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APPELLATE CIVIL.

31 C. 174=8 C. W. N. 87.

view that the manufacture of indigo is an agricultural purpose. That being so, it is in our opinion not shut out from interference in second appeal.

It remains now to consider the third question. The argument in favour of the respondents upon the point is this: that if the erection of an indigo factory renders the land unfit for the purposes of the tenancy, the plaintiff is under section 25, clause (*a*) of the Bengal Tenancy Act, entitled to eject the tenant, and that is a more complete remedy than a remedy by way of injunction. And if that is so, the Court should not entertain a suit for the less complete remedy. We are of opinion that this contention has several answers to it. One of them is this: the landlord may not want to eject the tenant, but may be content to have the land prevented from being changed prejudicially to his interest or **[178]** being rendered unfit for the purposes of the tenancy, and there is no reason why he should not be allowed to claim this lesser remedy. Then in the next place the plaintiff here is a co-sharer landlord, and unless his other co-sharers joined, he could not, regard being had to the provisions of section 188 of the Bengal Tenancy Act, maintain a suit for ejectment of the tenant. There is nothing in section 54 of the Specific Relief Act to show that an injunction is not claimable in a case like the present. On the contrary, illustration (*k*) of that section, if not quite in point, shows that the Legislature did not intend to exclude cases like the present from the scope of section 54.

For all these reasons, we are of opinion that the decree of the lower Appellate Court must be set aside and that of the first Court restored with costs in this Court and in the Court of Appeal below.

Appeal allowed.

31 C. 179.

[179] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Geidt.

HASSAN ALI *v.* GAUZI ALI MIR.*

[29th June 1903.]

Execution of decree—Agreement previous to decree—Civil Procedure Code (Act XIV of 1882) s. 244.

A obtained a decree for *khas* possession of certain land by ousting *B*. In execution thereof, *B* pleaded that there was an agreement between him and the decree-holder, previous to the decree, that he should not be ousted from the land and that permanent rights over the same would be granted to him by the decree-holder:—

Held, that such a question could not be gone into under s. 244 of the Civil Procedure Code. Cases can only be inquired into under s. 244 when the existence of a decree which is susceptible and capable of execution is conceded, and it does not apply to a case where the object is to impugn the decree itself or to set up a case inconsistent with the decree which it is sought to execute.

Laldas Marandas v. *Kishordas Devidas* (1) dissented from.

Benode Lal Pakrashi v. *Brajendra Kumar Saha* (2) and *Chhoti Narain Singh* v. *Rameshwar Koer* (3) followed.

[Foll. 4. C. L. J. 475; Ref. 5.C. L. J. 328; 30. Mad. 402=2. M. L. T. 360; 17. M. L. J. 288; 14. C. L. J. 83; 29. I. C. 838; Not. Foll. 33. I. C. 66=39. Mad. 541.]

* Appeal from order No. 82 of 1902, against the order of Aukhoy Kumar Sen, Subordinate Judge of Dacca, dated Jan. 11, 1902, reversing the order of Annada Charan Sen, Munsif of Munshigunge, dated July 20, 1901.

(1) (1896) I. L. R. 22 Bom. 463.
(2) (1902) I. L. R. 29 Cal. 810.
(3) (1902) 6. C. W. N. 796.

1903
JUNE 29.

APPELLATE CIVIL.

31 C. 179.

SECOND APPEAL by Syed Hassan Ali, the decree-holder.

This appeal arose out of an application for execution of a compromise decree. One Hassan Ali obtained a decree for ejectment against Gauzi Ali Mir and others. The decree was to the effect that the plaintiff was to recover possession of the land in dispute by ejecting the defendants and removing their huts from the same. The judgment-debtors were allowed four months' time for vacating the land. After the expiration of the four months the decree-holder applied for the execution of the decree. The judgment-debtors objected to the execution on the grounds **[180]** that the application was illegal, as execution was not applied for under s. 260, Civil Procedure Code, and that under s. 244 the application was not tenable, inasmuch as before the passing of the decree there was an agreement between the parties that the judgment-debtors should not be, in point of fact, ousted from the lands in question and that permanent rights over the same should be granted to them on their paying *nazar* to the decree-holder.

The Court of first instance disallowed the objections raised by the judgment-debtors, and allowed the execution to proceed.

On appeal the Subordinate Judge of Dacca having held that under s. 244, Civil Procedure Code, the Court could inquire into the existence and validity of the agreement in question, set aside the order of the first Court and remanded the case, under s. 562 of the Code of Civil Procedure, to be tried on the merits.

Dr. *Rash Behary Ghose* (Babu *Amarendra Nath Chatterjee* and Babu *Akshoy Kumar Banerjee* with him), for the respondent, took a preliminary objection that this appeal was premature. The application for execution was not finally decided, and there was no order determining a matter in execution within the meaning of s. 244, Civil Procedure Code, and the order was not one under s. 562 of the Code, and that the first Court did not dispose of the application upon a preliminary point: *Behary Lal Pundit* v. *Kedar Nath Mullick* (1) and *Jogodishury Debea* v. *Kailash Chundra Lahiry* (2).

Dr. *Ashutosh Mookerjee*, for the appellant, contended that an appeal lay under s. 588, cl. (28) of the Civil Procedure Code, as also under s. 244 of the Code. The cases referred to by the other side are distinguishable. As to the merits, it was contended that, the Lower Appellate Court was wrong in holding that it could inquire into the validity of the agreement entered into between the parties before the decree. I submit a Court cannot, under s. 244 of the Civil Procedure Code, go behind the decree and decide the question of the validity of an agreement before the decree: see *Chhoti Narain Singh* v. *Rameshwar Koer* (3) and *Benode Lal Pakrashi* v. *Brajendra Kumar Saha* (4).

[181] Dr. *Rash Behary Ghose* for the respondent. The Court could go into the question of validity of the agreement entered into between the parties, before the decree. It ought to be determined in execution under the provisions of s. 244 of the Civil Procedure Code and not in a separate suit: *Laldas Narandas* v. *Kishordas Devidas* (5).

MACLEAN, C. J. A preliminary objection was taken to this appeal that the appeal was premature, and that it did not lie at the present juncture. The inclination of my opinion is, having regard to sections 562 and 588 of the Code of Civil Procedure and the nature of the order

(1) (1891) I. L. R. 18 Cal. 469.
(2) (1897) I. L. R. 24 Cal. 725, 739.
(3) (1902) 6 C. W. N. 796.
(4) (1902) I. L. R. 29 Cal. 810.
(5) (1896) I. L. R. 22 Bom. 463.

made in this case, that an appeal would lie, but I express no final opinion upon that point, as it has not been pressed and the parties desire that we should deliver our opinion upon the real point in issue.

The real point in issue is this: A compromise decree was passed in a suit brought by the present appellant, directing him to obtain *khas* possession of certain land by ousting the present respondent, and, in execution, he asked that he should be put into *khas* possession. The appellant in the Court below—I am taking the facts as found by the Court below, this being a second appeal—pleaded in execution "that there was an agreement between him and the respondent previous to the compromise decree, that he should not be in point of fact ousted from the lands in question, and that permanent rights over the same should be granted by the respondent to him. He accordingly prayed that an issue might be raised regarding his objection, namely, whether there was or was not such an agreement." The question we have to decide is whether that matter can be gone into under section 244 of the Code. The Court from which the appeal is brought held that it could. I do not think that it can. In my opinion cases can only be inquired into under section 244 when the existence of a decree which is susceptible and capable of execution is conceded, and it does not apply to a case when the object is to impugn the decree itself, or to set up a case inconsistent with the decree which it is sought to execute. In other words, section 244 presupposes the existence of a decree which is [182] validly susceptible of execution. The respondents say the decree is only a paper decree, and there was an anterior bargain that it was not to be executed, and that therefore the decree is not susceptible of execution. The Court cannot go into the question of any such bargain under section 244. If there were any such bargain which would give the present respondent an equity to stop the execution of the present decree, that right must be asserted in an independent suit in which probably his right would be, if he can make out his case, to have a perpetual injunction to restrain the present appellant from executing his decree. No doubt the authorities show that a liberal construction is to be placed upon section 244, but it cannot apply to a case such as the present where, in effect, the respondent says that the decree is no decree at all and is only a paper decree. We cannot go behind the decree in any application under section 244. Section 244, clause (*c*) applies to questions relating to the execution, &c., of a decree which is unchallenged. We have been referred to a Full Bench case of the Bombay High Court of *Laldas Narandas* v. *Kishordas Devidas* (1). If that Court intended to hold that under circumstances such as the present, the Court can, under section 244, go into the question of a bargain anterior to the decree and not inserted in the decree, I respectfully dissent from that view. The principle laid down in two recent cases of this Court, namely, that of *Benode Lal Pakrashi* v. *Brajendra Kumar Saha* (2) and *Chhoti Narain Singh* v. *Rameshwar Koer* (3), would appear to apply to the case now before us.

On these grounds, I think, the appeal must succeed and the order of the Court below must be discharged with costs.

GEIDT, J. I concur.

Appeal allowed.

(1) (1896) I. L. R. 29 Bom. 463.
(2) (1902) I. L. R. 22 Cal. 810.
(3) (1902) 6 C. W. N. 796.