Penal Code by the Magistrate of the Banda District, or by such other competent Magistrate of that district, other than Saiad Sadik Husain, whom the Magistrate of the District may nominate for the purpose.

1884

QUEEN-EMPRESS v. KANDHAIA.

APPELLATE CIVIL.

1884 August 7.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

GHAZIDIN (DECREE-HOLDER) *v.* FAKIR BAKHSH (JUDGMENT-DEBTOR).*

Execution of decree—Civil Procedure Code, ss. 243, 244 (c), 545—Order in stay of execution a matter "relating to execution" of decree—Order appealable—Order restoring judgment-debtor to possession after execution—Order illegal.

The provisions of s. 244 of the Civil Procedure Code govern equally the procedure of the Court which passed the decree, when executing such decree, and the Court to which the decree is sent for execution. *Cooke* v. *Hiseeba Beebee* (1) referred to.

All orders staying execution of decrees, whether passed by the Court which passed the decree, or by the Court to which it is sent for execution, are "questions arising between the parties to the suit in which the decree was passed, and relating to the execution" thereof, within the meaning of s. 244 (*c*) of the Civil Procedure Code, and, as such, appealable, irrespective of the provisions of s. 588. *Kristomohiny Dossee* v. *Bama Churn Nag Chowdry* (2) and *Luchmeeput Singh* v. *Sita Nath Doss* (3) followed.

The widest meaning should be attached to clause (*c*) of s. 244 of the Civil Procedure Code, so as to enable the Court of first instance and the Court of appeal to adjudicate upon all kinds of questions arising between the parties to a decree and relating to its execution.

There is no provision in the law which empowers the Court passing a decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of his decree. The provisions of s. 243 of the Civil Procedure Code have no reference to a case in which execution has already been carried out, and the decree-holder placed in possession of the property decreed to him.

On the 24th December, 1883, Chauharja Bakhsh Singh and others, mortgagors, obtained in the Court of the Subordinate Judge a decree against Fakir Bakhsh, mortgagee, for redemption of mortgage and possession of the mortgaged lands, conditioned on their depositing in Court Rs. 3,328 within one month from

* First Appeals Nos. 24 and 25 of 1884, from orders of Babu Ram Kali Chaudhri, Subordinate Judge of Allahabad, dated the 4th March and 18th March, 1884.

(1) N.-W. P. H. C. Rep., 1874, p. 181.
(2) I. L. R., 7 Calc. 733.
(3) I. L. R., 8 Calc. 477.

1884

GHAZIDIN v. FAKIR BAKHSH.

the date of such decree. The decree-holders fulfilled the above-mentioned condition by paying the required amount into Court on the 8th January, 1884, and on the 22nd February, 1884, they applied to execute their decree by giving them possession. On the same day, an order was passed for delivery of possession, and, on the 4th March, 1884, the Amin forwarded a *dakhal-nama* reporting that possession had been given to the decree-holders, which reached the Court on the 6th of the same month. Meanwhile, on the 29th February, the judgment-debtor, intimating his intention to appeal to the High Court from the decree of the 21th December, 1883, and expressing his readiness to furnish security, had applied to the Court for stay of execution "till the expiry of the time allowed for appeal, or the final disposal of the appeal," and on the 4th March, 1884, the following order was passed:—"That under s. 545 of Act XIV of 1882 the execution-proceedings be stayed, provided that the applicant furnishes security to the extent of one year's profits on or before the 14th March, 1884, and that as an order has already been issued for the execution of the decree, a second order be issued directing the Amin to stay the proceedings of the delivery of possession till further orders, and to submit a report to the effect that these orders have been carried out." It will be noticed that this order was made on the same day as that on which the Amin reported to the Court that possession had been given to the decree-holders. The second order reached the Amin on the 8th March, 1884, and he reported what had already been notified, namely, that he had already given possession. On the 18th March, that is, four days beyond the time named in the order of 4th March, the judgment-debtor deposited Rs. 370-6-0 as representing one year's profits; and thereupon the Subordinate Judge ordered that the judgment-debtor be restored by the Amin to possession. From this order of the 18th of March, and the former order of the 4th of March, Ghazideen, one of the decree-holders, now appealed to the High Court.

Munshi *Hanuman Prasad* and Munshi *Ram Prasad*, for the appellant.

Pandit *Ajudhia Nath* and the *Junior Government Pleader* (Babu *Dwarka Nath Banerji*), for the respondent.

1884

GHAZIDIN v. FAKIR BAKHSH.

The Court (STRAIGHT, Offg. C.J., and MAHMOOD, J.) delivered the following judgment :—

MAHMOOD, J.—We have not yet entered upon a consideration of the pleas, as a preliminary objection to our entertaining the appeal has been taken by the learned pleader for the respondent. His contention in substance is, that the orders of the 4th and 18th March having been passed in advertence to the second paragraph of s. 545 of the Code, and not being orders in execution, but in stay of execution of the decree, were not within s. 244, and not being specially appealable under s. 588 are not appealable at all. And it is further urged by him that an application to stay execution is in terms a prohibition to the applicability of s. 244, and, it is said, how can such an application involve any question "relating to the execution" of the decree within the meaning of clause (*c*) of that section, when its very object is to suspend execution ?

We have taken time to consider the contention, which at first sight seemed somewhat plausible, but, on consideration, we think its force is more apparent than real. It seems to us that the argument rests upon an erroneous construction of the expression "Court which passed the decree" in s. 545 of the Code, and a too limited view of the scope of s. 244.

The chapter on execution of decrees in the Civil Procedure Code begins with s. 223, the first paragraph of which lays down the general rule that "a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution;" and s. 228 lays down that "the Court executing a decree sent to it under this chapter shall have the same powers in executing such decree as if it had been passed by itself." It is clear from these provisions that the functions of "*the Court executing a decree*" may be discharged either by the Court which passed it or by the Court to which the decree has been transferred for execution ; and, in order to prescribe the scope of those functions, s. 244 defines the questions to be "determined by order of the Court executing a decree, and not by a separate suit." The provisions of the section are general, and they certainly do not aim at drawing a distinction between "the Court which passed the decree"

1884

GHAZIDIN v. FAKIR BAKHSH.

and "the Court executing it," for both qualifications may be possessed by the same Court.

The subject of staying execution of decree is dealt with in the Code in two separate places; but this circumstance does not involve the soundness of the proposition relied upon by the learned pleader for the respondent, that an order staying execution does not fall within the purview of the general section 244, which, as we have shown, governs equally the procedure of the Court which passed the decree, when executing such decree, and the Court to which the decree is sent for execution. In connection with this subject, ss. 239, 240, 242, and 243 must be read with ss. 545 and 546, and indeed they might perhaps have more properly appeared together and in the same part of the Code. The use of the phrase "Court which passed the decree" in s. 545 does not of itself necessarily exclude the Court executing the decree, for it may itself be such Court; but it does exclude the Court to which execution of a decree has been transferred, for that Court is not the Court which passed the decree. In other words, it does not follow as a necessary consequence from the application under the second paragraph of s. 545 for stay of execution, having to be made to the "Court which passed the decree," that such application must be something other than a matter "relating to the execution" within the meaning of s. 244 *(c)*. And this construction is supported by the fact that s. 239 of the Code provides for cases in which, though a decree has entered upon the stage of execution, after its transfer to another Court, the Court that passed it, *qua* such Court, has still power to order stay of execution, or to make any order relating to the decree or execution, which might have been made by itself if it had issued execution, or if application for execution had been made to it; and any order it may pass "in relation to the execution of such decree" shall be binding on the Court to which the decree was sent for execution (s. 242). To put the matter briefly, it may be said that the transfer of a decree to another Court for execution, amounts to a *qualified* delegation of the powers possessed by the Court that passed the decree, in discharging its functions relating to the execution of that decree. Such delegation is, however, not complete, nor does it entirely divest the Court which transfers the decree of its powers and func-

1884

GHAZIDIN v. FAKIR BAKHSH.

tions "in relation to the execution of such decree," for under ss. 239 and 242, the higher authority in some matters still rests with that Court, notwithstanding the transfer. Indeed a comparison of the various sections shows that the powers as to stay of execution conferred by ss. 545 and 546 upon the Court which passed the decree are analogous to similar powers conferred by ss. 239 and 240 upon the Court to which the decree is sent for execution, both such Courts having in common the qualification of being "the Court executing a decree," within the meaning of s. 244. The powers are similar in kind, though different in minor details. Indeed, so strong is the analogy, that the provisions of s. 243, which relate to stay of execution pending suit between the decree-holder and the judgment-debtor, would seem to be common both to the Court which passed the decree and the Court to which it is sent for execution. Such was the ruling of this Court in the case of *Cooke* v. *Hiseeba Beebee* (1).

For these reasons, the argument of the learned pleader for the respondent fails, so far as it aims at drawing a generic distinction between orders staying execution passed by the Court which passed the decree and similar orders passed by the Court to which the decree is sent for execution. Nor do we think that the second part of the learned pleader's argument is sound. It is true that the object of an order staying execution is to *suspend* execution, but this circumstance is far from showing that such an order is not a question "relating to the execution" of the decree within the meaning of s. 244 (*c*) of the Civil Procedure Code. If the argument were sound, *a fortiori* would the proposition be true that an order dismissing an application for execution as barred by limitation is a matter not "relating to the execution of the decree," for whilst, in the one case, execution of the decree is temporarily suspended, in the other it is absolutely prohibited; and, whilst the learned pleader does not go to the extent of contending that the latter proposition is tenable, his argument falls short of explaining the anomaly which the logical consequence of his reasoning involves.

We have, therefore, no hesitation in holding that all orders staying execution of decrees, whether passed by the Court which

(1) N.-W. P. H. C. Rep., 1874. p. 181.

1884

GHAZIDIN v. FAKIR BAKHSH.

passed the decree, or by the Court to which it is sent for execution, are "questions arising between the parties to the suit in which the decree was passed, and relating to the execution" thereof, within the meaning of s. 244 (*c*), and, as such, appealable, irrespective of the provisions of s. 588 of the Civil Procedure Code. Such was the view taken by the Calcutta High Court in *Kristomohiny Dossee* v. *Bama Churn Nag Chowdry* (1) in connection with an order staying execution under s. 243; and again in *Luchmeeput Singh* v. *Seeta Nath Doss* (2) which was an appeal from an order made by the Court which passed the decree, and in which the execution was pending, requiring the decree-holder to give security under the provisions of s. 546 of the Civil Procedure Code. It is hardly necessary to add that the *ratio decidendi* of these two rulings is equally applicable to a case like the present, wherein the orders under appeal purport to have been made under s. 545 of the Code.

We are of opinion that the widest meaning should be attached to clause (*c*) of s. 244, so as to enable the Court of first instance and the Court of appeal to adjudicate upon all kinds of questions arising between the parties to a decree, and relating to its execution. And as a result of this view, we shall hear these cases on the merits of the pleas urged in appeal.

[The Court, after hearing the cases, was of opinion that the pleas urged in appeal must prevail, and continued as follows:]—

It appears that before the order of the 4th March, 1884, was passed, the order of the Subordinate Judge, dated the 22nd of February, 1884, had already been carried out by the Amin, and possession of the decreed property had already been delivered to the decree-holder-appellant. The decree had, therefore, been already executed, and the order of the Subordinate Judge, dated the 18th March, 1884, directing that the judgment-debtor be restored to possession, was therefore illegal. There is no provision in the law which empowers the Court passing the decree to set aside the proceedings under which the decree-holder has already been placed in possession in execution of the decree. The provisions of s. 243 of the Civil Procedure Code are limited to staying

(1) I. L. R. 7 Calc. 733. (2) I. L. R. 8 Calc. 477.

1884

GHAZIDIN v. FAKIR BAKHSH.

execution of decrees, and they have no reference to a case like the present, in which execution had already been carried out, and the decree-holder placed in possession of the property decreed to him. The same principle would apply to the case of a money-decree which had already been satisfied in execution. Indeed, an order such as the order of the 18th March in this case cannot be described as an order *staying* execution of a decree, for the execution had already taken place.

Upon the application of the decree-holder-appellant this Court, by its order of the 20th March, 1884, stayed the Subordinate Judge's order of the 18th March, and the decree-holder is therefore still in possession, and the decree under which he obtained possession is the subject of an appeal which is now pending in this Court.

Under the circumstances of this case, we decree both the appeals, and set aside the lower Court's orders, dated the 4th and 18th March, 1884, costs in both the Courts to be paid by the judgment-debtor-respondent.

Appeals allowed.

FULL BENCH.

1884
July 14.

Before Mr. Justice Straight, Offg. Chief Justice, Mr. Justice Oldfield, Mr. Justice Brodhurst, Mr. Justice Mahmood, and Mr. Justice Duthoit.

DAMODAR DAS (PLAINTIFF) *v.* GOKAL CHAND AND OTHERS (DEFENDANTS).*

Practice—Civil Procedure Code, s. 53—Rejection etc. of plaint at a date subsequent to first hearing.

Held (OLDFIELD, J., dissenting) that, under s. 53 of the Civil Procedure Code, a plaint can be rejected, returned for amendment, or amended by the Court of first instance only at or before the first hearing of the suit, and not after the first hearing thereof.

Modhe v. *Dongre* (1) dissented from.

Soorjmukhi Koer's Case (2), *Burjore* v. *Bhagana* (3), and *Fazul-un-nissa Begam* v. *Mulo* (4) distinguished by MAHMOOD, J.

Per MAHMOOD, J.—The plaint may, for causes other than those mentioned in s. 53, be amended by the Court after the first hearing.

* Second Appeal No. 1274 of 1883, from a decree of J. C. Leopolt, Esq., District Judge of Agra, dated the 26th July, 1883, affirming a decree of Babu Mrittonjoy Mukarji, Subordinate Judge of Agra, dated the 6th June, 1882.

(1) I. L. R., 5 Bom. 609.
(2) I. L. R., 2 Calc. 272.
(3) I. L. R., 10 Calc. 557; L. R., 11 Ind. Ap. 7.
(4) I. L. R., 6 All. 250.