

(1870) 02 CAL CK 0010

Calcutta High Court

Case No: None

Fleming

APPELLANT

Vs

Shearman

RESPONDENT

Date of Decision: Feb. 10, 1870

Judgement

Macpherson, J.

I do not think that Mr. Creagh is entitled, as of right, to the order he asks for, because the case does not come under the provisions of the 34th section of Act VIII of 1859, which applies only to the costs of the original suits and not to those which may be incurred by the defendant if, a decree having been passed against him, he chooses to appeal against that decree. Section 342 does not apply, and the 37th section of Act XXIII of 1861 is the only section which could possibly be held to give the Court power (by a sort of analogy to section 34) to detain this money. But that section really gives no such power in this case, for the relative positions of the parties are wholly changed from what they were when the plaintiff presented his plaint, and had to proceed u/s 34. A case somewhat similar to this in principle was recently decided by a Full Bench, see in re Ditta, Harackman Sing 3 B.L.R.F.B. 45. There the defendant's property had been attached before judgment u/s 81 of the Civil Procedure Code. The plaintiff got a decree in the Court of first instance, but the decree was reversed on appeal. The plaintiff then appealed to the Privy Council, and applied to the Court to continue the attachment. The Full Bench held unanimously that it could not do so; that the suit was at an end; and that the fact of there being an appeal pending was no ground for continuing the attachment. Mr. Marindin's proposal seems fair, and I shall make an order that, unless the defendant give security for the amount of the decree and costs within 48 hours, the application be dismissed with costs; if security is given, the money will be retained pending the appeal, and the costs of this application will be costs in the cause.