(1866) 09 CAL CK 0012

Calcutta High Court

Case No: None

Rajkrishna Roy and Others		APPELLANT
	Vs	
J.P. Wise		RESPONDENT

Date of Decision: Sept. 1, 1866

Judgement

Macpherson, J.

I remain of the opinion expressed by me in making the order referring the case to a Full Bench that, so far as the mere question of jurisdiction is concerned, the Court which made the decree first appealed from has power to entertain and dispose of an application for the issue of execution, even though an appeal to the Privy Council has been admitted. S. 362, Act VIII of 1859, expressly enacts that "application for execution of the decree of an Appellate Court shall be made to the Court which passed the first decree in the suit, and shall be executed by that Court in the manner and according to the rules hereinbefore contained for the execution of original decrees." Those words are absolute, and contain no limitation of any description; and so far as I can see, there is nothing in the fact of an appeal to the Privy Council being pending which will take a decree of the High Court out of the express words of this section. The doubt existing in the matter arises from the provisions of s. 4, Regulation XVI of" 1797, which section, it has been argued, either vests the power of executing such decrees solely and exclusively in the High Court, or at any rate limits the power which is given to the lower Court by s. 362 of Act VIII of 1859. S. 4, Regulation XVI of 1797, says: "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 to 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." It appears to me that that section, although it gives the High Court the power of acting as in that section is provided, does not, either expressly or impliedly, declare

that no Court whatever, other than the Sudder Court, is to execute decrees in respect of which, appeals are pending to the Privy Council. And even if it did so declare, the subsequent enactment of s. 362 of Act VIII of 1859 vested the lower Courts also with the power of executing such decrees. But as, notwithstanding s. 362 of Act VIII of 1859, the provisions of s. 4, Regulation XVI of 1797, still are in force to the extent of empowering the High Court to take security before execution is issued, and to restrain execution when it shall see fit to do so, it appears to me that the latter section practically does very much modify the powers which are given to the inferior Courts by s. 362 of Act VIII of 1859. For although the lower Court has power, under s. 362, to execute the decree, still as there is always (as provided in s. 221 of Act VIII of 1859) a certain discretion in every Court as regards issuing execution, the lower Court does not, in my opinion, exercise its discretion wisely or properly, if, in a case where an appeal is pending to the Privy Council, the lower Court, with notice of that appeal, issues execution without reference to the High Court, or without at least giving the parties, against whom the execution is sought, an opportunity of applying to the High Court in order that the provisions of s. 4, Regulation XVI of 1797, may be given effect to. Act VIII of 1859, s. 338, and Act XXLII of 1861, s. 36, contain provisions by which the local Courts can take security for the execution of any order which may be made in appeal. But those sections, when properly construed, cannot be considered to apply to cases under appeal to the Privy Council. They are manifestly intended to apply merely to cases where appeals are pending to some Court in India. On more careful consideration, I think that the opinion which I expressed recently to the effect that the lower Courts are by those sections empowered to take security pending an appeal to the Privy Council was erroneous, and that those sections apply exclusively to appeals to the Courts of this country.

2. As the lower Court could not itself, in the present instance, take security, and as the uniform practice unquestionably has been always that applications for execution after the admission of an appeal to the Privy Council should be made to the High Court, and as the law expressly gives the High Court the power to take security or to restrain execution, it seems to me that the lower Court did not properly exercise its discretion in issuing execution without either referring to the High Court or giving the parties an opportunity of doing so. Under these circumstances, the proper order to make now will be to stay all proceedings in this matter until the further order of this Court. That is an order which will meet the justice of the case, and cannot possibly work injustice to any one. Meanwhile, it is open to either party to make such application to this Court as he may be advised.

Campbell, J.

3. I am, for the most part, substantially of the same opinion as Macpherson, J. I agree with that learned Judge that, in the case of an appeal, which is not an appeal from the order of the Court which originally passed the decree, that is to say, in the

case of an appeal to the Privy Council, the Court of original jurisdiction has no power to take security, and upon that security to stay execution. I think, however, that, as laid down by Macpherson, J., in the order which refers the case to the Full Bench, the Court which made the original decree first appealed from has jurisdiction to entertain and dispose of an application for the issue of execution even after an appeal to the Privy Council has been admitted, provided that no order to the contrary has been received from the High Court.

4. I believe that there is a great deal of hardship in the practice that has hitherto prevailed in respect of appeals from this Court to the Privy Council. It frequently happens that a man who has carried his case through the Courts for perhaps the greater part of his life may find that the fruit of his litigation is indefinitely postponed, although he has the clearest and best of cases, simply because the other party has thought fit to file an appeal to the Privy Council, in the decision of which there must be necessarily a considerable delay. I have heard, I know not whether true or not, that a great millionaire of this city, who had a very large litigation, was in the habit of appealing, upon principle, every case to the Privy Council, "because," said he, "I am only charged 5 per cent, so long as the appeal to the Privy Council lasts, whereas by keeping the decree-holder out of his money I can obtain 20 per cent, in the bazar." The practice of the lower Courts has no doubt hitherto been that, upon appeal to the Privy Council, execution has been stayed. I am very glad that this case has been referred in order that it may be decided whether the practice (as during the course of the argument was suggested by Jackson, J.) is founded only upon superstition, or whether it is really founded upon law.

5. The general law of the country, applicable to all cases, is the law laid down by the Act of Civil Procedure, s. 338, and s. 36 of the amending Act XXIII of 1861. The general result of these provisions of the law is that it is entirely in the discretion of the Court to stay execution or not to stay execution, taking or not taking security. Well, I do not think that s. 4, Regulation XVI of 1797, is at all at variance with that general provision of the law. That section lays down that 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 shall think fit to make on the appeal, or to 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." The word used both in the first and second clauses is "may" and not "must." It seems that the provisions of that law do not make it compulsory upon the Sudder Dewanny Adawlut, now represented by the High Court, to adopt either of those courses. There is also necessarily a third case in which neither party may give security. In such cases I do not think that s. 4 of the Regulation quoted can in any way be made to apply, and consequently such cases must be left to the operation of the ordinary law. Therefore, the law being, as it seems to me, in its literal reading

plain, I do not think that we are bound to put upon it a forced construction which it does not literally bear, if that construction would work injustice, as I think must be worked by any construction which makes it compulsory to hang up a case upon appeal (with or without reasonable cause) in which the decree-holder is not in a position to give security. Where the literal interpretation is in favor of the poor man, we are not, I think, in any degree bound to put upon it a hard interpretation against him. Therefore, in the absence of any order of this Court, the Court below has, X think, jurisdiction to issue execution.

6. With regard to the matter of discretion, it certainly seems that the lower Court, knowing the law and practice of this Court in such cases, ought not to allow the judgment-creditor, as it were, to snap execution. The proper course for him would have been to say to the judgment-debtor:-- "I cannot refuse execution; I will not refuse execution, but you are entitled to apply, under s. 4, Regulation XVI of 1797, to the High Court; and in case it should see fit to pass an order under that section, I give you a reasonable time within which to obtain an order, if you can."

7. In this case, we have not had the facts completely before us. We do not know what time elapsed between the filing of the appeal, to the Privy Council and the application for execution, but it does not appear that the lower Courts ever proposed to give to the judgment-debtor such a time as I think might reasonably have been given to apply to this Court. Therefore, in my opinion, the proper order now to be passed would be this. That the order for execution passed by the lower Court should be stayed for, say two months, in order to give the judgment-debtor an opportunity of applying to this Court for the issue of any order which this Court may deem proper under s. 4, Regulation XVI of 1797. I also think that any inconvenience which may be apprehended from the undue snapping of decrees, has been obviated by the late decision of the Privy Council Mussumat Jariut-Ool-Butool vs. Mussumat Hoseinee Begum . That decision rules that even although execution may have been already carried out, nevertheless the High Court has power, under the general provisions of the law, to take such steps as it may deem proper for the protection of the properly. Therefore, if it should happen that in this case execution has been carried out, still I believe that, on a proper application being made to this Court and good reason shown, the Court may nevertheless protect the property, if it is necessary to protect it.

Jackson, J.

8. I am of the same opinion as Macpherson, J. I have no doubt that, under s. 362 of the Civil Procedure Code, the Principal Sudder Ameen had prima, facie authority to execute the decree of this Court even though an appeal against that decree to Her Majesty in Council had been preferred. At the same time, this Court is competent, under s. 4, Regulation XVT of 1797, to provide for the due protection of the property, the subject of dispute, pending the appeal to Her Majesty in Council. That power of protecting the property under such circumstances is not vested in the Zilla Court, or

in any subordinate Court, but in the High Court only. That being so, and that power having invariably been exercised by the High Court upon application, it appears to me that, adverting to the language of s. 221 of the Code of Civil Procedure, the knowledge of the circumstance (brought to his notice) that an appeal to Her Majesty in Council had been admitted, ought to have appeared to the Principal Sudder Ameen a "sufficient cause" for not issuing the warrant for execution of decree. He must have known that it was in the power of this Court to make an order, and that the Court, if applied to, would make an order, either for execution of the decree upon the party executing it giving sufficient security, or for the suspension of that execution on security being given by the opposite party. It seems to me, therefore, that the Principal Sudder Ameen exercised, under the circumstances, an improper discretion in allowing execution to proceed. I think, therefore, that the proper order for us to make is that the order of the Principal Sudder Ameen directing immediate execution be set aside, and that the case stand over until the further orders of this Court.

Loch, J.

9. It appears to me that until an appeal to the Privy Council is admitted, the first Court may deal with the application for the execution of the decree of the Appellate Court as if it were an application for execution of its own decree. But where an appeal has been admitted, I think that the decree cannot be executed except as provided by s. 4, Regulation XVI of 1797. If, therefore, execution of a decree from which an appeal to the Privy Council has been admitted is applied for, the Court whose duty it is to execute the decree should stay its hand, as it is empowered to do under s. 221, Act VIII of 1859, leaving the parties to apply to the High Court, either the decree holder for execution or the judgment debtor to suspend execution; and that Court will be guided by the rules laid down in s. 4, Regulation XVI of 1797.

10. It is unnecessary in this case to express any opinion as to whether the terms of s. 4 of the above Regulation render it imperative upon this Court to take security in all cases.

11. I think that in this case the order of the lower Court is wrong, and that it should be reversed.

Peacock, J.

12. I am of opinion that, in a suit in which an appeal to the Privy Council from a decree of this Court has been admitted, and is still pending, the Court of original jurisdiction which made the decree first appealed, from has jurisdiction to issue execution, but I agree with the learned Judges who are of opinion that in this case the proceeding ought to be stayed until further orders of this Court.

13. One question for determination is whether, under Regulation XVI of 1797, s. 4, it is compulsory upon the High Court (who now represent the Sudder Court) either to

take security from the plaintiff or from the defendant, or whether there may not be certain circumstances under which the Court, exercising a sound and proper discretion, may allow a plaintiff to execute his decree without security, notwithstanding an appeal has been preferred from that decree to Her Majesty in Council. As a general rule, no doubt, a decree of this Court ought not to be executed pending an appeal without security from one party or the other, but there may be oases in which it would, be unjust to prevent a plaintiff from executing his decree without giving security even when the opposite party is willing to give security. It was contended that, as the Court is authorized to do one of two things, it must do one of them, and that it cannot allow the decree to be executed pending appeal without taking sufficient security. The word used in the Regulation is "may." The word "may" is sometimes read as "must" or "shall." But in this case it appears to me that it may properly he read in its ordinary sense, which leaves it to the discretion of the Court either to take security from, one party, or the other, or to allow the decree to be executed without requiring security at all, if, in the exercise of a sound discretion, it sees fit to do so. If we hold that in this case the High Court cannot, in its discretion, allow the decree to be executed without taking security, we shall, in effect, hold that this Court has a less discretion in the case of an appeal to the Privy Council than the lower Courts have in appeal from their judgments. If a lower Court passes a decree, it may, under s. 338 of the Code of Civil Procedure, stay execution; but it cannot do so, unless the party against whom the decree is given shall give security. The section says:-- "Execution of a decree shall not be stayed by reason only of an appeal having been preferred against such decree; but the Appellate Court may, for sufficient cause shown, order that execution be stayed. If application for execution be made before the time allowed for appeal has expired, and the lower Court has not received intimation of an appeal having been preferred, the lower Court, if sufficient cause be shown, may stay the execution." There the word "may" leaves it in the discretion of the Court to order execution to be stayed or not, But then the section goes on:-- "Before making an order to stay execution, the Court making the order shall require security to be given by the party against whom the decree was passed, for the due performance of the decree or order of the Appellate Court." In the latter part of the section the word "shall" makes it compulsory on the Court to require security before staying the execution. But the converse does not hold, and it is not compulsory on the Court to require security before it allows execution upon a decree against which an appeal has been preferred. By s. 36, Act XXIII of 1861, it is enacted that "when an order is made for the execution of a decree against which an appeal has been preferred, it shall be lawful for the Court which pronounced the decree to require security to be given for the restitution of any property which may be taken in execution of the decree, or of the value thereof, and for the due performance of the decree or order of the Appellate Court. The Appellate Court may, in any such case, direct the Court which pronounced the decree to take such security." The words "it shall be lawful for the Court" leave it discretionary. I am of opinion that the High Court has a similar discretion vested in

it.

14. Before the passing of Act XXV of 1852, the Sudder Court executed its own decrees, but by that Act the decrees of the Sudder Court were to be executed by the Court which passed the first decree. That Act, as regards decrees of the High Court and of the Mofussil Courts, has been repealed, and s. 362, Act VIII of 1859, has been substituted for it. By that section it is enacted "that application for execution of the decree of an Appellate Court shall be made to the Court which passed the first decree in the suit, and shall be executed by that Court in the manner and according to the rules hereinbefore contained for the execution of the original decrees." No order frond this Court is necessary before the lower Courts can execute a decree passed in appeal. I am now speaking of cases in which no appeal has been preferred from the decree. The decree of this Court is sent to the Court which passed the first decree, and, under s. 362, the Court has power, without any further order, to carry it into execution. It may be that, before the application to the lower Court for execution of the decree, or pending the execution of the decree, or even after the decree has been executed, an appeal may be preferred from the decree. It may be that, though such appeal has been preferred before the application for execution, the lower Court may not be aware of the fact. We cannot say that simply because an appeal has been preferred against the decree, the jurisdiction of the lower Court to execute the decree is at an end. The lower Court has power to execute a decree of this Court, whether an appeal has been preferred or not, unless restrained by an order of this Court, but then the question is, whether the Court, when it is informed that there has been an appeal to Her Majesty in Council from the decree which it is called upon to execute, would be exercising a sound discretion in issuing an execution without giving the parties an opportunity of applying to this Court for an order to stay the execution, or to require security from the party left in possession. Jackson, J., has referred to s. 221 of the Act, which enacts that, "when all necessary preliminary measures have been taken, where any such are required, the Court, unless it see cause to the contrary, shall issue the proper warrants for the execution of the decree." Well, then, suppose the lower Court is informed that since the decree was sent to it by the High Court, the parties have appealed against the decree to Her Majesty in Council, is not that a sufficient cause why the lower Court should, in the exercise of its discretion, stay its hand, and allow time to the parties to apply to the High Court, instead of proceeding immediately to issue a warrant of execution. I should say, as a general rule, that in such a case the Court ought to stay its hand, unless it should see danger of the property being made away with in the interval.

15. I agree with Macpherson, J., that s. 338 of Act VIII of 1859 and s. 36 of Act XXIII of 1861 do not give to the lower Courts power to take security in the case of an appeal from the decree of this Court to the Privy Council. It is quite clear, when Ave read the sections, that they were not intended to apply to such a case. Take s. 36 "When an order is made for the execution of a decree, against which an appeal has been preferred, it shall be lawful for the Court which pronounced the decree to require

security to be given for the restitution of any property which may be taken in execution of the decree, or of the value thereof, and for the due performance of the decree or order of the Appellate Court." "The Court which pronounced the decree." The lower Court is not the Court which pronounced the decree, when the decree to be executed is a decree of a Court of Appeal. The section goes on to say that it may also take security "for the due performance of the decree or order of the Appellate Court," that is, the Court of Appeal from its own decision. But the clause never meant that when a decree of the High Court is sent to the Mofussil for execution, that the Mofussil Court can take security for the due performance of the decree or order of the Privy Council. That must be done by this Court under s. 4, Regulation XVI of 1797, before it can allow the appeal, for that section declares that "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." If this Court must take security, it could not have been intended that the lower Court may also take security for the same thing, for in that case the security might be taken twice over.

16. In this case the Principal Sudder Ameen was informed that an appeal had been preferred to the Privy Council. He knew that he had no power to take the required security, and he must have known that the only Court which could take the required security is the High Court. Then was not that sufficient cause for staying his hand. It appears to me that it was, and that he ought to have stayed his hand until some orders were obtained from this Court. Under these circumstances, I think that this Court would have the power to reverse the decision of the lower Court on appeal, but it is not necessary to do that, because it may be that these proceedings will eventually go on, and therefore all that it is necessary to do at present is to stay the proceedings until the further orders of this Court; that is the opinion of the majority of the Court. On the other hand, Campbell, J., is of opinion that the order ought to be stayed for two months, to give the judgment-debtor an opportunity of applying to this Court for the issue of any order which it may think proper to make; and at the end of that time if no such order be made, the execution to go on. The majority of the Court think that we ought not to allow execution to go on without security on one Bide or the other, unless we see good reason to the contrary. We ought to be satisfied either that the party who issues the execution of the decree is unable to give security, and that he will be injured by staying the execution upon security being given by the opposite party, or that there is some reason why he ought to be allowed to execute his decree without giving security. Until we know what are the actual circumstances of this case, we ought not to allow the execution to go on without security. It is not shown to us that this is such an exceptional case as would justify us in jeopardizing the property by allowing the execution to be proceeded with without security. The order of the Principal Sudder Ameen in this case, for issue

of the warrant of execution, will be stayed until the further orders of this Court.