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one of the orders mentioned in section 588 of the Code of Civil Procedure (Act XIV of 1882), and it cannot be said to determine a question mentioned or referred to in section 244, so as to bring it within the definition of a decree.

We think, however, that the Subordinate Judge of the Second Class of Rájápur was wrong in refusing to exercise jurisdiction, and that relief should, therefore, be given under section 622 of the Code of Civil Procedure (XIV of 1882). The subject-matter of the suit, which was the sum due on the mortgage sought to be redeemed, was within the jurisdiction of the Second Class Subordinate Judge; and his jurisdiction would continue, whatever might be the result of the suit, in all such matters in the suit as, by the Code of Civil Procedure, are brought within his cognizance, amongst which are matters in execution in that suit—see *Lakshman Bhátkar* v. *Bábáji Bhátkar* (1); and the mere circumstance that the amount actually due under the decree, by process of accumulation, now exceeds 5,000 rupees cannot, in our opinion, oust him from the jurisdiction he has hitherto had over the suit.

We must, therefore, discharge the orders of the District Judge and the Subordinate Judge of the Second Class, and direct the latter to dispose of the application in question. No order as to costs.

(1) I. L. R., 8 Bom., 31.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

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NUSUR MAHOMED, PLAINTIFF, *v.* KAZBA'I AND OTHERS, DEFENDANTS.*

Practice—Issue of summons—Summons transmitted to local Court for service—Return of local Court when sufficient evidence of service—Form of return to be made by Civil Court.

Where the service of summons has been effected on a defendant by affixing a copy of the summons on the door of his dwelling-house the Court must decide whether the summons has been duly served by such affixing or not, and, if it

* Suit No. 414 of 1883.

decides in the negative, a new summons must be issued, or substituted service directed. Before the Court can decide in favour of the sufficiency of this mode of service it must be satisfied that the defendant is keeping out of the way for the purpose of avoiding service.

Where a summons has been transmitted by one Court to another for service by the latter, the transmitting Court is not bound, in every case, to satisfy itself that the law as to service has been strictly followed. The presumption in favour of the proceedings of a Court of Justice is that everything has been duly performed, and if the return made by the Court serving the summons states that the summons has been duly effected, that presumption must prevail, unless the return discloses some patent irregularity or clear divergence from the law. As a rule, on a return from a competent Court, that *summons has been duly effected*, it may be presumed that either personal service has been effected, or substituted service under section 82, or under sections 80 and 82 combined, of the Civil Procedure Code (XIV of 1882).

As proof of due service of summons, a return from the Court of Small Causes at K. was relied upon in the High Court. The return was in the following words:—"Read bailiff's endorsement on the back of the process, stating that the summons has been affixed to the defendant's house on the 22nd December, 1884, at 9 A.M.; and proof of the same having been duly taken by me, it is ordered that the summons be returned."

Held, that there was no sufficient service. The return itself proved the insufficiency. There was no statement, under the hand of the Judge, that the summons had been *duly effected*, and it did not appear that anything had been done beyond fixing the summons on the defendant's door. That affixing was not sanctioned after inquiry by the local Court, as required by section 82. All that appeared to have been done, was the affixing prescribed by section 80, which was insufficient until confirmed under section 82.

IN the plaint filed in this suit one of the defendants, Gulám Hussein Gángji, was described as "residing at Kámpti, in the Central Provinces." At the hearing this defendant did not appear, and a question arose as to whether he had been duly served with the summons. Counsel for the plaintiff proposed to prove service upon him by putting in evidence a return made to the High Court by the Court of Small Causes at Kámpti, to which the summons had been sent for service under an order made in accordance with the provisions of section 85 of the Civil Procedure Code (Act XIV of 1882). The return made by the Judge of the Court of Small Causes at Kámpti was in the following words:—"Read bailiff's endorsement on the back of the process, stating that the summons has been affixed to the defendant's house on the 22nd December 1884, at 9 A. M.; and

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proof of the same having been duly taken by me, it is ordered that the summons be returned."

V. K. Dhairyaván and *Dávar* for the plaintiff.

Jardine for the defendants.

SCOTT, J.—In this matter I was asked to proceed to judgment *ex parte* against an absent defendant, Gulám Hussein Gángji, under section 100 of the Civil Procedure Code (XIV of 1882). The question arose whether there was sufficient proof that the summons was duly served, and in consequence of a recent decision in another Court I took time to consider the question. An order for service out of the jurisdiction had been obtained, and a return from the Court of Small Causes at Kámpti was put in as sufficient proof of service under section 85 of the Code. It is there enacted that if the defendant is out of the jurisdiction, and no person competent to receive service for him is within it, then the summons may be sent for service to the Court within whose jurisdiction the defendant resides. The section further provides that the local Court must execute service in the manner prescribed by the Code, and then return the summons, with the record, if any has been made. Now, what is the manner prescribed by the Code? The general principle is that, whenever it may be practicable, the service shall be made on the defendant in person or on his authorized agent, or, if the defendant himself cannot be found, on an adult male member of his family (sections 75, 78). If the defendant either refuses to sign, or is not to be found, and there is nobody competent to accept service for him, then a copy of the summons must be fixed on the door of the defendant's dwelling-house, and a report of the circumstances made to the Court. This affixing, taken by itself, is certainly not effectual complete service. It is expressly provided by section 82 that the Court shall decide whether the summons has been duly served by such affixing or not, and if it decides in the negative, then a new summons must be issued, or substituted service directed. Before the Court can decide in favour of the sufficiency of this mode of service by affixing a copy of the summons on the door of the defendant's dwelling-house, it must be satisfied that the defendant is keeping out of the way for the purpose of avoiding service[1]. Thus the

(1) 19 Calc. W. R., Civ. Rul. 353, see p. 356 P. C.; 4 Calc. L. R., 397.

law is clear. There must be personal service, if practicable; and substituted service of any kind whatsoever is only allowed on proof that reasonable efforts have been made to serve the defendant personally, and that he is wilfully evading service. The mode of substituted service must be settled according to the circumstances of each case. This is the law I am bound to apply in cases where the defendant is within the jurisdiction of this Court, and this is also the law which ought to be applied by local Courts to which summonses are transmitted for service on defendants in this Court, but residing out of its jurisdiction.

But I cannot agree with the theory that when service has been effected through another Court, this Court is bound, in every case, to satisfy itself that the law as to service has been strictly followed. The Court serving the summons alone can judge whether service has been properly effected, and it was not, in my opinion, intended by the Legislature that the transmitting Court should act as a revising Court as regards the service. There is a presumption in favour of the proceedings of Courts of justice that everything has been duly performed, and if the return states that the service has been duly effected, I think that presumption would prevail, unless the return discloses some patent irregularity or clear divergence from the law. I, therefore, hold that, as a rule, on a return from a competent Court, *that service has been duly effected,* it may be presumed that either personal service has been made, or substituted service under section 82, or under sections 80 and 82 combined.

It must be remembered that a defendant can set aside a judgment made against him in his absence on satisfying the Court that the summons was not properly served upon him, and the right of plaintiffs to prompt relief must not be sacrificed to an excessive regard for the interests of defendants. I think, moreover, it would only lead to great inconvenience and delay, without effecting any real good, for this Court to discuss the discretion of the local Court as to what facts are sufficient to justify the waiver of personal service on the defendant, and the substitution of an affixing of the summons on his dwelling-house, or other mode of substituted service. For instance, where a

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local Court has returned a summons as duly served, and the return states that the summons has been posted on the defendant's dwelling-house, because the defendant has gone elsewhere, I think it ought to be presumed that this service was justified by the facts, and that the local Court had duly acted under the provisions of sections 80 and 82 read together. But at the same time the presumption in favour of the due execution of acts of a judicial nature only obtains *donec probetur in contrarium*, and there may now and then occur cases where there is something in the return distinctly negativing that presumption, and showing illegality in the mode of service.

I think the present case is one of those which must be treated exceptionally. As proof of due service a return from the Court of Small Causes at Kámpti was relied upon. The whole of that return is contained in the following words:—"Read bailiff's endorsement on the back of the process, stating that the summons has been affixed to the defendant's house on the 22nd December, 1884, at 9 A. M.; and proof of the same having been duly taken by me" (*i.e.*, the Judge)" it is ordered that the summons be returned." Now, in the first place, there is no statement, under the hand of the Judge, that service was *duly effected*. In the second place, it does not appear that anything was done beyond the fixing of the summons on the defendant's door. That affixing was not sanctioned after inquiry by the local Court, as required by section 82. All that appears to have been done is the affixing prescribed by section 80, which is insufficient until confirmed under section 82. I am obliged, therefore, to come to the conclusion that there has been no sufficient service in this case. The return itself proves the insufficiency, and the case constitutes an exception to the general rule, that a return of service by a competent Court must be taken as proof of such service.

I must, therefore, under section 100, hold that the summons has not been duly served, and direct that a second summons be issued and served on the defendant.

Attorney for the plaintiff.—Mr. *Khanderáo Moroji*.

Attorneys for the defendants.—Messrs. *Payne, Gilbert and Sayáni*.