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 18 B. 59.

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## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.*

LALLUBHAI VAJERAM AND ANOTHER (*Original Plaintiffs and Petitioners*),  
*Appellants v. BAI MAGANGAVRI (Original Defendant and Opponent),*  
*Respondent.\** [10th January, 1893.]

*Practice—Procedure—Civil Procedure Code (XIV of 1882), ss. 100 and 647—Dismissal of suit for default—Application to restore suit—Notice of application—Service of notice—Negligence—Second application for issue of notice—Costs.*

A suit having been dismissed for plaintiff's default, he applied for the restoration of the suit to the file, and a notice was issued to the defendant to show cause why the suit should not be restored. The notice was returned unserved, owing to plaintiff's neglect to point out the defendant to the serving officer. The plaintiff having applied for a fresh notice, the Subordinate Judge rejected the application.

*Held*, that the Subordinate Judge had no power to reject the plaintiff's application for a fresh notice. Section 100 of the Civil Procedure Code (XIV of 1882), which by s. 647 is made applicable to such a proceeding, only enabled him to order a fresh notice to issue, and, if he thought proper, to order plaintiff to pay the costs occasioned by the necessary postponement.

[R., 10 Ind. Cas. 705=7 N.L.R. 32.]

APPEAL from an order passed by the First Class Subordinate Judge of Surat.

The plaintiff's suit having been dismissed for default, the plaintiff applied to the Subordinate Judge to set aside the order of dismissal. A notice was issued to the defendant to show cause why the suit should not be restored to the file, but it was returned unserved owing to plaintiff's neglect to point out the defendant to the bailiff. The plaintiff then applied for the issue of a fresh [60] notice, stating that he had been absent in Bombay, and, therefore, had been unable to accompany the bailiff when he went to serve the previous notice on the defendant.

The Subordinate Judge, however, rejected the application, on the ground that no sufficient excuse had been shown for the plaintiff's neglect. The plaintiff appealed.

*Govardhanram M. Tripathi*, for the appellants (plaintiffs).—The lower Court was bound to issue a fresh notice. Under s. 100 of the Civil Procedure Code (XIV of 1882), which is made applicable to proceedings of the present nature by s. 647, the utmost that the Court could do was to make the plaintiff pay the costs of the application, but it had no authority to reject it. The issue of a fresh notice is merely a formal matter.

*Motilal Muguttal Munshi*, for the respondent (defendant).—It was the plaintiff's duty to point out the defendant to the bailiff. The Court found him guilty of negligence in not doing so. The Court is not bound under these circumstances to continue to issue fresh notices.

## JUDGMENT.

SARGENT, C. J.—The Subordinate Judge had no power to dispose of the plaintiff's application on the 18th June, because notice had not been served on defendant owing to plaintiff's neglect to point him out to the serving officer. Section 100 of the Code of Civil Procedure (XIV of 1882); which by s. 647 of the Civil Procedure Code is made applicable

\* Appeal No. 35 of 1892.

to a proceeding of this nature, only enabled him to order a fresh notice to issue, and, if he thought proper, to order plaintiff to pay the costs occasioned by the necessary postponement. We must, therefore, discharge the order, and direct the Subordinate Judge to proceed according to law. Costs of this appeal to be costs in the plaintiff's application.

*Order discharged.*

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[61] APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.*

KRISHNA VELJI MARWADI (*Original Opponent*), Applicant v.  
BHAU MANSARAM (*Original Petitioner*), Opponent.\* [3rd August, 1893.]

*Civil Procedure Code (XIV of 1892), ss. 25 (1) and 647—Decree—Execution—Transfer of execution proceedings from one Court to another—Small Cause suit—Act VI of 1892, s. 4—Rateable contribution—Civil Procedure Code (XIV of 1882) ss. 295 and 223 (d)—Discretion of District Judge—Extraordinary jurisdiction of High Court.*

A District Judge has power, under s. 25 of the Civil Procedure Code (XIV of 1892), or under that section read with s. 647, to transfer execution proceedings in a Small Cause Court to the Court of a Subordinate Judge. The ruling in the case of *Balaji Ranchoddas* (2), that these sections apply to execution proceedings in Small Cause Courts, is not affected by the explanation to s. 4 of Act VI of 1892.

Execution proceedings under a decree against A in a Small Cause Court were transferred by a District Judge to a Subordinate Judge's Court where execution was proceeding against A under another decree, and it was objected that, as by the concluding paragraph of s. 25 of the Civil Procedure Code (XIV of 1892), the attachments under the two decrees would be in different Courts, s. 295 of the Code would not apply, and rateable distribution could not be granted.

*Held*, that the last paragraph of s. 25 did not convert the Subordinate Judge's Court into a Small Cause Court, but only provided for the trial of the suit, which had been transferred, being conducted by the Subordinate Judge's Court as a Small Cause suit.

[62] The High Court will not in its extraordinary jurisdiction interfere, except under circumstances of a very special nature, with the discretion of a Judge who has transferred execution proceedings under a decree from one Subordinate Court to another.

*Quere*—Whether a Subordinate Judge under cl. (d) of s. 223 of the Civil Procedure Code (XIV of 1892), can transfer a decree for execution to a Court of Small Causes when the property attached is situate within the local jurisdiction of the Subordinate Judge.

\* Application No. 217 of 1892 under Extraordinary Jurisdiction.

(1) Section 25, Civil Procedure Code (XIV of 1892) :—

The High Court or District Court may, on the application of any of the parties, after giving notice to the parties and hearing such of them as desire to be heard, or of its own motion without giving such notice, withdraw any suit whether pending in a Court of first instance or in a Court of appeal subordinate to such High Court or District Court, as the case may be, and try the suit itself, or transfer it for trial to any other such Subordinate Court competent to try the same in respect of its nature and the amount or value of its subject-matter.

For the purpose of this section the Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

The Court trying any suit withdrawn under this section from a Court of Small Causes, shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(2) 5 B. 680.