as appears from the context, an appeal from the decree or order sought to be executed—*Sheo Prasád* v. *Anrudh Singh*[1]. The appeal made by the defendant in the present case was an appeal not from the decree but from the order of the Court refusing to set it aside.

Again it was argued that the decree was kept open by the defendant's application and appeal, and did not become final until the order of the appellate Court was passed thereon; but we cannot accept that view, as both the application and the appeal were dismissed. We do not concur in the ruling in *Lutful Huq* v. *Sumbhudin*[2]. The infructuous efforts of the defendant to set aside the plaintiff's decree cannot have the effect of extending the period within which the plaintiff was allowed by law to execute it. We, therefore, confirm the decree in execution of the lower appellate Court.

Decree confirmed.

(1) I. L. R., 2 All., 273. (2) I. L. R., 8 Calc., 248.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

NA'RO VINA'YAK PATVARDHAN (ORIGINAL PLAINTIFF), APPELLANT, *v.* NARHARI BIN RAGHUNA'TH AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Evidence—Evidence Act (I of 1872, Sec. 11.)—Fact making probable a fact in issue—Admission by one defendant relevant against other defendants.

In a suit brought by the plaintiff against several defendants to prevent encroachments by the defendants in a lane which was the common property of himself and the defendants.

Held, that the admission of one of the defendants in a previous suit to which the other defendants were not parties as to the common character of the portion of the lane between his house and the plaintiff's, and also a similar statement in a deed put in by another of the defendants to prove his title to his own house, were admissible in evidence to establish the common character of the entire lane as alleged by the plaintiff. The fact of common ownership of other parts of the lane should be treated as relevant to the issue as to the common character of the entire lane on the principle laid down in section 11 of the Indian Evidence Act.

* Second Appeal, No. 274 of 1890.

1891.

NÁRO VINÁYAK PATVARDHAN v. NARHARI BIN RAGHUNÁTH.

THIS was a second appeal from the decision of W. H. Crowe, District Judge of Poona.

The plaintiff sued the defendants (five in number), alleging that to the south of his house there was a narrow lane which was the common property of all of them; that defendant No. 1 in enlarging his house encroached on this lane by building a staircase; that defendants 2 and 3 had enclosed certain walls; that defendants Nos. 4 and 5 had encroached by building an *ota* (raised verandah of earth) to their houses and thus prevented the plaintiff from passing through his door to the south; and that the defendants prevented him from enclosing a certain door to his house.

He prayed for an injunction ordering the defendants to remove the walls and the *ota* and to open the lane for common use; that defendant No. 1 might be ordered to remove the staircase, and that the defendant should be enjoined not to interfere with him in erecting his door.

The Subordinate Judge passed a decree for the plaintiff.

The defendants appealed to the District Court at Poona and the District Judge reversed the decree of the Subordinate Judge as far as defendants Nos. 2, 3, 4 and 5 were concerned, and confirmed the decree as against defendant No. 1.

Amongst other issues the District Judge framed issue No. 3 as follows:—

"(3). Whether the plaintiff was entitled to the injunction awarded" (by the Subordinate Judge).

The finding on the above issue was, that the plaintiff was entitled to the injunction as regards defendant 1 only and not as regards defendants 2, 3, 4 and 5.

The District Judge in his judgment made the following observations:—

"The suit is maintainable against all the defendants together, but the evidence which binds one defendant has been wrongly admitted as against the others. The first defendant admitted in a former deposition in another suit (No. 740 of 1884) recorded here as Exhibit 26, that there was a lane to the north of

his house and that it was common property. That statement will properly be held to bind him in this suit. But the Subordinate Judge goes on to remark that 'another effect that may be given to them (his statements) is that they may be regarded as proving plaintiff's allegation that there was a common *bol* (lane).' The Subordinate Judge has misconceived the law of evidence altogether. The statement of defendant No. 1 in a suit to which he was himself a party cannot be used against other defendants in another suit who were not parties to the former suit. Then as regards the deeds recorded as Exhibits Nos. 34 and 35. No. 34 seems to have been passed to the father of defendants 4 and 5, but there is nothing to show who were the parties to Exhibit No. 35, or how they were connected with the present defendants. Taking the text of Exhibit 34, all that is stated thererein is that there was a lane to the north between the property sold and Angal's house. There is no statement that the lane was a *common one*, and everything turns on this. The evidence of witness No. 24, a boy of 22 years of age, is obviously entitled to very little weight."* * The Subordinate Judge "seems to have treated the admissions of defendant No. 1 as binding on each and all the defendants."

Against the decree of the District Court the plaintiff appealed to the High Court.

Dáji Abáji Khare for the appellant.

There was no appearance for the respondents.

SARGENT, C. J.:—The admission of defendant No. 1, in Exhibt 26, as to the common character of the portion of the lane between his house and the plantiff's and also the statement to the same effect in Exhibit 35, which was one of the deeds put in by defendant No. 4 to prove his title to his own house, were both admissible in evidence to establish the common character of the entire lane as alleged by the plaintiff. In *Jones* v. *Williams* [1] Parke B. said that "evidence of acts in another part of one continuous hedge adjoining the plaintiff's land was admissible in evidence on the ground that they are such acts as might reasonably lead to the inference that the entire hedge belonged to the

[1] 2 M. W., at p. 331.

1891.

NÁRO VINAYAK PATVARDHAN v. NARHARI BIN RAGHUNA'TH.

plaintiff." In other words, they are facts which, by section 11 of the Evidence Act, are relevant, because they make the existence of a fact in issue highly probable. The same principle requires that the fact of common ownership in other parts of the lane should be treated as relevant to the issue as to the common character of the entire lane. We also think that the District Judge was wrong in entirely discarding the evidence of Exhibit 24 as to the user of the lane. Upon the whole, as we think that the District Judge has altogether omitted to consider important evidence in the case in its bearing on the general character of the lane, we ought not to accept his finding on issue 3, and must, therefore, reverse the decree as regards defendants 2, 3, 4 and 5 and send the case back for a fresh decision with due regard to the above remarks. Costs to abide the result.

Decree reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1891. *April* 30.

SHIDU (ORIGINAL DEFENDANT), APPELLANT *v.* GANESH NA'RA'YAN (ORIGINAL PLAINTIFF), RESPONDENT.*

The Dekkhan Agriculturists' Relief Act (XVII of 1879), Sec. 3 (3), clause (x)—Suit to recover rent—Question of title incidentally decided—Analogy with the decisions under the Small Cause Courts' Acts—Appeal to the District Court—Revision by the Special Judge.

In a suit to recover a sum of Rs. 30 as rent under section 3 (3), clause (*x*) of the Dekkhan Agriculturists' Relief Act (XVII of 1879), a Second Class Subordinate Judge incidentally determined the question of the plaintiff's title to the land for which the rent was claimed. The point then arose as to whether the decision of the suit by the Subordinate Judge could be appealed against, or whether it was open to revision by the Special Judge under section 50 of the Act.

Held that although a question of title was incidentally raised and decided in the case, still by analogy with the decisions under the several Small Cause Courts Acts, the suit as brought was one properly falling under clause (*x*) of section 3 (3) of the Dekkhan Agriculturists' Relief Act (XVII of 1879), and that no appeal lay to the District Court from the decree of the Subordinate Judge who decided the suit.

THIS was a reference made by Ráo Bahádur Jayasatya Bodhráv Tirmalráv, First Class Subordinate Judge with Appellate

* Civil Reference, No. 6 of 1891.