

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Wilkinson.

ARUNACHALLAM (DEFENDANT), APPELLANT,

v.

MURUGAPPA (PLAINTIFF), RESPONDENT.*

1889.
July 18.

Civil Procedure Code, ss. 244, 462—Execution proceedings—Decree by consent of guardian of minor defendant—Application to stay execution, &c., for want of sanction of Court under s. 462—No appeal lies from order rejecting such application.

An application to stay execution of and to set aside a decree, passed with the consent of the guardian of a minor defendant, for want of sanction of the Court under s. 462, Civil Procedure Code, was rejected:

Held, no appeal lay against the order of rejection.

PETITION of appeal against the order of S. Gopalachariar, Subordinate Judge of Madura (East), on miscellaneous petition No. 161 of 1888.

Application of the minor defendant by his guardian that the execution of the decree passed in original suit No. 42 of 1879 be stayed and the decree be set aside, on the ground that it was passed on a compromise entered into with the plaintiff by the guardian of the minor defendant without the consent of the Court given under section 462 of Civil Procedure Code.

The Subordinate Judge held that the consent of the Court had been given and dismissed the application.

The minor defendant filed a petition of appeal against the order of the Subordinate Judge.

Bhashyam Ayyangar and *Kalianaramayyar* for appellant.

Subramanya Ayyar and *Seshagiri Ayyar* for respondent objected that no appeal lay.

The further facts of the case and the arguments adduced on this second appeal appear sufficiently for the purpose of this report from the following judgments.

WILKINSON, J.—The defendant in original suit No. 42 of 1879, on whose behalf his mother and guardian had compromised the suit, now applies through his guardian (mother) to stay execution

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of the said decree on the ground that, the compromise having been entered into without the leave of the Court which is required by section 462, Civil Procedure Code, the decree is a dead letter and not enforceable.

The Subordinate Judge dismissed the application on the ground that the leave of the Court had been obtained, that a suit to set aside the compromise had failed, and that the application was too late.

The minor, through his mother and guardian, appeals, and the plaintiff's pleader raises the preliminary objection that no appeal lies. It is argued that unless it is held that the question is one which arises between the parties relating to the execution of the decree, there is no provision of the Code which provides for an appeal. This is conceded by the appellant's pleader, who contends that as the question is merely one which affects the voidability or otherwise of the decree, it is one which relates to the execution of the decree, and as such is cognizable under section 244. It was laid down in the case of *Sudindra v. Budan*(1) that "a question whether the decree was obtained by fraud or collusion is not one which relates to the execution of the decree, but which affects its very subsistence and validity, and such a question can only be raised by a separate suit."

The objection taken in this case by the defendant's guardian affects the validity of the decree; for if it is found that the compromise was entered into without the leave of the Court, it would not be binding on the minor. But that question cannot be decided in execution. As was pointed out by Garth, C.J., in the case of *Eshan Chundra Safooi v. Nundamoni Dasse*(2), there are only three ways in which a minor can avoid the consequences of his guardian's compromise:—first, by an application to the Court in which the compromise took place, secondly, by a regular suit to set aside the judgment founded on the compromise, or, thirdly, by bringing a fresh suit.

The question whether or not the decree was void as against the minor was not one relating to the execution of the decree and the order passed by the Subordinate Judge was not therefore an order passed under section 244, and no appeal lies. The appeal must therefore be dismissed with costs.

(1) I.L.R., 9 Mad., 80.

(2) I.L.R., 10 Cal., 657.

MUTTUSAMI AYYAR, J.—I am of the same opinion. From the order appealed against, section 588 provides no appeal. Every decree passed by a Civil Court is presumed to be valid so long as it is in force. Section 244 accordingly presupposes that there is a decree and that it is valid, and then declares that certain questions shall be dealt with by an order in execution and not by a regular suit. The question whether the decree under execution is valid for the purposes of execution is not within the purview of that section. It may be that the decree is liable to be set aside in a fresh suit or on an application for review of judgment. It may also be, when execution is refused on the ground that the decree is illegal on the very face of it or of the proceedings mentioned therein, an appeal will lie. The order might then be regarded as substantially setting aside a subsisting decree and consequently as being in the nature of a decree as defined by section 2 of the Code of Civil Procedure. But it is not necessary to determine that question for the purposes of this appeal, and it would suffice to state that the order before us did not refuse execution.

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I would also dismiss this appeal with costs.

APPELLATE CIVIL.

*Before Sir Arthur J. H. Collins, Kt., Chief Justice, and
Mr. Justice Parker.*

ADAKKALAM AND OTHERS (DEFENDANTS), APPELLANTS,

v.

THEETHAN (PLAINTIFF), RESPONDENT.*

1888.
October 20.
1889.
April 2.

Registration Act—Act III of 1877, s. 17 (c)—Unregistered agreement by mortgagor to sell to mortgagee—Subsequent assignment of equity of redemption to third person for value, but with notice of agreement.

In a suit for redemption filed by an assignee for value of the equity of redemption against a mortgagee in possession, it was found that the mortgagor had agreed with the defendant to sell the mortgage premises to him, that part of the purchase-money had been acknowledged as paid and that the balance had been tendered in pursuance of the agreement. It was further found that the plaintiff had taken his assignment with notice of the above agreement and tender. The agreement was in writing, but not registered :

* Second Appeal No. 88 of 1888.