

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

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April 1.

PALUCKDHARY ROY AND OTHERS (JUDGMENT-DEBTORS) v. RADHA PURSHAD SINGH (DECREE-HOLDER).*

Execution—Transfer of Proceedings—Appeal from order—Act X of 1877, ss. 244, 588, cl. (j).

There is no appeal against an order under s. 224 of Act X of 1877, granting an application for the sale of certain property, to satisfy a sum which, in the course of execution-proceedings, has been found to be due to the applicant for mesne profits. Such an order does not fall within the class of appealable orders referred to in s. 588 (j).

THIS was an appeal to the High Court from the order of the Subordinate Judge of Shahabad, dated the 31st day of August 1878, granting an application for the sale of certain property, to satisfy a sum which had, in the course of certain execution-proceedings, been found to be due to the applicant for mesne profits.

Baboo Chunder Madhub Ghose (with him Baboo Bhowani Churn Dutt and Baboo Juggadanund Mookherjee) for the respondent, took a preliminary objection that no appeal lies against an order of this kind. The order, though passed in the course of execution-proceedings instituted under Act VIII of 1859, was in reality made under Act X of 1877, it having been passed after that Act came into force. Under Act X of 1877 no appeal lies. [Baboo Mohesh Chunder Chowdhry.—An appeal lies under s. 588, cl. j. [GARTH, C. J.—This is an order to enforce execution for the amount of mesne profits against the judgment-debtor. The Bombay Courts have held that there is no appeal against such an order. See *Dalpat Bhai Bhagu Bhai v. Amarsang Khema Bhai* (1).] Referring to s. 588, and to the words in cl. (j) of that section, there is no appeal against such an order as passed by the Subordinate Judge allowing execution to

* Appeal from Original Order, No. 314 of 1878, against the order of Mahomed Nooral Hossein, Subordinate Judge of Zilla Shahabad, dated the 31st August 1878.

proceed. An order to allow execution to proceed is not an order such as is referred to in s. 588. [GARTH, C. J.—The order in this case is one which forwards the proceedings of the suit, instead of staying them; and although there is an appeal against an order “staying proceedings,” there is no appeal against an order allowing proceedings to go on; and the same thing may be said with regard to objecting to a plaint: suppose the Court allows the plaint to be filed notwithstanding the objections, there is no appeal; although there would be an appeal against an order rejecting the plaint.]

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Baboo *Mohesh Chunder Chowdry* (with him Baboo *Siris Chunder Chowdry*) for the appellant.—An appeal lies under s. 588, cl. (j) of Act X of 1877.

The judgment of the Court was delivered by

GARTH, C. J. (PRINSEP, J., concurring).—The order, which is the subject of this appeal, was made in the course of certain execution proceedings, which have been going on between these parties since the year 1866. In those proceedings it was found by the Subordinate Judge of Shahabad that a certain sum for mesne profits was due to the plaintiffs, and on the 26th of June 1878 an application was made to the same Judge by the plaintiffs, that the rights and interests of the judgment-debtors in certain property should be sold to satisfy the sum so found to be due. The objections made to this application were two-fold, —1st, that the execution proceedings had been carried on by the Subordinate Judge of Shahabad entirely without jurisdiction, and that consequently he had no power to grant the application; and 2ndly, that the application was barred by limitation under art. 179 of Act XV of 1877. The Subordinate Judge considered that, as an application had been made to the Shahabad Court in furtherance of the execution proceedings within three years from the time when this application was made, both objections depended upon the same question (see cl. 4 of art. 179), namely, whether the Shahabad Court was a competent Court to deal with the execution proceedings; and as he found this question in the affirmative, he granted the application. The defendants

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then appealed to this Court, and a preliminary objection has been made here by the respondents, that no appeal lies against an order of this kind. They contend that this order, though passed in the course of execution proceedings instituted under the Civil Procedure Code of 1859, was in fact made under the provisions of the new Code of 1877; and when we consider the nature of the application, and of the order which was made upon it (which was in effect to grant the application), it appears quite clear that the order was made under the new Code; and this is a point which is hardly contested by the appellants. Then, as under s. 588 of the new Code there are only certain orders from which an appeal lies, we must see whether the order now appealed against is one of them. The appellants contend that it is an order made under cl. (j) of that section, that is to say, an order made under s. 244 upon a question which relates to the execution of a decree, and of the same nature as appealable orders made in the course of a suit. There can be no doubt that the order is made under s. 244, and upon a question which relates to the execution of a decree, but the question remains, whether it is an order of the same nature as appealable orders made in the course of a suit. Now the only orders made in the course of a suit which are appealable under the new Code are those which are enumerated in s. 588; and having looked carefully through those orders, we do not find any one of them which is at all of the same nature as the order which is here appealed against. That being so, it seems impossible for us to say that this order, although it relates to the execution of a decree, and raises a most important question between these parties, is of the same nature as any appealable orders made in the course of a suit under the new Code. We therefore hold the objection to be a good one, and consider that no appeal lies. We have been referred during the argument to a case which was decided at Bombay by Mr. Justice Melvill and Mr. Justice Kemball—*Dalpat Bhai Bhagu Bhai v. Amarsang Khema Bhai* (1)—in which that Court appears to have disallowed upon similar grounds an appeal against an order relating to execution pro-

(1) I. L. R., 2 Bomb., 553.

ceedings; and we find, moreover, that this decision of the Bombay High Court has been followed by other Division Benches of this Court.

The appeal will be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Birch and Mr. Justice Miller.

GUNNES CHUNDER HAZRA (DEFENDANT) v. RAMPRIA DEBBA
(PLAINTIFF).*

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March 18.

Enhancement, Notice of—Grounds of Notice of Enhancement—Beng. Act VIII of 1869, s. 18, cl. 2—Declaratory Decree in Suit for Enhancement.

When the lands, the rent of which is sought to be enhanced, consist of more than one plot, it is not sufficient for the landlord to serve the tenant with a notice of enhancement, specifying all the three grounds of enhancement mentioned in s. 18 of Beng. Act VIII of 1869. Such notice should specify the particular ground or grounds on which each separate plot is alleged to be liable to enhancement.

Semle.—This would not be so if the same ground or grounds applied to every plot, the rent of which is sought to be enhanced.

If, in a suit for enhancement, the plaintiff fails to prove that he has served the defendant with a proper notice, the Court is not bound to make a declaratory decree, but whether it shall do so or not lies entirely in its discretion.

Baboo *Sreenath Doss* and Baboo *Rashbehary Ghose* for the appellants.

Baboo *Annoda Prosad Mookherjee*, Baboo *Juggadanund Mookherjee*, and Baboo *Mohini Mahan Roy* for the respondent.

THE facts of this case are sufficiently disclosed by the judgment of the Court, which was delivered by

MITTAR, J.—The defendant in this case is owner of some 800 bigas contained in 56 plots scattered over four villages

* Appeal from Appellate Decree, No. 679 of 1876, against the decree of L. R. Tottenham, Esq., Judge of Midnapore, dated the 30th January 1876, modifying the decree of Baboo Jodoo Nath Roy, the Subordinate Judge of that District, dated the 27th April 1876.

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