

(1866) 09 CAL CK 0001

Calcutta High Court

Case No: None

In Re: Rajkissen Singh

APPELLANT

Vs

RESPONDENT

Date of Decision: Sept. 15, 1866

Judgement

Sir Barnes Peacock, Kt., C.J.

It is said, in the plaintiff's petition to this Court, that the defendants have applied for execution of the decree of the High Court made on appeal. More correctly speaking, they are applying for restitution of the property from which they were ousted under the decree which has been reversed. The question is whether the case falls within Regulation XVI of 1797, s. 4, and whether this Court can suspend the restitution upon the security which the plaintiff has already given, or upon his giving fresh security for the due performance of the decree which Her Majesty in Council may think fit to make on the appeal against the decree of reversal; or whether they can compel the defendants to give the like security before they are allowed to enforce restitution. In support of the contention of the defendants that this case does not fall within the section of the Regulation above quoted, the case of Nilkissen Thakoor v. Beer Chunder Thakoor Gossain 2 W.R., Mis., 23 decided by the Officiating Chief Justice and Pundit, J., is relied upon, in which it was laid down that there was no power to make such an order under s. 4, Regulation XVI of 1797. We are of opinion that the ruling in the case quoted is correct. Even if the decree reversing the decision of the lower Court had not contained an order for restitution, the defendants would have been entitled to be restored to the property of which they had been turned out of possession under the decree which was reversed. A writ of restitution cannot properly be said to be a writ of execution of the decree of reversal, and such a writ is never classed under the head of writs of execution.

2. If a man is turned out of possession of property under a decree which is afterwards reversed on appeal, it would be very unjust and inequitable to allow the party who obtained possession under that decree to retain possession of the property pending his appeal against the decree of reversal even upon his giving

security; it would also be unjust and inequitable to refuse restitution of the property to the party who had been turned out, unless he should give security. It is very just that where execution of a decree would change the state of things as they existed at the commencement of litigation, the party wishing to enforce that decree should give security, or that the party against whom an existing decree is given should not be allowed to remain in possession of the property decreed against him, pending an appeal against that decree without security. These are the cases intended to be provided for by the Regulation above quoted. Here there is no decree now in existence against the defendants who were in possession at the time when the litigation commenced, the decree under which they were turned out by the plaintiff having been reversed. Why, then, should the plaintiff retain the defendant's property upon giving security; or why should not the defendants have their property restored to them without giving security? There being no decree against the defendants they ought to be put in the same position as they were in before the decree of the lower Court was given. This will not be the case if they be required to give security which they may be unable to do, or if the plaintiff be allowed upon giving security to retain possession of that which by the decree of reversal now appears not to be his. The defendants must be restored without security to all that was taken from them in execution of the decree of the lower Court. In fact the plaintiff gave security for such restitution before he was allowed to execute his decree. There is no reason why he should be absolved from such security, because he has thought fit to appeal against the decree of reversal.

3. As regards costs, if any, either in the lower or Appellate Court, awarded to the defendants by the decree of reversal, we think that the case comes within the Regulation, and that security may be required either from the one party or the other at the discretion of the Court. In this respect we also agree with the Judges who decided the case cited. They say "if the application had been simply for security to the extent of the decree, so far as it applied to the costs, we might have acceded to its prayer."

4. The case will go back to the Judge who referred it, in order that he may deal with the application so far as it relates to the costs, if any, awarded to the appellants by the decree of reversal.

Loch, Campbell, Macpherson, JJ.

concurred.

Jackson, J.

I do not dissent from this decision.

¹ See *Soudaminee Dossee v. Moharaja Dheraj Mohatab Chanel Bahadoor antc*, p. 585.