

1892
July 1.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

ZABADA JAN (DEFENDANT) v. MUHAMMAD TAIAB AND ANOTHER
(PLAINTIFFS).*

Civil Procedure Code, ss. 496, 588 cl. (24)—Order refusing to set aside an injunction—Appeal.

An appeal will lie under s. 588, cl. (24), of the Code of Civil Procedure from an order under s. 496 of the Code refusing to set aside an injunction. *Nabbi Buksh v. Chasni* (1) referred to.

In a suit for partition of certain immovable property between the parties to this appeal in the Court of a Subordinate Judge an injunction was obtained by the plaintiffs against the defendant to restrain the defendant from building on a portion of the land in suit which was then in her possession. The injunction was served on the defendant on the 9th of December 1891, but she neither applied to get it set aside, nor, apparently, until the intervention of an amin of the Court, did she desist from building a house which was at the time in process of construction. Subsequently, on the 6th of January 1892, the defendant applied under s. 496 of the Code of Civil Procedure to the Court issuing the injunction to have the same set aside, but the Court on the same day refused to set aside the injunction. The defendant then appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Maulvi *Ghulam Mujtaba*, for the respondents.

EDGE, C. J., and BLAIR, J.—This is an appeal from an order under s. 496 of the Code of Civil Procedure refusing to discharge an injunction. For the respondent it is objected that no appeal lies, it being contended that the only orders under s. 496 which are appealable under s. 588, cl. (24), are orders discharging, varying, or setting aside an injunction. Clause (24) in our opinion gives an appeal where the order is an order discharging, varying, or setting aside an injunction, or an order refusing to discharge, vary, or set

* First Appeal No. 23 of 1892, from an order of Babu Bepin Behari Makerji, Subordinate Judge of Mainpuri, dated the 6th January 1892.

(1) I. L. R., 6 Cal. 168.

aside an injunction. An examination of the other clauses of s. 588 shows that when it was intended to limit an appeal to an affirmative order or to a negative order that was expressly done. Clauses (20) and (25) may be cited as examples. Further, the decision in the case of *Nubbi Buksh v. Chasni* (1), although not a decision on cl. (24), decides the principle which we think applies here. We hold that the order in question was appealable under s. 588, cl. (24), of the Code of Civil Procedure. As to the merits it is said on behalf of the appellants that they had pulled down the house before the order for the injunction was made. The injunction restrains them from pulling down the house or building, and it is in our opinion eminently a case in which it was proper that such an order of injunction should be made, as the suit was one for partition. We dismiss the appeal with costs.

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ZABADA JAN
v.
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Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Blair.

NIJAZ GUL KHAN (DEFENDANT) v. DURGA PRASAD AND ANOTHER
(PLAINTIFFS).*

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July 2.

Civil Procedure Code ss. 111 and 216—Set-off—Cross-claims of the nature of set-off.

The plaintiffs agreed to purchase from the defendant certain timber. They paid part of the price in advance and took delivery of some part of the timber, but refused to take delivery of the rest, and subsequently sued the defendant to recover part of the price paid, alleging that the portion of which they had taken delivery was not of the quality contracted for. *Held* that in such a suit the defendant might claim by way of set-off compensation for the loss which he had incurred in the re-sale of that portion of the timber, the subject of the contract, of which the plaintiffs had failed to take delivery.

S. 111 of the Code of Civil Procedure is not exhaustive of the descriptions of cross-claim which may be allowed by way of set-off.

Stephen Clark v. Rakkarloo Chetti (2), *T. Kistnasamy Pillay v. The Municipal Commissioners for the Town of Madras* (3), *Kishorekand Champalal v. Ma-*

* Second Appeal No. 431 of 1889, from a decree of T. R. Redfern Esq., District Judge of Bareilly, dated the 24th December 1883, confirming a decree of Maulvi Muhammad Abdul Qayyum, Subordinate Judge of Bareilly, dated the 20th June 1888.

(1) I. L. R., 6 Calc. 168. (2) 2 Mad. H. C. Rep. 296.
(3) 4 Mad. H. C. Rep. 120.