

1888

13 B. 241.

AUG. 31.

[241] ORIGINAL CIVIL.

ORIGINAL
CIVIL.*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Scott.*

13 B. 241.

DHUNJIBHOY COWASJI UMRIGAR (*Appellant*), (*Original Defendant*) v.
LISBOA (*Respondent*), (*Original Plaintiff*)* [31st August, 1888.]*Practice—Stay of execution of decree—Appeal—Decree for injunction, damages and costs
—Stay of execution as to costs.*

A party appealing against a decree, which directs him to pay money, may obtain stay of execution of decree, so far as it directs payment, on his lodging the amount in Court, unless the other party gives security for the repayment of the money in the event of the decree being reversed. If such security be given by the successful party, then stay of execution should not be granted.

THE plaintiff sued for an injunction against the defendant restraining him from building so as to interfere with the free access of light and air to certain ancient windows of the plaintiff's house. On the 1st May, 1888, he obtained a decree granting him an injunction in respect of some of the said windows and compensation by way of damages for the injury done to other windows. The decree also directed that the defendant should pay the plaintiff's costs of the suit. The defendant lodged an appeal against the decree, and now applied for an order staying execution of the decree so far as it related to the costs of the suit.

Anderson, for the appellant, in support of the application.

Kirkpatrick, for the respondent, *contra*.

JUDGMENT.

SARGENT, C.J.—Where a decree orders payment of money, and an appeal is lodged against that decree by the party directed to pay, we think that on his application the execution of the decree should be stayed so far as it directs payment on his lodging the amount in Court, unless the other party gives security for the repayment of the money in the event of the decree being reversed. If such security be given by the successful party, then stay of execution should not be granted. We make an order in this case accordingly. The costs of this application will be costs in the appeal.

[242] The following order was made:—

“It is ordered that on the respondent giving security for the sum of rupees three thousand, eight hundred and forty-four, annas fourteen and pies three to the satisfaction of the Acting Prothonotary of this Honourable Court on or before Friday, the seventh day of September one thousand eight hundred and eighty-eight, the said application be refused; and it is further ordered that, in default of the said respondent giving security within the time aforesaid, execution of the said decree so far as it relates to costs be stayed, and that the said appellant do deposit with the Prothonotary of this Court the sum of rupees three thousand eight hundred and forty-four, annas fourteen and pies three, being the amount of the taxed costs of the above suit. And it is further ordered that the costs of this application be costs in the appeal, and it is lastly ordered

* Suit No. 575 of 1887.

that execution of the said decree as regards the said costs be stayed until the said seventh day of September one thousand eight hundred and eighty-eight."

Attorneys for the appellant:—Messrs. *Little, Smith, Frere, and Nicholson.*

Attorney for the respondent:—Mr. *Mirza Hossein Khan.*

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Before Sir Charles Sargent, Kt., Chief Justice and Mr. Justice Bayley.

FATMABAI (*Original Plaintiff*), Appellant v. AISHABAI (*Original Defendant*), Respondent.* [12th October, 1888.]

Res judicata—*Suit by a woman for a share of property alleging herself to be A's widow—Prayer for declaration of her marriage to A—Denial of her marriage to A by defendant—Arbitration—Award of a certain sum in satisfaction of plaintiff's claim—Decree on award—No declaration as to her marriage—Subsequent suit by her as widow—Release—Civil Procedure Code (Act XIV of 1882), s. 13.*

The plaintiff Fatmabai in this suit alleged that both she and the defendant had been the wives of one Haji Adam Haji Ismail, a Cutchi Memon Mahomedan, who died intestate in 1878, leaving them his widows and other members of his family him surviving. The plaintiff had a daughter named Mariambai. Both plaintiff and defendant had since Haji Adam's death filed separate suits, in which they respectively claimed parts of his estate. In 1879 the defendant Aishabai had filed a suit (No. 616 of 1879) against the executors of her father-in-law's will, to recover certain money belonging to her husband. She obtained a decree, and the suit was referred to the Commissioner to make inquiries. In 1882 the present plaintiff Fatmabai and her daughter Mariambai filed a suit (No. 227 of 1882) against the present defendant Aishabai, claiming a share of the estate of her deceased husband Haji Adam. In that suit she alleged that she had [243] been lawfully married to Haji Adam, and had ever since cohabited with him, and that her child Mariambai was his legitimate daughter; and she prayed (*inter alia*) for a declaration that she was the lawful wife and that Mariambai was the lawful daughter of Haji Adam. In the written statement filed by Aishabai in that suit she alleged that Fatmabai was not the lawful wife of Haji Adam, but only his kept mistress, and she denied that Fatmabai was entitled to share in his property.

On the 3rd May, 1882, an order of reference was made, by which both the above suits, *viz.*, No. 616 of 1879 and No. 227 of 1882, "and all matters in difference thereon" were by consent of all parties thereto referred to arbitration. The arbitrators were the respective attorneys of the parties. Awards were duly made, and on the 1st October, 1883, decrees were passed in both suits in accordance with the said awards. By the decree and award in suit No. 227 of 1882, Fatmabai was to be paid by Aishabai a sum of Rs. 55,000 in full satisfaction of all the claims of Fatmabai and her daughter Mariambai upon the estate of Haji Adam, the rest of the estate being declared the sole property of Aishabai. The material part of the decree was as follows:—"This Court doth by consent pass judgment according to the said award * * * and doth order that the said Aishabai do pay for the said Fatmabai to her attorneys, Messrs. Tyabji and Dayabhai, within seven days after the date of this decree, the sum of Rs. 55,000 in full settlement of all and singular the claims and claim of the said Fatmabai and Mariambai, or either of them, against or upon the estate of the said Haji Adam Haji Ismail whatsoever and whosoever * * * and doth declare that upon the payment of the said sum of Rs. 55,000 by the said Aishabai to the said Fatmabai as aforesaid, all claims whatsoever of the said Fatmabai and Mariambai or either of them upon the estate of the said Haji Adam Haji Ismail, in the hands of any person whatsoever or upon the said Aishabai as heir of the said Haji Adam Haji

* Suit No. 500 of 1887.