

(1894) 03 CAL CK 0004
In the Calcutta High Court

Yamin-ud-dowlah and Others

APPELLANT

Vs

Amed Ali Khan and Others

RESPONDENT

Date of Decision : 14-03-1894

Acts Referred:

Citation : (1894) ILR (Cal) 561

Hon'ble Judges : Sale, J

Bench : Single Bench

Judgement

Sale, J.—This suit, the object of which was to set aside the decree in a former suit between the same parties purporting to be a consent decree, was dismissed with costs, it being held that the compromise embodied in the decree is binding upon all the parties to the suit. An application is now made by the plaintiffs in this suit for an order to prevent the disposal, pending an appeal, of funds in the hands of the receiver appointed in the former suit. The question which I have to consider is whether, under the circumstances, I have jurisdiction to make the order asked for.

2. In the case of *Wilson v. Church* L.R. 11 Ch. D. 576 where an action had been dismissed by a Divisional Court, it was held by Sir George Jessel, M.R, with the concurrence of Brett and Cotton, L.L.J., that that Court had no jurisdiction to entertain an application for an injunction to prevent funds in the hands of trustees from being parted with pending an appeal, and that such an application could only be made to the Court of Appeal.

3. In the later case of *Otto v. Linaford* L.R. 18 Ch. D. 394 where an action had been dismissed with costs, it was held by the Court, consisting of the same Judges who had decided the former case, that the Divisional Court had jurisdiction pending an appeal to stay proceedings for costs under the order of dismissal, and that that question differed entirely from the question which had been determined in the previous case of *Wilson v. Church*.

4. The practical result of these two cases is to establish the rule, that when an

action has been dismissed with costs, the Court of First Instance can, pending an appeal, stay proceedings for costs, under the order of dismissal, but that it cannot, pending an appeal, restore and maintain by a further order the state of things which existed previous to the dismissal of the action.

5. In this country the power which the English Courts have of staying proceedings for costs under an order of dismissal is given by Section 545 of the Civil Procedure Code. No doubt in the case of *Polini v. Gray* L.R. 12 Ch. D. 438 the Court of Appeal, consisting of the same Judges who decided the other cases to which I have referred, assisted by Lord Justice James, though it dismissed the suit which had been brought for establishing the claimants' right to share in a fund, yet, on a subsequent application, made an order for preserving the fund pending an appeal to the House of Lords. There are in that case circumstances which serve to distinguish it from the preceding case of, "*Wilson v. Church*, one of the circumstances being that in order to enable an application to be made for an interim injunction, the Court stayed the drawing up of the order of dismissal. But apart from this, it is, I think, sufficient to say that in the later case of *Otto v. Lindford* the case of *Wilson v. Church* is expressly referred to and is treated as a continuing authority. Reading, therefore, the case of *Polini v. Gray* with the later case of *Otto v. Lindford*, the proper conclusion is that the jurisdiction exercised by the Appeal Court in the former case must be taken to be a jurisdiction of an exceptional and limited character, and one which is confined to the Appeal Court in matters which are appealed or intended to be appealed to the House of Lords: see *Hamill v. Lilley* L.R. 19 Q.B.D. 83. No procedure exists under which an application for an interim injunction can be made to the House of Lords direct. The jurisdiction exercised by the Appeal Court in *Polini v. Gray* in respect of an application which could not be made to the higher tribunal was therefore one strictly of necessity. The other cases which have been cited in support of this application, of which *Breiver v. Yorke* L.R. 20 Ch. D. 669 may be referred to as an example, deal with the power of the Court to stay execution of its own order, and have, I think, no bearing on the present question.

6. A point has also been made of the fact that in this case no appeal has as yet been filed, and that the filing of the appeal has been purposely delayed in order to admit of the present application being made to this Court. In *Wilson v. Church* it is true an appeal would seem to have been tiled, which was followed by an application to the Appellate Court for an injunction. But this distinction appears to me to be immaterial. The decision in *Wilson v. Church* proceeded on the ground that the Court of First Instance had no power to interfere, not because an appeal had been filed, but because the suit, had been dismissed. It appears to me that under the Civil Procedure Code, once a suit has been dismissed, the Court dismissing it is *functus officio*, except that it may stay execution of its own decree or order for costs. Its jurisdiction extends no further in regard to a suit which has ceased to be a pending suit. This view is, I think, supported by the Indian cases which have been cited, viz., *Moheooddeen v. Ahmed Hassein* 14 W.R. 384 and *Gossain Money Puree v. Guru Pershad Singh* ILR Cal. 146. The

result is that the application must be refused with costs.