

FULL BENCH.

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

1904
March 21.

BALKISHEN SAHU

v.

KHUGNU.

*Appeal—Civil Procedure Code (Act XIV of 1882) s. 215A. and s. 545—
Preliminary order—Appellate Court, power of to stay proceedings.*

When an appeal is pending in the High Court against a preliminary order made by a Subordinate Court under s. 215A. of the Civil Procedure Code, the High Court having seizin of the appeal can, apart from the question whether the case falls within s. 545 of the Code, make an order staying the carrying out of such order pending the hearing of the appeal.

REFERENCE to a Full Bench by Harington and Brett JJ.

The Order of Reference was as follows:—

“ In this case Balkishen Sahu, Hira Lal Sahu and Luchman Sahu are the appellants. Mussummat Khugnu and Luchman are the respondents.

In August 1888, Luchman Sahu as the guardian of Mussummat Khugnu (who was then a minor) sued Balkishen Sahu, and the father of Hira Lal and Luchman Sahu claiming possession of certain property, for an account and various other reliefs.

The suit was decreed in September 1890 and the judgment was upheld by the High Court on appeal in May 1892.

In July 1892, the defendant appealed to Her Majesty in Council, but pending the hearing of the appeal a compromise was effected between the parties. In September 1892, the compromise was sanctioned by the District Judge under section 462 of the Civil Procedure Code as being for the benefit of the minor.

Mussummat Khugnu, having attained her majority, has now sued the appellants in the Court of the second Subordinate Judge of Patna alleging that the compromise was obtained by fraud and re-asserting the claim, which had been given up under the compromise, to have an account rendered from January 14th, 1882, to September 9th, 1892, and claiming various other reliefs.

Reference to Full Bench in Civil Rule No. 1355 of 1903, in Regular Appeal No. 132 of 1903.

The learned Judge passed a preliminary decree under Section 215A, Civil Procedure Code, directing that an account should be taken and ordering that a Commissioner should be appointed for that purpose, and that the accounts should be produced within one month.

Against this preliminary decree, the defendants have appealed to this Court and the appeal is now pending.

On May 1st, 1903, a rule was issued calling upon the respondent to show cause why, pending the hearing of the appeal, further proceedings should not be stayed.

On the rule coming on for hearing it was argued that the Court had no jurisdiction to stay the proceedings consequent on the preliminary decree, when no final decree had been made in the suit. The case of *Basanta Kumar Sircar v. Bhut Nath Sircar* (1) is an authority for the proposition that, when a preliminary decree for partition has been passed and an order has been made appointing a Commissioner for the purpose of carrying out that decree, the Court has no jurisdiction to stay the proceedings, the proceedings not being in execution of a decree within Section 545 of the Civil Procedure Code.

On the other hand *Mussummat Brij Coomari v. Ramrick Das* (2) lays down that, where there remains something substantial to be done under a decree, before it can become thoroughly effectual, the decree has to be executed within the meaning of Section 545, Civil Procedure Code. The Court therefore has jurisdiction to stay the proceedings.

In our opinion there is no distinction in principle between the carrying out by a Commissioner appointed by the Court of a preliminary decree for partition, and of a preliminary order for the taking of accounts.

If therefore the law is correctly laid down in the case of *Basanta Kumar Sircar v. Bhut Nath Sircar* (1) we have no jurisdiction to stay the proceedings. On the other hand the order made under Section 215A is a decree and appealable as such and there remains something to be done to make it thoroughly effectual. If therefore the proposition enunciated in *Brij Coomari v. Ramrick Das* (2) is correct, the Court has jurisdiction to stay the proceedings consequent on the order under Section 215A.

There being this conflict of authority we refer to the Full Bench this question.

When an appeal is pending to the High Court against a preliminary order made in a Subordinate Court under Section 215A of the Civil Procedure Code, has the High Court jurisdiction to stay the carrying out of such order pending the hearing of the appeal ? ”

Babu Umakali Mukerji and Moulavi Mahomad Mustafa Khan
for the petitioner.

Babu Ram Charan Mitra and Babu Kritanta Kumar Bose
for the opposite party.

(1) (1897) 1 C. W. N. 264.

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

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MACLEAN C.J. The question submitted to us is this :—“ When an appeal is pending to the High Court against a preliminary order made in a Subordinate Court under section 215A of the Civil Procedure Code, has the High Court jurisdiction to stay the carrying out of such order pending the hearing of the appeal ? ” I have no hesitation in answering the question in the affirmative. Apart from the question whether the case falls within section 545 of the Code of Civil Procedure the Court, which has *seisin* of the appeal, can make an order staying proceedings pending its hearing.

With this expression of opinion, the rule must go back to the referring Court. The costs of this reference are made costs in the rule.

PRINSEP J. I am of the same opinion.

GHOSE J. I agree.

HARRINGTON J. I agree.

BRETT J. I agree.
