

CIVIL RULE.

Before Mr. Justice Bodilly and Mr. Justice Mukerjee.

BHAGWAT RAJKOER

v.

SHEO GOLAM SAHU.

1904

July 20.

Decree, execution of—Execution, stay of—Appeal—Civil Procedure Code (Act XIV of 1902) 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), *Balkishen Sahu v. Musst. Khugno*(3) distinguished.

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

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 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 103 of the Civil Procedure Code. This application was rejected and the decree ordered to be executed. She appealed against this order passed under s. 103, and subsequently obtained this Rule calling upon the decree-holder to show cause why the execution should not be stayed pending the appeal.

Civil Rule No. 2530 of 1904.

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

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

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

(4) (1902) Unreported.

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Babu Umakali Mackerjee 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 mortgage 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 Coomari v. Ramrick Dass*(2), and *Balkishen Sahu v. 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 the 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 subsection (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*(3), was decided upon grounds which appear to

(1) (1901) I, L. R. 28 Calc. 784.

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

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

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* (1) 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 215A of the Civil Procedure 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, acquired 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* (2), (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.

G. M. F.

(1) (1904) 8 C. W. N. 572.

(2) (1902) Unreported.