

1870.  
Aug. 17.

*Regular Appeal No. 29 of 1870.*

MANSUKHRA'M PURSHOTAM *et al.* ..... *Appellants.*

JAVAREVOHU, widow of Nandkisor Bhagván. *Respondent.*

*Security for the Restitution of Property—Appeal—Execution—  
Act XXIII. of 1861, Sec. 36.*

*After property the subject of litigation has been given over in execution of a decree to the plaintiff, it is not within the scope of Sec. 36 of Act XXIII. of 1861 to exact security from the plaintiff for the restitution of such property in the event of a successful appeal.*

THE appellants in this suit presented a petition, under date the 9th of June 1870, to the High Court, which stated that in a suit valued at Rs. 3,41,184-7-8, the lower court, namely, that of the District Judge of Súrat, had passed a decree in favour of the respondent Javarebái, widow of Nandkisor Bhagván, and had passed an order that execution should follow upon the said decree, and that she should recover possession of all the property awarded by the decree. That, the amount in dispute being large, and the opponent not being possessed of any property, to the best of the petitioners' knowledge and belief, except that awarded by the decree, the petitioners were apprehensive that, unless due and proper security was taken from the respondent for the restitution of any property which had come or might come into her possession by virtue of the decree, and for the performance of such order as might be passed in the appeal by this Honorable Court, serious and irreparable loss might accrue to the petitioners in the event of the High Court modifying or reversing the decree of the lower court. That the petitioners, therefore, prayed that it might be ordered that security as above should be forthwith taken, that the execution or further execution of the lower court's decree should in the meanwhile be stayed, or that a receiver might be appointed for management and care of the property pending the appeal.

The Court, on reading the above petition, granted, on the 9th of June 1870, *a rule nisi*, calling on the respondent to show cause why security should not be given for any

execution which the plaintiff (the respondent) might take out, or might have already taken out.

1870.

MANSUKHRA'M  
PURSHOTAM  
- et al.

v.

JAVAREVOHU.

On the 17th of August, *coram* WESTROFF, C. J., LLOYD and MELVILL, JJ., *Macpherson* showed cause, and stated that the decree under appeal, so far as it related to immoveable property, had been already executed by the lower court, and that the property had been put in actual possession of the respondent, before the *rule nisi* was issued. He contended, under the circumstances, that the application for security was too late, and that it was not competent to the High Court to demand security in such a case. He further stated that the other part of the decree, which related to money and costs, had been already stayed by the lower court upon the petitioners' request, and urged that the petitioners ought to have made this application to the lower court, under Sec. 338 of the Civil Procedure Code, at the proper time. He contended that Sec. 36 of Act XXIII. of 1861, under which the *rule nisi* had issued, provides for security being taken only when *an order is made for the execution of a decree* which has been appealed against, and that, in the present instance, the respondent was not going to *take out*, or *enforce*, any order for the execution of her decree against the petitioners, and that, in point of fact, there was now no order for execution at all.

He also relied on the absence of any allegation on the petitioners' part of there being any attempt by the respondent to alienate, waste, or damage the property, which the lower court had adjudged in her favour, and delivered into her possession, in execution of its decree. He cited in support of his argument *Joynarain Pattur v. Russeck Mohun Bannerjee (a)*.

*Shántárám Náráyan*, in support of the rule, alleged that certain creditors of the respondent had placed, or were about to place, attachments on the property, and rested his application for security mainly on the ground that the respondent

(a) 8 Cal. W. Rep., Civ. R. 144.

1870.

MANSUKHRA M

et al.

v.

PURSHOTAM  
JAVAREVOHU.

had taken out execution, and entered into possession, of the property *before the appeal time had expired.*

PER CURIAM :—This application is too late. After property has passed into the possession of the successful party, under a decree in respect of which an appeal is preferred to the High Court, it is not within the scope of Sec. 36 of Act XXIII. of 1861, nor in the power of the High Court, to exact security for the restitution of such property, in the event of the decree appealed against being reversed.

The rule of the 9th of June 1870 will, therefore, be discharged with costs.

*Rule discharged with costs.*