1893 JULY 17.

CRIMINAL REFERENCE.

18 B. 428.

THIS was a reference under s. 438 of the Code of Criminal Procedure (Act X of 1882) by F. S. P. Lely, Esq., District Magistrate of Surat.

The accused was charged with the offence of keeping in his possession implements for the purpose of drawing toddy, and convicted by the Second Class Magistrate of Olpad under [429] s. 43, cl. (*f*) of the Bombay Abkari Act (V of 1878) and sentenced to a fine of Rs. 8.

The District Magistrate on examining the record of the case was of opinion that mere possession of implements for the purpose of drawing toddy was not an offence punishable under s. 43, cl. (*f*) of the Abkari Act. He, therefore, referred the case for the orders of the High Court under s. 438 of the Criminal Procedure Code (X of 1882).

This reference was heard by a Division Bench (CANDY and FULTON, JJ.).

Rao Saheb *Vasudev J. Kirtikar*, Government Pleader, for the Crown.
Manekshah Jehangirshah, for accused.

JUDGMENT.

PER CURIAM.—We do not think that drawing toddy is manufacturing liquor as defined in cl. 11 of s. 3 of Bombay Act V of 1878, for it will be observed that in s. 43 of the Act the drawing of toddy and the manufacture of liquor are treated separately. We concur, therefore, with the District Magistrate that the mere possession of implements for the purpose of drawing toddy is not an offence punishable under cl. (*f*) of s. 43 of Bombay Act V of 1878. We accordingly reverse the conviction and sentence, and direct the fine, if paid, to be refunded.

Conviction and sentence reversed.

---

18 B. 429.

APPELLATE CIVIL.

Before Mr. Justice Candy and Mr. Justice Fulton.

HAJRAT AKRAMNISSA BEGAM (*Original Defendant No.* 14), *Applicant* v. VALIULNISSA BEGAM (*Original Defendant No.* 2), *Opponent.**
[18th July, 1893.]

Civil Procedure Code (Act XIV of 1882), s. 647 as amended by Act VI of 1892, s. 4—Execution of decree—Application for execution dismissed for default—Power of the Court to restore such application to the file—Construction of Statutes.

[430] There is nothing in the Code of Civil Procedure (Act XIV of 1882) as amended by Act VI of 1892, which authorizes a Court to apply to execution proceedings any of the procedure enacted in chap. VII of the Code.

Accordingly a Court cannot under s. 103 restore to the file an application for execution which has been dismissed for default.

Alterations in forms of procedure are retrospective in effect, and apply to pending proceedings.

[F., 18 M. 131 (133); 7 Ind. Cas. 11 (15); 139 P. L. R. 1905; R., 13 C.L.J. 532=11 Ind. Cas. 385; 2 C.W.N 606 (607); 153 P.L.R. 1901.]

THIS was an application under s. 622 of the Code of Civil Procedure (Act XIV of 1882).

---

* Application No. 113 of 1893 under Extraordinary Jurisdiction.

1893
JULY 18.
APPELLATE CIVIL.
18 B. 429.

One Amtulnissa Begam filed a suit (No. 76 of 1886) in the Court of the First Class Subordinate Judge of Surat for a partition of three *jaghir* villages.

On the 29th October, 1890, the Subordinate Judge passed a decree directing the villages to be divided among the parties to the suit according to their respective shares under the Mahomedan law.

On 15th April, 1891, defendant No. 2 presented a *darkhast* for execution of the decree.

On the 27th July, 1892, the Subordinate Judge dismissed the *darkhast* for default of appearance of the applicant's pleader in support of the *darkhast*.

On the 29th July, 1892, the pleader made an application to the Court to restore the *darkhast* to the file. This application was granted on 27th August, 1892.

Thereupon defendant No. 14 moved the High Court under its extraordinary jurisdiction, and obtained a *rule nisi* calling upon defendant No. 2 to show cause why the Subordinate Judge's order restoring the *darkhast* to the file should not be set aside.

Ganpat Sadashiv Rao, for the applicant :—The lower Court had no jurisdiction to restore the *darkhast* to the file. There is no provision in the Code of Civil Procedure empowering the Court to restore an application for execution which has been dismissed for default. Under s. 4 of Act VI of 1892, the provisions of s. 647 of the Civil Procedure Code are no longer applicable to applications for execution of decrees. That being the case, [431] s. 103 of the Code, under which the lower Court's order purports to have been passed, has no application to the present case—*Dhonkal Singh* v. *Phakkar Singh* (1).

Motilal M. Munshi, for the opponent.—The *darkhast* was dismissed for default on the 27th July, 1892. The application for its restoration to the file was made on the 29th July, 1892,—that is, before Act VI of 1892 came into force. Section 4 of that Act does not, therefore, apply to the present proceeding. That being so, the provisions of chap. VII of the Code of Civil Procedure relating to suits are applicable also to execution proceedings under s. 647 of the Code.

Ganpat Sadashiv Rao, in reply :—Act VI of 1892, relating as it does to procedure, applies to all pending proceedings, and, therefore, governs the present case—*Sha Jasraj Himaraj* v. *Chudasama Vakhatsang* (2) ; *Javanmal Jitmal* v. *Muktabai* (3).

JUDGMENT.

FULTON, J.—As by s. 4 of Act VI of 1892 it is declared that s. 647, Civil Procedure Code (XIV of 1882), is inapplicable to applications for execution which are proceedings in suits, it seems impossible to rely on this latter section as justifying the use of s. 103 for the purpose of restoring to the file an application for execution. We, therefore, concur in the opinion of the learned Chief Justice of Allahabad expressed in *Dhonkal Singh* v. *Phakkar Singh* (1), that there is nothing in the Code of Civil Procedure as now amended which authorizes a Court to apply to an application for execution any of the procedure enacted in chap. VII of the Code.

But the question remains whether, apart from the provisions of s. 103, a Court can restore to the file an application for execution dismissed in

(1) 15 A. 84. (2) P.J. (1891), p. 294. (3) 14 B. 516.

1893
JULY 18.
APPELLATE CIVIL.
18 B. 429.

the absence of the applicant. This question, we think, must be answered in the negative. The decision of the Judicial Committee of the Privy Council in the *Delhi and London Bank* v. *Orchard* (1) is an authority for holding that such a dismissal, not being an adjudication that the decree is not to be executed, is not a bar to a subsequent application for execution, for it shows that an order refusing execution on a particular [432] application does not prevent a second application when such order is based on some ground peculiar to the first and not on any decision as to the right of the applicant to enforce the decree. And the judgment in *Ram Kirpal Shukul* v. *Mussamat Rup Kuari* (2) shows that, in the absence of statutory provision, a Court, when it has once passed an interlocutory judgment or order in a suit, cannot alter that order. As, however, there is, as above pointed out, no statutory authority for restoring to the file an application for execution which has been dismissed for default, it follows that the Court cannot, without departing from the principles laid down in the last-mentioned case, set aside the order of dismissal, and place the parties in the position they occupied before it was passed. So far as the order is ineffectual to bar a subsequent application for execution it is innocuous; but in so far as it may be accompanied by any order as to costs or otherwise places one party in a position of advantage over the other, it appears to be an order in a suit which cannot subsequently be changed by the Court which made it, excepting possibly on review. It was not suggested in argument that the application granted on the 27th August, 1892, could be treated as an application for review, and it is clear that it could not be so treated, as notices were not served on all the parties liable to be affected as required by s. 626, proviso (*a*). We must, therefore, hold that, assuming the proceeding to be governed by Act VI of 1892, the Court had no jurisdiction to pass the order of the 27th August, 1892.

Next it was contended that Act VI of 1892 did not apply to this proceeding, because the application for restoration to the file was presented on the 29th July before the Act came into force. Whether, considering that the Act came into force on the 29th July, any application presented on that day could be treated as made before it came into force, is a point which we need not consider; for even if the application were pending when the law was enacted, the case would be governed by the general principle, that alterations in forms of procedure are retrospective in effect and apply to pending proceedings—*Sha Jasraj Himaraj* v. *Chudasama Vakahtsang* (3). Section 5 does not seem to have [433] any reference to applications for execution, and merely deals with appeals and applications for review.

We set aside the Subordinate Judge's order of the 27th August, 1892, but, under the circumstances, we think it fair to direct that the parties severally pay their own costs in both Courts.

Order reversed.

(1) 4 I.A. 127. (2) 11 I. A. 37. (3) P.J. (1891), p. 294.