

[APPELLATE CIVIL JURISDICTION.]

1874.
February 20.*Miscellaneous Special Appeal No. 20 of 1873.*

CHHAGANLÁL NARBHÉRA'M.....*Appellant.*
 JAMNÁDA'S MANCHHÁ'RA'M*Respondent.*

The Code of Civil Procedure, Sec. 216—Execution of a decree—Notice.

The Court, to which a decree is sent for execution by another Court, has the power to take the same steps, including the issue of a notice under Sec. 216 of the Code of Civil Procedure, which it could take in execution of its own decree.

THIS was a miscellaneous special appeal from the decision of W. H. Newnham, Judge of the District of Ahmedabad. The facts of the case appear from the following extract of his judgment:—

“ Chhaganlál got a decree against Jamnádás on the original side, High Court, and presented an application for its execution, on March 17th, 1873, in the Court of the Subordinate Judge of Ahmedabad.

“ Notice to show cause why the decree should not be executed was issued under Sec. 216, and a warrant of attachment and sale issued, but as the applicant did not pay the expense of publishing the sale, the matter was dropped and the attachment raised.

“ On explanation by the applicant the Subordinate Judge found he was not to blame and in order to avoid needless loss to him held the former attachment to remain good and issued fresh proclamation for sale.

“ The appellant urges that the action of the court was illegal, in issuing notice under Sec. 216, which was for the High Court to do, and in acting again on a *dáarkhást* which had been once shelved; whereas the applicant should have put in a fresh one; and the evidence he adduced was not trustworthy. The first point to be decided is whether there has been any illegality committed which vitiates the proceedings.

“ The first illegality alleged is the issue of notice under Sec. 216 by the Subordinate Judge himself and appellant's Vakil refers to *Ládluvarbái v. Ghoel Shri*

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Sarsangji (a) in which Westropp, C.J., said ' that such notice could only be issued by the Court which made the decree.'

" On the other hand the respondent contends that this is only an *obiter dictum* and not a ruling, and refers to the Full Bench Calcutta Ruling in *Bagram v. Wise* (b) which is to the effect that the executing Court is competent to issue the notice as though the decree were one of its own.

" I should certainly be disposed to follow the latter ruling, the issue of notice being a necessary step towards the execution of the decree which is committed to the Court to which it is sent : but I think I am bound to defer to the view of the learned Chief Justice of this Presidency, which, although not part of a decision on that point, is most positively expressed. The notice then having been issued without jurisdiction, all subsequent proceedings towards executing the decree are void, and on this ground the Subordinate Judge's order must be reversed with costs on respondent."

On the merits of the case, however, the District Judge was of the same opinion as the Subordinate Judge, ^{and} but for the above dictum of the Chief Justice would have allowed the execution to proceed.

The appeal was heard by MELVILL and WEST, J.J.

Dhirajlal Mathuradas, Government Pleader, for the appellant : —The decree of the High Court, which is sought to be executed, was passed on the 10th September 1868. The certificate required by Act VIII. of 1859, Sec. 286, was given on the 27th October following. Application for execution of the decree was made to the Subordinate Judge's Court at Ahmedabad, to whom the decree had been transferred for execution first on the 20th August 1869, that is within a year of the date of the decree. Various applications were subsequently made, the last being the present one

(a) 7 Bom. H. C. Rep. O. C. J. 162.

(b) 1 Beng. L. R. (F. B.) 91.

dated the 17th March 1873. The Subordinate Judge issued a notice required by Sec. 216, and proceeded to execute the decree as if it were a decree of his own Court. This procedure is quite correct and is not at variance with the dictum of the Chief Justice in *Ládkuvarbái v. Ghoel Shri Sarsangji* (*supra*), where the decree had been transmitted for execution after a year. He also quoted *Govind Hari v. Shidráam* (c).

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Nagindás Tulsidás appeared for the respondent.

PER CURIAM :—The observation of the Chief Justice in *Ládkuvarbái v. Ghoel Shri Sarsangji* has reference to a case in which more than a year had elapsed between the date of the decree and its transmission to another Court for execution. In the present case, there had been no such interval; and we can see no reason for holding that the Court, to which the decree was sent for execution, had not the power to take the same steps, including the issue of a notice under Sec. 216, which it could take in execution of its own decree. We reverse the order of the District Judge and order that execution do proceed. Costs on respondent Jámnadás.

Order accordingly.

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Appeal No. 1 of 1874 under Act XX. of 1864.

March 27.

In re MOTIRA'M RUPACHAND.

Minor—Procedure—Act XX. of 1864, Secs. 2 and 8—Defendant—Certificate of Administration.

Section 2 of Act XX. of 1864, does not prohibit a person having a claim against a minor from bringing a suit until a certificate of administration has been granted. He may properly bring his suit, but immediately after his doing so he should apply to the District Judge for the appointment of an administrator, and it is competent to the District Judge under Sec. 8 of the Act to make that appointment.

THIS was an appeal from the decision of G. A. Hobart, Judge of the District of Khandesh.

(c) 7 Bom. H. C. Rep. A. C. J. 37.