

## CIVIL RULE.

*Before Mookerjee and Holmwood JJ.*

NANDA KISHORE SINGH

v.

RAM GOLAM SAHU.\*

1912

Sept. 5.

*High Court, jurisdiction of—Stay of Execution—Inherent Powers of Court—Special leave to appeal to the Privy Council—Civil Procedure Code (Act V of 1908) ss. 112 and 151 ; O. XLI, r. 5 (2)—Letters Patent, 1865, cl. 36.*

The High Court is competent to make an order for stay of proceedings in execution of its decree in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council.

*Hurro Chunder Roy Chowdhry v. Shoorodhoney Debta (1), Panchanan Singha Roy v. Dwarika Nath Roy (2), Lukum Chand Boid v. Kamalanand Singh (3), Mahomed Wahiduddin v. Hakimian (4), Tara Pudo Ghose v. Kamini Dass (5), Mahadeo v. Budhai Ram (6), Gajju v. King Emperor (7), Brij Coomaree v. Ramrick Dass (8), Nityamoni Dasi v. Madhu Sudan Sen (9) referred to.*

RULE granted to Nanda Kishore Singh and others, the defendants.

The circumstances under which this Rule was obtained were as follows. The petitioners were defendants in a mortgage suit valued at less than Rs. 10,000.

\* Civil Rule No. 4293 of 1912 (Application in the matter of Appeal from Original Decree No. 531 of 1908, and Privy Council Appeal No. 22 of 1911).

(1) (1868) 9 W. R. 402.

(2) (1905) 3 C. L. J. 29.

(3) (1905) I. L. R. 33 Calc. 927 ;

3 C. L. J. 67.

(4) (1898) I. L. R. 25 Calc. 757.

(5) (1901) I. L. R. 29 Calc. 644.

(6) (1904) I. L. R. 26 All. 358.

(7) (1905) 2 All. L. J. 173.

(8) (1901) 5 C. W. N. 781.

(9) (1911) I. L. R. 38 Calc. 335 ;

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The Court of first instance dismissed the suit on the merits. On appeal to the High Court that decree was reversed, and the usual mortgage decree made on the 16th February 1911. The defendants subsequently applied to the High Court for leave to appeal to His Majesty in Council. During the pendency of this application the plaintiffs made an application to the Court of first instance for execution of their mortgage decree. On the 19th March 1912 the application for leave to appeal to His Majesty in Council was refused. The defendants then applied to the High Court to review this order and this application was also refused on the 16th April 1912. The defendants, thereupon, on the 7th July 1912, moved the High Court and obtained the present Rule for staying proceedings in execution of the mortgage decree in view of an application by them to the Judicial Committee for special leave to appeal to His Majesty in Council

*Babu Upendra Nath Chatterjee*, for the petitioners. Although leave to appeal to His Majesty in Council was refused by the High Court, the defendants still have it open to them to apply to the Judicial Committee for special leave to appeal, and steps have already been taken by them for this purpose. My submission, therefore, is that, until this application for special leave is disposed of, the mortgage decree of the High Court is not a final decree. Under O. XLI, r. 5 (2) of the Code of Civil Procedure, 1908, the High Court has jurisdiction to stay proceedings in execution in the present case; but if it be held that this Order is not applicable to this case where special leave to appeal to His Majesty in Council has to be obtained, then I submit that by analogy to the cases governed by that Order, the High Court has jurisdiction to stay execution in the present case pending the filing of

such an appeal. Had an appeal been actually filed, there would have been no question about the jurisdiction of the High Court: see *Nitaymoni Dasi v. Madhu Sudan Sen* (1). I submit that this jurisdiction should now be extended to the present case, as it will take some time before the matter can be brought on before their Lordships of the Judicial Committee, and my clients will be seriously prejudiced if in the meantime the mortgaged properties be sold. I further submit, that the High Court is the proper Court to consider this application for stay of proceedings, as it is in a better position to deal with the facts of this case than their Lordships of the Judicial Committee.

*Babu Kshetra Mohan Sen*, for the opposite party. There is no provision in the Code of Civil Procedure justifying a stay of execution in a decree which has been passed by the High Court and in which leave to appeal to His Majesty in Council has been refused. The mortgage decree passed by the High Court in the present suit has, therefore, become a final decree, and unless an appeal or an application for leave to appeal is actually pending, the High Court has no jurisdiction to stay proceedings in execution.

*Cur. adv. vult.*

MOOKERJEE J. This Rule raises a question of first impression and of considerable importance, namely, whether this Court is competent to make an order for stay of proceedings in execution of its decree, in view of an application by the judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council. The circumstances under which the application has been made are not disputed and may be briefly stated. The petitioners were defendants in a mortgage suit. The Court of first instance

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dismissed the suit on the merits. On appeal to this Court, that decree was reversed, and the usual mortgage decree made on the 16th February 1911. The defendants applied to this Court for leave to appeal to His Majesty in Council. This application was refused on the 19th March, 1912, on the ground that the decree did not involve a claim to property of the value of Rs. 10,000 or upwards. The defendants applied to this Court to review this order; that application was refused on the 16th April 1912. The position, therefore, is that in so far as the Courts of this country are concerned, the mortgage decree has become final. On the 7th July, 1912, the defendants, however, made the present application for a stay of proceedings in execution of our decree, for which the decree-holder had applied to the Court below on the 2nd November 1911 during the pendency of the application in this Court for leave to appeal to His Majesty in Council. The present Rule was granted on the application of the 7th July 1912. The petitioners state in their affidavit that they have taken steps to apply to the Judicial Committee for special leave to appeal to His Majesty in Council, and at the hearing before us, the learned vakil for the petitioners stated that the papers and costs have been transmitted to their Solicitors in England. The decree-holders opposed the application on the ground that as no appeal or application for leave to appeal is pending in this Court or elsewhere, the Court has no jurisdiction to grant a stay of proceedings. It is not disputed that there is no statutory provision applicable to this question; indeed, the absence of a provision in this behalf is not a matter for surprise, because the Code of Civil Procedure does not deal with applications for special leave to appeal to His Majesty in Council, though section 112 of the Code of 1908 declares that nothing

in the Code shall be deemed to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council. The question, therefore, arises whether this Court is competent, in the exercise of its inherent power, to stay proceedings under these circumstances. Section 151 of the Code does not lay down any new principle, but merely declares that the Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. The existence of this inherent power to do justice has been recognised from the earliest times: *Hurro Chunder Roy Chowdhry v. Shoorodhonee Debia* (1) and has been repeatedly affirmed *Panchanan Singha Roy v. Dwarka Nath Roy* (2), *Hukum Chand Boid v. Kamalanand Singh* (3). This inherent power is not, as has sometimes been supposed, capriciously or arbitrarily exercised; it is exercised *ex debito justitiæ* to do that real and substantial justice for the administration of which alone the Court exists. In other words, as Mr. Justice Woodroffe puts it in *Hukum Chand Boid v. Kamalanand Singh* (3), the Court in the exercise of such inherent power must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the Legislature. It is not necessary for my present purpose to formulate the circumstances under which a Court will exercise its inherent power; various instances will be found mentioned in the judgments in *Hukum Chand Boid v. Kamalanand Singh* (3). Amongst obvious cases may be mentioned, consolidation of suits and appeals, postponement of the hearing of a suit pending the

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decision of a selected action, stay of cross suits on the ground of convenience, enquiry as to whether all the proper parties are before the Court, entertaining an application of a stranger to be made a party, the addition of a party, entertaining a defence *in forma pauperis*, deciding one question while reserving another for investigation, remanding a suit which has not been properly tried, staying the drawing up of the Court's own order, suspending the operation of the Court's order, staying proceedings pending an appeal in a guardianship matter and appointing a temporary guardian *ad interim*, applying the principle of *res judicata* to execution proceedings for the sake of finality, punishing contempt of Court committed when the Court is not sitting, deciding questions of jurisdiction though the Court is ultimately found not to have jurisdiction over the suit, directing a party who has applied for leave to appeal to His Majesty in Council to pay costs on the dismissal of his application, amending decrees or orders, granting restitution in cases of reversal of execution sales and orders in execution proceedings, restraining by injunction a person from proceeding with a suit in the Small Cause Court, staying proceedings pursuant to its own order in view of an intended appeal, and treating an application for revision as an appeal and *vice versa*; *Mahomed Wahiduddin v. Hakimian* (1), *Tara Pado Ghose v. Kamini Dassi* (2), *Mahadeo v. Budhai Ram* (3), *Gajju v. King Emperor* (4). Let me examine the matter before us in the light of this principle. The decree-holders contend that the Court is not competent to grant a stay because no appeal or application for leave to appeal is pending here or elsewhere. This argument is based on the assumption that the Court

(1) (1898) I. L. R. 25 Calc. 757.

(3) (1904) I. L. R. 26 All. 358.

(2) (1901) I. L. R. 29 Calc. 644.

(4) (1905) 2 All. L. J. 173.

has authority to grant a stay, only when an appeal or an application for leave to appeal is pending. The assumption is groundless and is negatived by Order XLI, rule 5(2) of the Code of 1908, which expressly recognises the position that an Original Court may, for a limited time, stay proceedings in execution of its own decree, in view of a possible appeal to a superior tribunal. The principle thus recognised by the legislature in express terms, furnishes, in my opinion, a useful guidance in the determination of the question, how the inherent power of this Court should be exercised in a matter of this description. That the Court has inherent power to stay proceedings pursuant to its own order in view of an intended appeal, even though there is no express statutory provision in that behalf, is conclusively shown by the case of *Brii Coomaree v. Ramrick Dass* (1). This is one aspect of the matter. Another point of view is of equal, if not greater, importance. The Judicial Committee have laid down in *Nityamoni Dasi v. Madhu Sudan Sen* (2) that as soon as an appeal has been admitted by the special leave of His Majesty in Council, the High Court is vested with authority to stay execution, in the same manner as if leave to appeal had been granted by the High Court itself. Consequently, if the proposed application by the petitioners for special leave to appeal to His Majesty in Council is granted by the Judicial Committee, this Court will be competent to stay proceedings under the authority of the decision just mentioned. The Court, therefore, ought now to act in aid of a possible order for stay that may hereafter have to be made. If the contrary view is taken, what is the result? Assume that the present application for stay is refused, and the decree-holders permitted to sell

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the mortgaged properties; the application for special leave is granted by the Judicial Committee and an application then made to this Court by the judgment-debtors for stay of proceedings. Are we to say that our action has already been paralysed, that we are powerless to grant relief and that the application is infructuous? I am strongly of opinion, after most anxious consideration of the subject, that the Court should not tolerate such a result, and, as I have shown, the position may be avoided by the recognition of sound judicial principles. The decree now under execution was made by this Court, and the Court has control over it, so as to enable the Court to stay proceedings in view of a possible appeal to His Majesty in Council. It is fairly obvious that if the contention of the decree-holders were to prevail, the gravest injustice might be done to litigants. An application to the Judicial Committee for special leave to appeal to His Majesty in Council must necessarily take time; distance cannot be annihilated, and time must be occupied, in spite of the utmost expedition, in the preparation and transmission of papers. Besides, their Lordships of the Judicial Committee do not hold their sittings continuously throughout the year, and weeks may elapse before the most diligent of suitors is able to obtain special leave to appeal to His Majesty in Council; if meanwhile his properties are allowed to be sold up by the decree-holders on the theory that this Court is powerless to interfere, not only may an application for stay after the grant of the special leave, as contemplated by the Judicial Committee in *Nityamoni Dasi v. Madhu Sudan Sen* (1), become infructuous, but the appeal admitted by special leave of their Lordships of the Judicial Committee may turn out to be wholly illusory and ineffectual.

(1) (1911) I. L. R. 38 Calc. 335; L. R. 38 I. A. 74.



It cannot seriously be maintained that the grant of a stay in any way throws doubt on the decree or weakens its effect; the stay is granted on the principle that the parties should, if the circumstances justify the adoption of such a course, be retained in *statu quo* till the validity of the decree has been tested in the Court of ultimate appeal. The exercise of the inherent power of the Court should thus be widened to aid the administration of justice and not unduly restricted so as to cause needless hardship to litigants and a possible failure of justice. I hold, therefore, that this Court has authority to grant this application. The stay, however, can be granted only for a limited time and on terms. The Rule, in my opinion, should be made absolute and execution proceedings stayed till the 30th November 1912; and the Court below directed to value the mortgage properties and the judgment-debtors called upon to furnish security for so much of the judgment debt as may exceed the value so determined; if security is not furnished within a time to be prescribed by the Court below, the decree-holders will be entitled to proceed with execution of their decree.

The Rule is made absolute on these terms under clause 36 of the Letters Patent, but there will be no order as to costs.

HOLMWOOD J. I am not prepared to differ from my learned brother upon the general point he makes, that this Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. But there are numberless cases where the parties come to this Court asking for a relief which it is not competent for them to seek, and the Court does not in practice make use of its inherent powers to extend a

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procedure which does not apply to a particular case to such a case. For instance the Court does not ordinarily allow an application for revision to be treated as an appeal, far less does the Court go outside its own walls to deal with parties who have no pending litigation before it.

To my mind the use of the inherent power in this case would be an abuse of the process of the Court.

Here is a case of a mortgage suit valued at less than Rs. 10,000, which was dismissed in the Court of first instance but decreed on appeal to this Court on the 16th February, 1911. The defendants applied to this Court for leave to appeal to His Majesty in Council. This application was refused on the 19th March 1912 and the suit being of less value than Rs. 10,000 admittedly it must be assumed that the Bench dealing with Privy Council matters held after full consideration that no substantial point of law arose in the case. The decree of this Court of the 16th February, 1911, is, therefore, *res judicata* between the parties and we cannot go into the merits of the case and say that this is a case where a stay of execution should be granted.

The parties are not properly before the Court and I do not think they have any right to come before the Court. Their only remedy is to go to the Judicial Committee for special leave to appeal to His Majesty in Council. Until they do this they have no footing whatever for further litigation in this matter.

There is no question of using our inherent powers to right a wrong or to prevent the abuse of the process of this Court. We are bound to hold that the decree of this Court of the 16th February 1911 which under the rules is not obnoxious to appeal to the Judicial Committee is a good and just decree and one which ought to be executed.

That is the view I am prepared to hold since in my opinion the applicants for special leave to the Privy Council are not entitled to be heard to the contrary. They are barred by the principle of *res judicata* and speaking for myself I am not prepared to hold that the decree of 16th February 1911 was not a good and just decree and was not final as far as this Court is concerned. It is to my mind clear that it cannot be a proper use of the inherent powers of this Court to impede the execution of the final decrees of this Court and I do not see why this Court should not use its inherent powers to help the decree-holder who has obtained a good decree rather than help the judgment-debtor who has no *locus standi* to delay the course of justice.

I am strongly averse to staying execution where the law does not expressly authorise it except on very good grounds shown to the satisfaction of the Court.

I have never been able to see why the interests of the decree-holder should not be just as worthy of consideration as those of the judgment-debtor and I do not feel myself either called upon to interfere or justified in interfering with a perfectly competent, good and just proceeding in execution.

As the rule is to be made absolute I may say that the applicant to the Privy Council has practically gained all he wanted by this application and I can see no objection to adjourning the matter to the 30th November which is the practical effect of the order with the additional advantage to the decree-holder of the security order.

O. M.

*Rule absolute.*

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