

that, under the circumstances, the Judge was right in holding that the defendant is not dwelling within the local limits of his jurisdiction within the meaning of Sec. 8 of Act XI. of 1865.*

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Reply accordingly.

Act XI. of 1865, Sec. 8, Ex. a.—Where a person has a permanent dwelling at one place, and also a lodging at another place for a temporary purpose only, he shall be deemed to dwell at both places in respect of any cause of action arising at the place where he has such temporary lodging.

[APPELLATE CIVIL JURISDICTION.]

Application for the exercise of Extraordinary Jurisdiction, No. 33 of 1873.

Sept. 26.

KÁVASJI BHIMJI.....*Petitioner.*

DHONDIRÁJ VINA'YAK by his agent VISA'JI...*Opponent.*

The Code of Civil Procedure, Sec. 338—Stay of execution of a decree.

When an Appellate Court reverses a decree in favour of the plaintiff in a suit, it ought not to stay execution of its own decree under Section 338 of Act VIII. of 1859.

Order of District Court staying execution under such circumstances set aside.

THIS was an application for the exercise of the Court's extraordinary jurisdiction.

Dhondiráj obtained a decree against Kávasji in the Court of the Subordinate Judge of Panwel, and, in execution of it, attached certain moveable property belonging to Kávasji. This decree was reversed by the Appellate Judge, Mr. Coghlan, who, however, on the application of Dhondiráj, ordered that execution of his own decree should be stayed for a period of

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ninety days from the date of that decree. On an application for the reversal of this stay order, MELVILL and PINHEY, JJ., granted a *rule nisi*,

The rule was argued by *Mánikshá Jehángirshá*.

Shántáram Náráyan (with him *R. S. V. N. Mandlik*) in showing cause, said :—There is no appeal against an order of this kind. Under Sec. 338 of the Code of Civil Procedure, an Appellate Court has undoubted power of staying execution of its own decree.

[MELVILL, J. :—But that decree reversed the decree of the court of first instance in the plaintiff's favor ; so there remained no decree to execute.]

The defendant can ask for restoration of his property only by virtue of the appellate decree ; in fact, he must present a *Darkhást* for its execution. If then the right to apply for execution undoubtedly belongs to the defendant, it also belongs to the plaintiff. The only conditions required by that section, preliminary to the issue of a stop order, are—1st, the showing of a sufficient cause, and 2ndly, giving of security for the due performance of the final decree. Suppose the defendant in this case were to take no measures for the recovery of the goods for over three years, and the decree of the superior courts is not passed for a dozen years, I presume he would be precluded from recovering them ever afterwards.

Mánikshá was not called on to reply.

MELVILL, J. :—The District Judge's order, staying execution of his own decree, is, at the best, a provisional order, capable of having effect only so long as the pleasure of this court is unknown. Whether, therefore, an appeal lies against such an order or not, it is our duty to set it aside, as soon as it is brought to our notice, if it appear to us to be an improper order. We are clearly of opinion that it is an order which ought not to have been made. The defendant was

entitled, as soon as the decree against him ceased to exist, to have his property released from attachment, and to be restored to his original position. The plaintiff, having lost his decree, is in no better position, until his special appeal is decided, than a plaintiff before judgment. He would not be entitled to have the defendant's property attached before judgment, unless he were to satisfy us that the defendant is about to dispose of, or remove, his property, in order to obstruct or delay execution of any decree which we may pass against him; and even then he would not be entitled to such relief unless the defendant should fail to furnish security. But the effect of the District Judge's order, is to give to the plaintiff an attachment before judgment without any proof having been offered that the defendant has a dishonest intention, and without any option having been offered to the defendant of furnishing security, and retaining possession of his own property.

For these reasons, we consider that the District Judge's order should be set aside, and that the defendant's application for the removal of the attachment on his property should be allowed.

Order accordingly.

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