

solemn farce of paying the purchase-money into Court to receive it back again through his pleader. We think it fair to assume that such proceedings could only have been pursued for purposes of deception. It may be that the plaintiff's object was partly to deprive the mortgagors of the privilege, always accorded, of an allowance of time within which to redeem, and on this point we think it worthy of remark that it would be well if the Courts in the mofussil would follow the practice adopted by the High Court, on its original side, in the case of applications to enforce personal decrees, by sale of the collateral security, which is to order the sale, but to direct that it shall not take place till after the expiration of six months.

We confirm the decree of the District Court, with costs on appellant.

Decree confirmed.

4 B. 65.

[65] APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice and
Mr. Justice Melwill.*

KASTURCHAND (*Original Plaintiff*), *Appellant v.* RAVJI SADASHIV,
NAZIR, DISTRICT COURT, SATARA, AND ANOTHER (*Original
Defendants*).* [10th July, 1879.]

Nazir's liability for escape of judgment-debtor—Batta, payment of—Civil Procedure Code, Act (VIII of 1859), s. 282.

The plaintiff sued out a warrant for the arrest of his judgment-debtor on the 4th December 1876. The warrant was lodged with the nazir on the 16th December, and was to be in force till the 4th January 1877. On the 22nd December 1876, the nazir was informed that the judgment-debtor was already in the civil jail under a writ of execution issued by another creditor. The nazir then returned the warrant to the Subordinate Judge who had issued it. On the 29th December, the Subordinate Judge again sent it to the nazir's office, where it was duly received by the nazir's karkun (defendant No. 2.). This fact was not reported by the karkun to the nazir (defendant No. 1) until the 4th January 1877. On the 1st January 1877 the judgment-debtor's debt was paid by Government, and he was released in honour of Her Majesty's assumption of the title of Empress of India. The judgment-debtor thereupon left the district, and could not be found, and the plaintiff's warrant remained unexecuted. The plaintiff sued the nazir and his karkun for allowing his judgment-debtor to escape.

Held, that the nazir ought not to have sent the warrant back to the Subordinate Judge, and that there was no necessity for a fresh order on it until the time which it had to run had expired.

Held, further, that if the nazir forgot the existence of this unexecuted warrant on the 1st January 1877, and thus allowed the debtor to be released from the former process, when he ought to have been re-arrested under the plaintiff's warrant, there was actual negligence on his part, making him liable in damages to the plaintiff.

Held, also, that according to Act VIII of 1859, as it stood at the end of 1876 and until October 1877, the *batta* for the maintenance of a debtor could not become payable until he was arrested and brought before the Court and the latter made the order for his committal to the civil jail.

Quære, whether or not the nazir could have been made responsible for the negligence of the karkun, who was not his servant, but the servant of, and paid by, Government and appointed by the District Judge, if the warrant had been lodged with the karkun in the first instance and that fact had never been communicated to the nazir and if he had never known of the existence of the warrant.

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4 B. 57.

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THIS was an appeal from the decision of R. F. Mactier, Judge of the District Court of Satara, in original suit No. 2 of 1878.

[66] The following are the facts of the case:—The plaintiff Kasturchand, held a decree against one Sheti bin Choundu, and applied to the Subordinate Judge of Satara for the arrest of his judgment-debtor in execution of the said decree. The Subordinate Judge thereon issued a warrant on the 4th December 1876. It was received by the nazir (defendant No. 1) on the 16th December and was to be in force till the 4th January 1877. The plaintiff paid the necessary *batta* (process fee) to the nazir for the execution of the warrant. On the 22nd December the nazir returned it to the Subordinate Judge, and reported that the judgment-debtor was already in the civil jail in execution of another judgment-creditor's decree. On the 29th December it was again sent by the Subordinate Judge to the nazir's office for execution, but this fact was not reported by the karkun (defendant No. 2) to the nazir (defendant No. 1) until the 4th January 1877. The judgment-debtor was released from the jail on the 1st January 1877 on payment of his debt by Government, in honour of Her Majesty's assumption of the title of Empress of India. Plaintiff's warrant consequently remained unexecuted. On his release from the jail, Sheti left Satara, and as he could not be found, the Subordinate Judge on the 6th August 1877 struck off from his file the execution proceedings taken on plaintiff's application. The plaintiff thereupon sued the nazir and the karkun in the District Court of Satara for damages sustained by him in consequence of their negligence in allowing the judgment-debtor to escape. The nazir (defendant No. 1) denied that there was any negligence on his part, and answered that Sheti had been released by Government; that plaintiff did not lodge the usual subsistence money and did not pay a second *batta* (process fee) for the re-arrest of his judgment-debtor; that the Court was closed on the 1st January 1877, as it was a holiday, and that the suit was vexatious.

The karkun (defendant No. 2) pleaded that he was not answerable for the nazir's neglect.

Of the five issues laid down by the District Judge the following three are material to the case: (1) whether the nazir committed negligence in allowing Sheti to leave his custody on the 1st January [67] 1877, while he (the nazir) held a warrant for his (Sheti's) detention; (2) whether the plaintiff paid a second process fee to the nazir for the arrest of Sheti, and, if he did not, whether that omission justified the nazir in releasing Sheti on the 1st January 1877, in spite of the warrant for his detention; and (3) whether the karkun (defendant No. 2) was liable for any neglect of duty as a subordinate to the nazir.

The District Judge found these issues against the plaintiff, and dismissed his claim with costs on the 11th November 1878. The plaintiff appealed.

G. R. Kirloskar, for the appellant, submitted the facts mentioned in the statement, and contended that the nazir was liable to make good to the appellant the amount of money lost by him in consequence of his judgment-debtor's escape through the nazir's negligence.

Ghanasham Nilkanth, for respondent No. 1 (the nazir).—When, on the 22nd December 1876, the nazir returned the warrant to the Subordinate Judge and duly reported that the judgment-debtor was already in the jail in execution of another decree, he did all that he was bound to do. There was no report made to the nazir of the warrant being again lodged in his office until the 4th January 1877. If there was any negligence in this,

it was the negligence of the karkun. But he is not the nazir's servant. The karkun's negligence, therefore, is not the nazir's negligence. There is no suggestion that the nazir acted dishonestly, or in collusion with anyone. As a matter of fact the karkun did not inform the nazir in time, of the receipt of the warrant on the 29th December. This was the karkun's mistake. But the nazir is not responsible for that mistake, as he does not stand in the character of his master or employer: *Reedie v. London and North-West Railway Company*(1).

G. R. Kirloskar, was not called upon to reply.

JUDGMENT.

The judgment of the Court was delivered by
 WESTROPP, C.J.—The warrant to arrest Sheti, sued out by the plaintiff Kasturchand, was dated the 4th December 1876, and [68] was lodged on the 16th of the same month with the nazir for execution, and then bore the stamp for the proper Court fee, viz., 8 annas. Upon the 22nd December the bailiff (who had himself been so informed by the plaintiff Kasturchand) reported to the nazir that Sheti, the judgment-debtor of Kasturchand named in the warrant, was already in his (the nazir's) custody in the civil jail in pursuance of a writ issued in execution of a decree obtained by one Aniram against Sheti. The nazir then sent back Kasturchand's warrant to the Subordinate Judge who had issued it, and reporting to him that Sheti was already in civil arrest, asked for further orders. The nazir ought not to have sent back that warrant to the Subordinate Judge until the time which it had to run had expired, that is to say, until the 4th January 1877, if it then remained unexecuted. He might have reported the facts, but retained the warrant. Although the longest period of imprisonment which Sheti could have been detained at Aniram's suit was until the 6th March 1877, yet, either by payment of the debt to Aniram, or by non-payment of monthly *batta* by Aniram, or by permission of Aniram, Sheti might have become entitled to his discharge, not only before the 6th March 1877, but before the 4th January 1877, and the nazir ought not, by sending back Kasturchand's warrant to the Subordinate Judge, to have left himself without the means of executing that warrant immediately on Sheti's becoming entitled to his discharge from custody at Aniram's suit. On the 1st of January 1877, when Government, in honour of Her Majesty's assumption of the title of Empress of India, paid the debts of all persons who were in civil custody for sums less than Rs. 100, the nazir was aware that Kasturchand's warrant against Sheti was unexecuted, and that Kasturchand was entitled to have Sheti arrested under it immediately upon the termination of his imprisonment at suit of Aniram by payment by Government of the debt due by Sheti to Aniram; and yet the nazir made no inquiry as to whether the warrant which he had most unnecessarily sent back to the Subordinate Judge had been sent with any fresh order to the office of the nazir. It has been suggested that the nazir may have then forgotten all about Kasturchand's warrant, but this is no excuse. Only nine days previously that warrant had been in his hands, [69] and he then was fully aware that it was unexecuted, and that Sheti, the debtor named in it, was in his (the nazir's) own custody in the civil prison, and if he did forget those circumstances on the 1st of January, that was negligence on his part. If he had made inquiry in his office he

1879
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4 B. 65.

would have found that on the 29th December 1876 Kasturchand's warrant had been sent back by the Subordinate Judge for execution. It may well be that the karkun was very remiss in not informing the nazir that the warrant had again reached the office, but this does not exonerate the nazir either from his original mistake in parting with that warrant or in not making inquiry as to it before ceasing to detain Sheti in custody.

The fact that Kasturchand's warrant has not been executed against Sheti, is primarily due to this mistake and negligence on the part of the nazir. The negligence of the karkun subsequent to the original mistake of the nazir does not relieve the latter of his responsibility.

It is unnecessary for us to consider, and we do not give any opinion upon the question, whether, if the warrant had in the first instance been lodged with the karkun, and that fact had never been communicated to the nazir and he never knew of the existence of the warrant, he could have been made responsible for the negligence of the karkun, who is not his servant, but the servant of and paid by Government and appointed by the District Judge, or whether to such a case the reasoning which prevailed in the case of *Kalee Coomar Chatterjee v. Siddhessur Mundul* (1) might be applicable in favour of the non-liability of the nazir. That is not the case here, where there has been actual, not merely constructive, negligence of the nazir himself.

We reverse the decree of the District Judge, and make a decree for the plaintiff against the nazir only for Rs. 82-10-3 and costs of this suit and appeal. The defendant Ganesh (the karkun) must bear his own costs throughout.

We should observe that there was not only an absence of any necessity for the issue of a second warrant in Kasturchand's suit until the period named in his first warrant had expired, but the *batta* required for the maintenance of Sheti could not, under the law as it stood at the end of 1876 and until October 1877, (*viz.*, [70] Act VIII of 1859, s. 282), have become payable until he had been arrested and brought up before the Subordinate Judge, and the latter had made the order for Sheti's committal in execution of Kasturchand's decree. The reference by the District Judge to the new Civil Procedure Code upon this point is quite irrelevant.

Decree reversed.

4 B. 70—4 Ind. Jur. 520.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice and Mr. Justice F. D. Melvill.

RAJAN HARJI, KHOJA, DECEASED, BY HIS SON AND HEIR, FAZALBHAI RAJAN (*Original Defendant*), *Appellant v. ARDESHIR HORMUSJI WADIA (Original Plaintiff), Respondent.** [23rd July, 1879.]

Alienation made to defeat intended execution of decree—Consideration—Fraud—Contract Act (IX of 1872), ss. 23, 24.

On the 3rd October 1865 the plaintiff filed a suit against D to recover certain lands and money. While the suit was pending, *viz.*, on 13th October 1866, D mortgaged part of his immoveable property to defendant R,

* Second Appeal, No. 170 of 1879.

(1) 11 B. L. R. 256.