

ORIGINAL CIVIL.

Before Mr. Justice B. Tyabji.

JAYNA'RA'YAN MEGHRA'J AND ANOTHER, PLAINTIFFS, v. ISMA'IL
KARAMALI AND OTHERS, DEFENDANTS.*

1895.

December 12.

Execution—Decree—Property attached in execution of decrees of Small Cause Court and High Court—Execution proceedings in Small Cause Court transferred to High Court—Property realized in execution—Civil Procedure Code (Act XIV of 1882), Sec. 295.

The plaintiffs obtained a decree in the High Court against the defendant and in execution attached goods in the defendant's shop. These goods, however, were already under attachment in execution of certain decrees obtained in the Small Causes Court against the defendant. On the 4th September, 1895, by an order of the High Court made on the application of the plaintiffs the execution proceedings in the Small Cause Court suits were transferred to the High Court, and it was ordered that the attached property should be realized by the High Court. The records of the execution proceedings in those suits were lodged in the Prothonotary's office. On the 26th September, 1895, the decree-holder in one of the Small Cause Court suits obtained an order from the Judge in chambers directing the Sheriff to take charge of the attached property and realize it by sale. The Sheriff accordingly sold the property and certified the sale to Prothonotary's office. The plaintiffs subsequently (under the rules of the Sheriff's office) applied to the Prothonotary for payment to them of the amount realized or so much thereof as should satisfy their decree. The plaintiffs were directed to give notice of their application to the holders of the Small Cause Court decrees.

Held, that the holders of the Small Cause Court decrees were entitled to share rateably with the plaintiffs in the High Court suit in the proceeds of the property sold in execution by the Sheriff.

IN chambers.

This was an execution matter arising as follows:—On the 21st January, 1895, the plaintiffs obtained a decree in the High Court against Karmali Khakibhai (father of defendant) for Rs. 5,839 and costs, and in execution attached certain goods in the defendant's shop. These goods, however, were already under attachment in execution of a Small Cause Court decree (No. $\frac{346}{27498}$ of 1895) obtained by one Rájbaí against Karmali and also in another decree in another Small Cause Court suit. The plaintiffs' attachment was, therefore, effected under section 272 of the Civil Procedure Code (Act XIV of 1882) by a letter, dated 20th July, addressed to the

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Registrar of the Small Cause Court requesting him to hold the property until the further order of the High Court. By a similar letter dated the 1st March, 1895, other goods in a godown belonging to the said Karmali were also attached by the plaintiff.

By an order of the High Court, on the Appellate Side, made on the 4th September, 1895, on the application of the plaintiff, the execution proceedings in the Small Cause Court suits were transferred to the Original Side of the High Court, and it was ordered that the attached property should be realised by the High Court. The records of the execution proceedings in those suits were accordingly lodged in the Prothonotary's office.

The Small Cause Court suits having thus been transferred, Rájibái, the decree-holder in one of them, applied *ex parte* on the 26th September, 1895, to the Judge in chambers, and obtained an order directing the Sheriff to take charge of the attached property and realise the same by sale. The Sheriff accordingly sold the property and filed his certificate certifying the sale in the Prothonotary's office, dated 30th November, 1895.

Rules Nos. 4, 7 and 8 of the Rules of the Sheriff's office are as follows :—

(4) Such certificate shall be filed in the office of the Prothonotary and the Prothonotary shall at the request of the judgment-creditor at whose instance the realization was made, certify what persons, if any, have within twelve months prior to the realization applied to the Court for execution of decrees for money against the same judgment-debtor, together with the amount appearing in the Register of Suits to be payable under such decrees.

(7) Should the judgment-creditor at whose instance the realization was made, neglect or refuse to apply for the certificate, or to serve the notice hereinbefore mentioned, any other person entitled to share in the assets shall be at liberty to apply for such certificate and serve such notice.

(8) If the Prothonotary shall certify that no person has within twelve months prior to the realization applied to the Court for execution of a decree for money against the judgment-debtor, the judgment-creditor may at once apply to the said Prothonotary for an order directing the Sheriff to pay to him the amount realized or so much thereof as may be sufficient to satisfy his decree.

No application having been made by Rájibái or the other Small Cause Court decree-holder under the above Rule No. 4, the decree-holder in the High Court suit (Jaynáráyan) applied under the above Rule No. 7 for the certificate required under Rule 4, and on the 27th

November, 1895, the Prothonotary granted the certificate stating that Jaynáráyan was the only person who had applied.

Under the above Rule No. 8, Jaynáráyan then applied to the Prothonotary for an order for payment. The Prothonotary referred the matter to the Judge in chambers, who directed Jaynáráyan to give notice of the application to Rájibái.

The matter now came on for hearing before the Judge in chambers.

Macpherson, for the plaintiff, admitted that the plaintiffs in the Small Cause Court suits had applied for execution in that Court in those suits.

Starling (Acting Advocate General) for Rájibái and the other Small Cause Court decree-holder.

Reference was made to *Jetha Mádhavji v. Najeralli*⁽¹⁾; *Krishna Shankar v. Chandra Shankar*⁽²⁾; *Dattatraya v. Rahimtulla*⁽³⁾; *Pal-lonji S. Mistry v. E. V. Jordan*⁽⁴⁾; *Gopináth Achárya v. Achcha Bibee*⁽⁵⁾; *Nimbaji Tulsirám v. Vadia Venkati*⁽⁶⁾; *Muttagirí Nayak v. Muttayyar*⁽⁷⁾; Civil Procedure Code (Act XIV of 1882), secs. 25, 230, 235, 245, 295 and 647.

B. TYABJI, J.:—I do not intend that my judgment in this case should in any way throw doubt upon the cases cited by Mr. Macpherson, as, in my opinion, they do not touch the state of facts which exists here. In this case this Court has made an order consolidating all the execution proceedings in the two cases in the Small Cause Court and brought them up here to be dealt with in conjunction with the case now before me in this Court. Under these circumstances, I hold that this Court has adopted all the proceedings in execution in the Small Cause Court, and will deal with them as if they had taken place here. Consequently I must hold that the applications for execution made in the Small Cause Court by the plaintiffs in the suits in that Court are applications for execution under section 295 of the Civil Procedure Code (Act XIV of 1882), and enure to the benefit of these plaintiffs in the same manner as if they had themselves transferred their decrees to this Court, and

(1) I. L. R., 4 Bom., 472.

(2) I. L. R., 5 Bom., 198.

(3) I. L. R., 18 Bom., 456.

(4) I. L. R., 12 Bom., 400.

(5) I. L. R., 7 Calc., 553.

(6) I. L. R., 16 Bom., 683.

(7) I. L. R., 6 Mad., 357.

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thereafter made applications for execution here. These plaintiffs are, therefore, entitled to share rateably with the plaintiffs in this suit in the proceeds of the property sold in execution by the Sheriff.

Attorneys:—Messrs. *Matubhai and Jamietram*; Messrs. *Payne, Gilbert and Sayani*; and Messrs. *Chalk, Walker and Smetham*.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

R. A. HILDRETH (ORIGINAL DEFENDANT), APPLICANT, v. SAYA'JI
PIRA'JI CONTRACTOR (ORIGINAL PLAINTIFF), OPPONENT.*

Civil Procedure Code (Act XIV of 1882), Secs. 100, 108 and 157—Presidency Court of Small Causes—Adjourned hearing—Absence of defendant—Ex-parte decree—Practice—Procedure.

A defendant is entitled to avail himself of section 108 of the Civil Procedure Code (Act XIV of 1882) where an *ex-parte* decree is passed against him at an adjourned hearing.

THIS was an application, under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882), against the decision of the Full Court (consisting of C. W. Chitty, First Judge, and M. H. Hakim, Fifth Judge) of the Bombay Court of Small Causes.

The applicant (defendant) was sued by the opponent (plaintiff) in the Court of the Fifth Judge of the Bombay Court of Small Causes to recover the sum of Rs. 507. At the first hearing of the case on the 7th May, 1894, the defendant appeared, denied the plaintiff's claim, and applied for a postponement to enable him to produce his witnesses. The case was consequently adjourned till the 14th June. The defendant did not appear in the Court on that day, and a decree was passed in the plaintiff's favour.

On the 16th June the defendant went to the Court, and he was then informed that a decree had been passed against him. On the 11th July he applied to the Judge that the decree should be set aside, and obtained a rule *nisi* for a new trial. The rule was subsequently made absolute, and a day was fixed for the re-trial of the case.

*Application No. 219 of 1894 under the extraordinary jurisdiction.

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February 21.