

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kemball,

**DHARAMDA'S SANTIDA'S, PLAINTIFF, v. VA MAN GOVIND,
DEFENDANT.***

1884
December 23.

Jurisdiction—Decree—Execution—Transfer of decree for execution—Subordinate Judge with Small Cause Court powers—Act XI of 1865, Sec. 20—Civil Procedure Code (XIV of 1882), Sec. 223—Act XIV of 1869, Sec. 28.

The plaintiff, having obtained a money decree against H. and others in a suit in the Subordinate Judge's Court at Dhulia, applied for execution by attachment and sale of their immoveable property. That property was accordingly sold, but before the realization of the assets the defendant, who also had obtained a money decree against the same judgment-debtors in the same Court in its Small Cause jurisdiction, applied for the execution of his decree by attachment and sale of the immoveable property which had already been attached at the instance of the plaintiff. The Court under section 295 of the Civil Procedure Code Act (XIV of 1882) rateably distributed the proceeds of the sale between the plaintiff and the defendant. The plaintiff now brought this suit in the Small Cause jurisdiction of the Subordinate Judge's Court at Dhulia to recover from the defendant the amount paid to him, alleging that it had been illegally paid, as the procedure laid down in section 223 of the Code had not been followed.

Held that, as ruled in *Bhagvān Dayalji v. Balu* (1), a Subordinate Judge invested with Small Cause Court powers has generally to follow the procedure prescribed in the Code of Civil Procedure. This governs his proceedings both in trial and execution, whether the suit is a Small Cause or not. If the two jurisdictions assigned to the Subordinate Judge's Court and to the Subordinate Judge personally, are locally co-extensive, there is no distinction of sides or branches. But where, as in some cases, the ordinary jurisdiction is wider locally than the Small Cause jurisdiction, the Court is, in that part of its territory which lies outside the Small Cause Court jurisdiction, to be regarded as a separate Court so far that a decree in a Small Cause should not generally be executed on property beyond the Small Cause jurisdiction without a transfer, *i. e.* a dealing with the execution as in a suit tried in the usual way, for reasons to be recorded in writing. As all is done by the same Judge, a suggestion and an order recorded in the case are sufficient without a formal transmission as to a distant Court.

THIS was a reference made by Rāv Bahādūr Chunilāl Māneklāl, First Class Subordinate Judge of Dhulia, under section 617 of the Code of Civil Procedure (XIV of 1882). The reference was as follows :—

* Civil Reference No. 48 of 1884.

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“The plaintiff, having obtained a money decree against Hindumal Jitmal and others in Suit No. 124 of 1883 in the Subordinate Judge's Court at Dhulia, applied for the execution thereof by attachment and sale of the immoveable property of his judgment-debtors. The property was accordingly sold; but, before the assets were realized, the defendant, who had obtained a money decree against the same defendants (Hindumal Jitmal and others) in this Court sitting as a Court of Small Causes, applied for the enforcement of that decree by attachment and sale of the same immoveable property which had already been attached at the instance of the plaintiff. The Court acted according to the provisions of section 295 of the Code, and distributed rateably the proceeds of the sale amongst the plaintiff and the defendant. Before the distribution was made, the plaintiff had objected to it on the ground that the defendant having obtained a decree on the Small Cause Court side of this Court, the decree was incapable of execution by the Court of the First Class Subordinate Judge at Dhulia without following the procedure laid down in section 223 and the following sections of the Code. That objection was disallowed, and the defendant was given his share of the sale proceeds. The plaintiff has now brought this suit to recover from the defendant the said amount, alleging that it was illegally paid to him.

“The defendant admits having obtained a decree on the Small Cause Court side of this Court. He further admits that at the time he presented *darkhast* No. 613 of 1883, it was necessary for him, according to the then practice of this Court, to have followed the procedure prescribed by the Code relating to the execution of a decree by a Court other than the Court passing it; but he maintains that, before such a practice was adopted by this Court, he had made *darkhasts* Nos. 718 of 1882 and 551 of 1883 for the enforcement of that decree against immoveable property, and that circumstance rendered it unnecessary for him to follow the procedure laid down by section 223 of the Code, in making *darkhast* No. 613 of 1883.

“Upon these facts the questions that present themselves for consideration are these:—

"1. Whether a decree passed in a suit cognizable by a Court of Small Causes, by a Subordinate Judge invested with the powers of a Small Cause Court, can be enforced by that Subordinate Judge against the immoveable property of the judgment-debtor without following the procedure prescribed by section 223 and the following sections of the Code ?

"2. If not, is the omission to follow the procedure laid down by section 223 and the following sections of the Code, a mere irregularity, or does it invalidate the whole of the proceedings taken in execution of the decree on the ground of want of jurisdiction ?

"Both these questions seem to me to be of considerable importance, and I beg to submit them for the opinion of Her Majesty's High Court. In *Bhagván Dayalji v. Bálu*⁽¹⁾ it has been held that a Subordinate Judge's Court invested with the powers of a Small Cause Court is a different Court within the meaning of section 223 of the Code, and, consequently, when a decree passed by a Subordinate Judge in the exercise of his Small Cause Court powers is sought to be enforced against immoveable property, the course prescribed by that section (223) of the Code should be followed. This decision is binding upon all the Courts in the Mofussil, and I should not have ventured to submit the same question for reconsideration by the High Court had the decision contained a solution of the other question that has arisen in this case. Previous to the publication of that decision in the Law Reports, the practice of the Courts in the Mofussil was not uniform. Some Courts required a certificate under section 20 of Act XI of 1865, whilst others required no certificate whatsoever. Some Courts had two separate registers of suits and two separate *darkhast* books. The latter having been brought to the notice of the High Court, Circular No. 823 of 1884 was passed, directing the Mofussil Courts to keep only one register and one *darkhast* book. Hundreds, nay thousands of decrees passed by Subordinate Judges in the exercise of the powers of a Small Cause Court were enforced against immoveable property without follow-

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ing the procedure laid down by section 223 of the Code, and it would disturb the title of many innocent auction-purchasers if it were held that a Court executing a decree passed by a Subordinate Judge in the exercise of his Small Cause Court powers, without having adopted the procedure laid down by section 223 and the following sections of the Code, acted without jurisdiction, and the whole execution proceedings were '*Coram non judice*'. If the decision in *Bhagván Dayalji v. Bábú*⁽¹⁾, referred to above, be good law, then it would be necessary, in order to protect the rights of auction-purchasers, to hold that the omission to adopt the procedure prescribed by section 223 of the Code is a mere irregularity. If it were held that the omission is not a mere irregularity, but affects the jurisdiction of the Court, it would be necessary to reconsider the said ruling; otherwise the rights of auction-purchasers and decree-holders cannot be protected. Previous to the passing of Act XIV of 1882 the Code of 1877 did not make section 223 applicable to Courts of Small Causes, and whilst that Code was in force, a Subordinate Judge exercising the powers of a Small Cause Court could not have adopted the procedure prescribed by that section. How could, then, a decree passed by a Subordinate Judge in the exercise of his Small Cause Court powers have been enforced against immoveable property? Section 20 of Act XI of 1865 has been held not to be applicable to a Subordinate Judge's Court exercising the powers of a Small Cause Court, and section 223 of the Code of 1877 had not been made applicable to such a Court. It seems to me that Subordinate Judges are invested with the jurisdiction of a Small Cause Court by the Local Government under the provisions contained in the Civil Courts Act (Act XIV of 1869), for the trial of suits cognizable by such Courts; and those powers are to be exercised only in suits of the nature of suits cognizable by a Small Cause Court. The word 'suit' can well be held to exclude proceedings in execution of a decree, and, if so construed, the difficulty would, in my humble opinion, disappear. It appears to me that a Court executing a decree passed by another Court, without a certificate under section 223 of the Code, acts without jurisdiction, and not merely irregularly."

(1) I. L. R., 8 Bom., 230.

SARGENT, C. J.—According to *Bhagvān Dayalji v. Bālu* ⁽¹⁾, a Subordinate Judge, invested with Small Cause Court powers, has generally to follow the procedure prescribed in the Code of Civil Procedure. This governs his proceedings both in trial and execution, whether the suit is a small cause or not. If the two jurisdictions assigned to the Subordinate Judge's Court and to the Subordinate Judge personally are locally co-extensive (which sometimes they are not), there is no distinction of sides or branches. But where, as in some cases, the ordinary jurisdiction is wider locally than the Small Cause jurisdiction, the Court is in that part of its territory which lies outside the Small Cause Court jurisdiction, to be regarded as a separate Court so far that a decree in a small cause should not generally be executed on property beyond the Small Cause Court jurisdiction without a transfer, *i. e.*, a dealing with the execution as in a suit tried in the usual way, for reasons to be recorded in writing. As all is done by the same Judge, a suggestion and an order recorded in the case are sufficient without a formal transmission as to a distant Court.

(1) I. L. R., 8 Bom., 230.

APPELLATE CIVIL.

Before Sir Charles Sargent, Knight, Chief Justice, and Mr. Justice Kembal.

RAVJI RANCHOD NA'IK (ORIGINAL CAVEATOR), APPELLANT *v.* VISHNU RANCHOD NA'IK (ORIGINAL APPLICANT), RESPONDENT.*

1884
December.

Probate—Will—Execution in Bombay—Property in Mofussil—Act XXI of 1870, Sec. 2—Act V of 1881, Secs. 2 and 83—The Code of Civil Procedure (Act XIV of 1882), Sec. 177.

Held that the District Judge of Thána had jurisdiction to grant probate of a will executed on 28th October, 1881, by a Hindu woman in the town of Bombay devising immoveable property situated in Thána.

Where the caveator refuses to answer a question, section 177 of the Code of Civil Procedure (XIV of 1882), the provisions of which are extended to proceedings

* Regular Appeal, No. 35 of 1884, from original decree.