

1926

HET
RAM
v.
RAJA
DUFF
PRABAD
SINGH.

Order XXXIV does not deal with the execution of a decree, and the Code of Civil Procedure, in which order XXXIV finds a place, has provided distinct rules for execution of decrees. We think that the appeal has no force and we dismiss it with costs.

Appeal dismissed.

*Before Sir Grimwood Mears, Knight, Chief Justice, and
Mr. Justice Mukerji.*

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May, 26.

ISHWARI PRASAD (DEFENDANT) v. SHEOTAHAL RAI
(PLAINTIFF).*

*Letters Patent, section 10—Appeal—Order of remand—
Suit for declaration of title or possession by a co-sharer.*

An appeal will lie under section 10 of the Letters Patent from a judgement of a single Judge of the High Court reversing the decree of the lower appellate court and remanding the suit for trial on the merits. *Sevak Jeranchod Bhogilal v. The Dakore Temple Committee* (1), distinguished.

Plaintiff sued as a co-sharer in possession, whose possession had been disturbed, asking for a declaration of his title or in the alternative for recovery of possession. The defendant was in possession, but never denied the plaintiff's title as a co-sharer.

Held, that the plaintiff's suit should be dismissed.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case sufficiently appear from the judgement of the Court.

Babu *Shiva Prasad Sinha*, for the appellant.

Munshi *Janaki Prasad*, for the respondent.

MEARS, C. J., and MUKERJI, J. :—A preliminary objection has been taken that no Letters Patent appeal lies. It would be necessary to state the facts of the case in order to find whether an appeal lies or not.

* Appeal No. 60 of 1925, under section 10 of the Letters Patent.
(1) (1925) 23 A.L.J., 555.

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The parties are co-sharers in a village which is subject to the alluvial action of a river. A certain piece of land was thrown up and the finding is that the defendant took possession of the same and was in possession till the date of suit. The plaintiff claimed that he was in possession and that his possession had been disturbed. He said that the land was his khudkasht. On these allegations he brought the suit, out of which this appeal has arisen, for a declaration of his title and, in the alternative, for recovery of possession. The lower appellate court found that the possession was with the defendant. There being no question of title at issue (the plaintiff's title was never denied), the suit was dismissed.

When the appeal came before this Court a learned Judge of this Court held that although the plaintiff's suit was for possession and possession alone, it should not have been dismissed, but if the plaintiff's title was proved and if the land was found to be joint property, a decree for joint possession might be awarded. Being of this opinion, the learned Judge set aside the decree of the appellate court and remanded the appeal for retrial.

It is admitted on behalf of the respondent that, up till now, the practice has been in this Court to entertain an appeal from a judgement like the one complained of. The case of *Sevak Jeranchod Bhogilal v. The Dakore Temple Committee* (1) has been quoted on behalf of the respondent as laying down a rule that no Letters Patent appeal would lie where the judgement does not amount to a decree. The case went from Bombay and evidently what their Lordships of the Privy Council had in their mind was the Letters Patent of that High Court. The Letters Patent of

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this High Court (section 10) speaks of orders and exclusion of certain orders as being not appealable. In the circumstances, we think that an appeal does lie. At any rate, nothing has been shown to us which ought to induce us to differ from the existing practice.

On the merits, it would appear that the plaintiff respondent had no cause for any complaint. The land was, admittedly, the property of the parties. The plaintiff's allegation that he had taken possession of the land has been found to be inaccurate. It has been found that the defendant has been in peaceful possession of the land and as a co-sharer. He has not denied the plaintiff's title. Under the circumstances, to grant the decree for joint possession to the plaintiff would mean a criminal case and nothing else. The plaintiff, on foot of the decree for joint possession, would try to take physical possession with the result of heads being broken. He has not shown that he was in possession and has been ousted from possession. All that he claims before us, through his counsel, is a title to share in the profits by a regularly framed suit in the revenue court. That title of his still exists and has not been denied. Under the circumstances we think the suit of the plaintiff was rightly dismissed by the court below.

We set aside the decree of this Court and restore the decree of the lower appellate court. The respondent must pay the costs of the appeals in this Court.

Appeal allowed.