pending in this Court being an appeal against an order of the Court below allowing execution to proceed, after overruling the objection of the judgment-debter, the execution case is now really before this Court; and whilst the execution case is before the Appellate Court, I do not see how the Lower Court can allow execution to go on, the execution case being no longer before that Court. It is different, where the appeal in the Appellate Court is one against the decree which is sought to be executed by the Court which made the decree in the first instance; for the appeal from the decree and the execution of the decree are, according to our procedure, treated as two

separate cases, and, whilst the appeal from the decree is pending before the Appellate Court, the proceedings in execution of the decree may go on before the First Court, which made the decree. There, therefore, special provision was needed to empower the Appellate Court to stay execution ; and such provision is to be found in s. 545 of the Code. Here, as I have pointed out above, the very case in which the decree is being executed, being before the Appellate Court, the Appellate Court has the power to stay execution in the same manner as the First Court, if the First Court had such power ; and that the First Court has the power to stay execution of a decree is clear from clause (c) of s. 244 of the Code of Civil Procedure. On this ground, then, I think it clear that this Court has the power to order stay of execution in this case. It is, therefore, unnecessary to consider whether, s. 545, read with s. 647 of the Code of Civil Procedure, does not give the Appellate Court the same power. A Full Bench of the Allahabad High Court in the case of *Har Shankar Parshad* (1) held that the Appellate Court, in a case like the present, had power, under s. 338 of Act VIII of 1859 and s. 38 of Act XXIII of 1861, to stay execution ; and the provision of law, just referred to corresponds to s. 545 read with s. 647, of the present Code. But our attention has been called to the case of *Jadoo Monee Dasee* (2) in which a Division Bench of this Court took a different view. If it had been necessary to decide whether, under s. 545 read with s. 647, of the present Code, the Appellate Court has power to stay execution in a case like the present, perhaps, it would have been necessary to refer the matter to a Full Bench ; but in the view we take it becomes unnecessary to go into that question.

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*Rule made absolute.*

S. C. G.

(1) (1876) I. L. R. 1 All. 178.

(2) (1869) 11 W. R. 494.