APPELLATE CIVIL.

Before Mr. Justice Melvill and Mr. Justice Pinhey.

CHENA PEMAJI (DECREE-HOLDER), APPELLANT, *v.* GHELABHAI NARANDAS (JUDGMENT-DEBTOR), RESPONDENT.*

1883 *January* 29.

The Code of Civil Procedure (Act X of 1877), Secs. 2 and 230—Decree Execution—Appeal—Discretion—Simultaneous attachment and arrest.

An order under section 230 of Act X of 1877 by a Court executing a decree refusing an application to execute it at the same time against the person and property of the judgment-debtor, being a "decree" under section 2 of the Act, an appeal lies against such order, and the Appellate Court is bound to consider whether the lower Court has properly exercised the discretion vested in it by section 230 or that Act.

The order of the Court below reversed, and a warrant of arrest directed to be issued against the judgment-debtor, notwithstanding the previous proceedings by attachment, the Court being satisfied that the judgment-debtor was determined to evade, if possible, the payment of his debt.

THIS was an appeal against the order of Ráo Bahadur Mangeshrav Balvant, Subordinate Judge (First Class) at Surat.

Chena Pemáji on the 14th of August, 1878, obtained a decree against Ghelábhái Nárandás for Rs. 6,301-8. He applied for its execution against the property of the judgment-debtor, but succeeded in recovering thereby only Rs. 301. Early in 1881 the decree-holder made his present application, and prayed that his decree might be enforced by imprisonment of the judgment-debtor if he failed to pay the balance due on the decree with interest and costs. The Subordinate Judge rejected this application on the ground that the earlier application praying for realization of the decree by attachment of the defendant's property was still pending. The decree-holder appealed to the High Court.

Nagindás Tulsidás Marphátiá for the appellant.—[MELVILL, J.—Does an appeal lie in this matter?]—An appeal does lie: the order made by the Subordinate Judge is one under section 244 of the Code of Civil Procedure, and as such is a 'decree' within the meaning of section 2. Therefore the Court is bound to consider whether or not the discretion vested in the Court below has been properly exercised. The debtor has been keeping out of the way

* Special Appeal, No. 33 of 1881.

1883

CHENA PEMAJI v. GHELABHAI NARANDAS.

and systematically evading the satisfaction of the decree. He does not now appear either in person or by pleader.

There was no appearance for the respondent.

The judgment of the Court was delivered by

MELVILL, J.—Section 230 of Act X of 1877 leaves it to the discretion of the Court executing a decree to refuse execution at the same time against the person and property of the judgment-debtor; but the law appears to allow an appeal against such an order of refusal, and we are, therefore, bound to consider whether the lower Court's discretion has been properly exercised. In the present case we are of opinion that the lower Court was not justified in refusing a warrant of arrest for no other reason than because a warrant for attachment of property had been issued. The decree was passed in 1878, and under it the judgment-creditor claims more than Rs. 6,000 but has never been able to recover more than Rs. 301. On the 1st October, 1880, the judgment-debtor asked for a month's time to enable him to raise money by sale or mortgage, and pay off the debt, and three months were granted him for that purpose; but he appears to have taken no steps to raise the necessary funds. When the present appeal was presented, we were satisfied that the judgment-debtor was keeping out of the way to avoid service, and we, therefore, directed substituted service of the notice to appear. The judgment-debtor has not appeared to-day either in person or by pleader. He seems to be determined to evade, if possible, payment of his debt; and under these circumstances we think that the creditor has a right to all the assistance which the law can give him. We, therefore, reverse the order of the Subordinate Judge with costs, and direct that a warrant be issued for the arrest of the judgment-debtor Ghelábhái Nárandás.

Order reversed.