Present: Mr. Justice Wood Renton and Mr. Justice Wendt.

1908.
September 15.

THE ATTORNEY-GENERAL *v.* PERERA.

D. C., Colombo, 24,032.

Appeal to the Privy Council—Stay of execution—Powers of Supreme Court—Jurisdiction of District Court—Courts Ordinance (No. 1 of 1889), s. 42—Civil Procedure Code, ss. 761–764, 777.

Where, after an appeal, proceedings are taken by a party with a view to appealing to His Majesty in Council, the proper Court to entertain an application for stay of execution pending such proceedings is the District Court, and not the Supreme Court.

THIS was an application to the Supreme Court to stay execution in a case in which proceedings were taken to appeal to His Majesty in Council.

H. J. C. Pereira, for the applicant.

Walter Pereira, K.C., S.-G., for the Crown.

Cur. adv. vult.

September 15, 1908. WOOD RENTON J.—

I do not think that we have any power, under the law as it stands, to stay the execution of a decree in such a case as this. The "Court" referred to in sections 761–764 of the Civil Procedure Code is, it appears to me, the Court of original jurisdiction. The clause in section 763, to which Wendt J. referred in the argument, and which speaks of security being given for "the due performance of the decree or order of the Supreme Court," points in this direction. Mr. H. J. C. Pereira relied on a two-fold argument.

In the first place, he contended that, after the allowance of this Court of a certificate to have its judgment in the present case brought up in review, prior to an appeal to the Privy Council, the whole proceedings, preparatory to the hearing in review, were converted into something in the nature of an appeal, although not an appeal in the strict sense of the term. Where, therefore, as here, the Supreme Court had set aside the decree of the Court of original jurisdiction and "passed a decree" of its own, the party who sought to bring up that decree in revision was entitled, by the very terms of section 761 of the Civil Procedure Code, to apply to the Supreme Court as the Court passing the decree for a stay of execution. This argument admits, in my opinion, of several answers. We are precluded by the decision of a Bench of two Judges in the case of *Cassim Lebbe Marikar v. Saraye Lebbe*[1]—a decision justified by the language of the Code and

[1] *(1894) 3 C. L. R. 61.*

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the Courts Ordinance—from holding that the proceedings preparatory to a hearing in review are an appeal. Again, in view of the provisions in section 777 of the Code of Civil Procedure and section 76 of the Courts Ordinance (and *cf.*, *Justice v. Mersey Steel Co.*,[1]) the decree of the Supreme Court either affirming or, reversing that of the Court of original jurisdiction, becomes the decree of the latter Court. On both these grounds section 761 is applicable.

Mr. Pereira's second point was that, in any event, under section 42 of the Courts Ordinance, which saves the right of appeal to the King in Council against "any final judgment, decree, or sentence," the decree of the Supreme Court in this case, whether it is to be regarded as that of the Supreme Court or as that of the Court of original jurisdiction, is an "appealable decree," and that, therefore, under section 761 of the Code, its execution can be stayed. But section 42 of the Courts Ordinance does not say that the final decree, to which it refers, is an "appealable decree." On the contrary, it clearly indicates (see clause 3) that the only "appealable decree" is the decree in review. All that the saving clause in section 42 does is to enact in effect that machinery will be provided by which a final decree may be got rid of on appeal to the Privy Council. This machinery is to be found in the clauses following the saving clause, and one of these expressly provides that it is from the decree in review that the appeal to the Privy Council must be taken. I think that Mr. Pereira's second point fails.

I would dismiss the application with costs.

WENDT J.—

This is an application by the defendant in the action for a stay of the execution of the decree pending his appeal to the Privy Council. The decree in question is a decree of this Court, whereby the plaintiff's appeal against a dismissal of his action by the District Court was allowed and defendant condemned to pay him a sum of Rs. 23,944·64. This decree was dated June 9, 1908, and within two months of that date the defendant applied for a certificate under section 781 of the Civil Procedure Code with the view of appealing to the Privy Council. The certificate was granted on August 4, security for costs of the review hearing has been given, and the case now awaits hearing accordingly. On August 17, 1908, the plaintiff applied *ex parte* for, and obtained from, the District Court a writ of execution against the defendant's property for the recovery of the amount decreed, and the present petition, supported by affidavit, was presented to us on August 21. As grounds for the application the petition alleges (paragraph 7) that "By the execution being enforced during the pendency of the appeal, the heirs of the deceased defendant, one of whom is a minor, will suffer irreparable loss, to

[1] (*1876*) *1 C. P. D. 575.*

prevent which the petitioner is prepared, if required, to offer adequate security to the plaintiff to meet his claim in the event of the action being decided against him in appeal."

Petitioners' counsel, in view of section 76 of "The Courts Ordinance," 1889, and section 777 of the Civil Procedure Code, was forced to admit that the District Court was the proper Court to execute the decree. The former section enacts that the execution shall be carried out "in like manner as any original judgment, order, or decree pronounced by the said District Courts could or might have been executed;" while section 777 directs the District Court to "proceed to execute the decree passed in appeal, according to the rules heretofore prescribed for the execution decrees in an action." Clearly a Court has power in a proper case to stay execution of its own decree, and in my opinion it has the same power over a decree passed in an appeal against its own decree. The present application ought therefore to have been made to the District Court of Colombo, and I think the petition should be dismissed with costs.

On the assumption that the application was properly presented to this Court, counsel sought to bring the case within Chapter LIX. of the Code. I am doubtful whether that chapter is applicable to the case at all. Its primary application, at any rate, is to appeals from inferior Courts to the Supreme Court, and the argument for making it govern appeals to the Privy Council must rest solely on the fact that there is no other express provision relating to the execution of a decree at the stage at which this case has arrived. Supposing the chapter applies, it has been held that proceedings to obtain a hearing in review do not amount to an "appeal" (*Cassim Lebbe Marikar v. Saraye Lebbe*[1]), and I think that ruling right. It is clear from section 42 (thirdly) of the Courts Ordinance and section 783 of the Code that the "appeal" allowed to an unsuccessful party is against the judgment of this Court in review only. In the present case there can as yet be no appeal to the Privy Council.

Application disallowed.

[1] *(1894) 3 C. L. R. 61.*