

if the provisions of section 187 were complied with, the compliance was after suit commenced, and was therefore too late. Their Lordships, however, are of opinion that, as the compliance was before decree, the Court was fully competent to deal with the case. Their Lordships will humbly advise His Majesty that the appeal should be dismissed and with costs.

J. v. v.

Appeal dismissed.

Solicitors for the appellant: *Downer & Johnson.*

Solicitors for the respondents: *T. L. Wilson & Co.*

1910
 CHANDRA
 KISHORE
 ROY
 v.
 PRASANNA
 KUMARI
 DAS.

PRIVY COUNCIL.

NITYAMONI DAS

v.

MADHU SUDAN SEN.

P.C.*
 1911
 March 10.

Ex parte NITYAMONI DAS.

[On petition relating to an appeal from the High Court at Fort William in Bengal.]

Privy Council, Practice of—Stay of execution of decree pending appeal—Power of High Court where appeal has been admitted by special leave—Civil Procedure Codes (Act V of 1908), o. XLV, r. 13; (Act XIV of 1882), s. 608.

The High Court has power, under rule 13 of order XLV of the Civil Procedure Code (Act V of 1908), to stay execution of a decree, pending an appeal to His Majesty in Council, in a case where the appeal has been admitted by special leave.

THIS was a petition for stay of execution of decree pending the hearing and determination of the above appeal, in which the respondents Madhu Sudan Sen and others (plaintiffs), had obtained a decree (11th December 1908) of the High Court at Calcutta, which affirmed with some modifications a decree (29th December 1906) of the Subordinate Judge of the 24-Parganahs.

*Present: LORD MACNAGHTEN, LORD ROBSON, AND SIR ARTHUR WILSON.

1911
 NITYAMONI
 DASI
 v.
 MADHU
 SUDAN
 SEN.

The petitioners, Nityamoni Dasi and others (defendants), stated in their petition that they obtained, on 19th July 1910, special leave to appeal to His Majesty in Council from the decree of the High Court which awarded to the plaintiffs-respondents possession, amongst other properties, of a one-seventh share in property known as No. 116, Cotton Street, Calcutta, with mesne profits, which had been afterwards assessed at Rs. 3,723-0-11; that the decree-holders partially executed the decree for mesne profits, and also so far as the decree allowed them possession of some of the properties in suit, and on 25th February 1910 they took out execution in respect of the balance of mesne profits due under the decree, amounting to Rs. 2,727-1-5, against the persons of four of the petitioners who were thereupon called upon to show cause why the decree should not be so executed; that by an order of the High Court, dated 28th January 1910, in a suit in which the respondent Gouranga Sen was the plaintiff, and the rest of the parties in the suit under appeal were defendants, a Receiver was appointed in respect of the property 116, Cotton Street, with effect from 17th February 1910, and the Receiver was now in possession of the property; that the petitioners applied to the High Court to direct that, pending the determination by His Majesty in Council of the above appeal, execution of the decree should be stayed on such terms as to security as to the High Court might seem fit; and that on 12th December 1910 the High Court refused such application for the following reasons.

After observing that by way of answer to the application it had been said that the High Court had no power to grant any stay of execution in an appeal to the King in Council, except under the terms of rule 13, order XLV, of the Code of Civil Procedure (Act V of 1908), and referring to three decisions of the High Courts in India bearing on the matter, the High Court observed as follows:—

“We are bound by the decision in *Tegha Singh v. Bichitra Singh* (1). At the same time I would point out that the

(1) (1909) 13 C. W. N. 101xxxix.

decision in that case, though alluding to certain changes of language in the new Code of 1908, omitted to notice the change which was intended to amplify the powers of the Court pending an appeal.

“In section 608 of the Code of 1882 the powers, pending an appeal, were vested in the ‘Court admitting the appeal,’ so that when the appeal had been admitted by special leave from the Judicial Committee this Court should not be regarded as coming within that description. In order XLV, rule 13, the words ‘admitting the appeal’ have been omitted, and, as is well known, designedly omitted, for the purpose I have indicated.

“The inconvenience of this limitation of the High Court’s jurisdiction was felt by their Lordships of the Judicial Committee in the case of *Mohes Chandra Dhal v. Satrugnan Dhal* (1), and the inconvenience becomes abundantly apparent in this particular application. However, as I have said, we are bound by the decision and cannot refuse to follow it.

“The applicants before us have indicated that, if by reason of the previous decision we are unable to grant this application, a similar application will be made to the Privy Council, who will thus have an opportunity of expressing an opinion as to whether or not the High Court has the power indicated in rule 13 pending an appeal admitted by the Judicial Committee, and not by this Court. I may point out that in all other respects the provisions now reproduced in order XLV have always been applied without question to an appeal admitted by special leave.

“The respondents in this case, in view of the applicants’ expression of their determination to apply to the Privy Council, have given an undertaking not to proceed with personal execution for three months from this date.”

The petitioners therefore prayed for an order that the execution of the decree now under appeal should be stayed until the determination of the said appeal upon terms to be stated

(1) (1899) I. L. R. 27 Calc. 1; L. R. 26 I. A. 281.

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by their Lordships of the Judicial Committee or by the High Court.

Ross, for the petitioner, submitted that it was clear from the observations of the High Court that that Court considered it had jurisdiction to deal with the application under the provisions of the new Code of Civil Procedure (Act V of 1908), but appeared to think itself bound by the case referred to, and required the directions of their Lordships of the Judicial Committee before entertaining the application.

The judgment of their Lordships was delivered by

March 10.

LORD MACNAGHTEN. Their Lordships are of opinion that the High Court has power to stay execution, notwithstanding that the appeal, as in this case, has been admitted by special leave of His Majesty in Council. Their Lordships venture to add that the learned Judges of the High Court are in a much better position than the members of this Board to determine in any particular case whether execution ought to be stayed, and if so, upon what terms and conditions and to what extent stay of execution ought to be granted.

Their Lordships will humbly advise His Majesty that execution in this case ought to be stayed upon such terms as the High Court may direct.

Solicitors for the petitioner: *T. L. Wilson & Co.*

J. V. W.