

(1867) 07 CAL CK 0002

Calcutta High Court

Case No: None

Russick Mohun Banerjee and
Others

APPELLANT

Vs

Joynarain Pattur

RESPONDENT

Date of Decision: July 8, 1867

Judgement

Sir Barnes Peacock, Kt., C.J., Kemp, Seton-Karr and Phear, JJ.

We should have been very glad, if we could, to assist the appellant in this case. But his application comes too late. Section 4, Regulation XVI of 1797, enacts:-- "In cases of appeal to His Majesty in Council, the Court of Sudder Dewanny Adawlut may either order the judgment passed by them to be carried into execution, taking sufficient security from the party in whose favor the same may be passed, for the due performance of such order or decree as His Majesty, his heirs, or successors, shall think fit to make on the appeal, or suspend the execution of their judgment during the appeal, taking the like security in the latter case from the party left in possession of the property adjudged against him: but in all cases security is to be given by appellants, to the satisfaction of the Sudder Dewanny Adawlut, for the payment of all such costs as the said Court may think likely to be incurred by the appeal, as well as for the performance of such order or judgment as His Majesty, his heirs or successors, may think fit to give thereupon: and after receiving such security, the Court of Sudder Dewanny Adawlut are to declare the appeal admitted, and to give notice thereof to the appellant and respondent respectively, that they may take measures, the one to prosecute, the other to defend, the cause in appeal before His Majesty in Privy Council, according to the established mode of proceeding in similar cases."

2. Now, in this case, before the appeal was preferred, and before any application was made to this Court to order execution to be suspended upon the appellant's giving security, or requiring the plaintiffs to give security for the execution, execution was issued, and the land was given over to the plaintiffs in execution of their decree, so that nothing remained to be done under the execution. If we were

to make an order in this case, we could not order the execution to be suspended, because it has been executed. All that we could do would be to order the execution to be set aside, or to award restitution. That appears to us to be doing more than we are authorized to do. Therefore it is too late to grant the application now made.

3. Suppose the appeal in this case had not been from a decree relating to land, but had been against a decree awarding a lac of rupees to be paid to the plaintiff, and that under an execution property had been seized and sold and the amount levied and paid over to the plaintiff in the suit, and the plaintiff had laid out the money in an investment upon a mortgage for five years. What could the Court do? Could we order the plaintiff to bring back the money? Clearly not.

4. Suppose the Court should order the plaintiff in such a case to give security, or to bring back the money, and he could not do so, could we attach him for a contempt and put him into prison? In such a case the Court could not enforce its order.

5. It is said that in all cases, if the Court cannot act after execution has been executed, the plaintiff succeeding will be able to get execution before the defendant can stop him by putting in an appeal, because it is urged that s. 4 does not require the Court to take the alternative pointed out until the appeal has been admitted. But we are not sure that that is the true construction of the section. We rather think it is not. That question, however, is not before us now, it will have to be finally settled when it shall arise. Security for cost, in appeal, and for the performance of such order as Her Majesty may think fit to give, is to be given "in all cases of appeal" to Her Majesty in Council. Now the words "in all cases of appeal" cannot mean cases of admitted appeal, because the Court are to require security "for the payment of all such costs as well as for the performance of such order or judgment, as His Majesty, his heirs, or successors may think fit to give thereupon; and after receiving such security are to declare the appeal admitted." So that in all cases of appeal, something at any rate is to be done before the appeal is to be admitted, namely, security is to be given for the costs to be incurred in the Privy Council. Therefore the words "in cases of appeal" may mean cases of appeals preferred, and do not necessarily mean "in cases of appeals admitted."

6. If the party should fail to get his appeal ultimately admitted, the order for security will go, because it is only an order conditional on his appeal being admitted. If the appellant fails to give security, the case will stand as if there had been no appeal, and the execution will go upon the appeal being rejected for want of the security being properly tendered. This application will be refused with costs.

Jackson, J.

7. After hearing the further argument which has taken place on this point, I am not disposed to dissent from the judgment delivered by the Chief Justice, and which is the judgment of the Court, on the point, that is, which has been submitted to the Full Bench, namely that after execution has once gone out, it is beyond the power of

this Court, and not within the scope of s. 4, Regulation XVI of 1797, to set aside the execution. On the other point, which has been thrown out by the Chief Justice, I wish to be understood as reserving my judgment. It is not before us to-day, and I have considerable doubt as to the construction of the words "in cases of appeal" and as to the meaning to be put on the latter part of the section; it appears to me quite possible that the words "but in all cases," should there mean, "be it understood, however, that the appellant must, before the appeal is admitted, take such and such steps." If that be the true construction, considerable hardship, no doubt, will arise to persons who have lost their appeals in this Court. I think it will be almost always in the power of persons who have been successful in this Court to defeat the persons who are desirous of appealing to England and of availing themselves of the provisions of s. 4, Regulation XVI of 1797, by taking out execution before the losing party can move in the appeal to England. I wish, therefore, to have it understood that I reserve my opinion on this particular point. Otherwise I agree in the judgment of the Chief Justice.