APPELLATE CIVIL.

Before Mr. Justice Crowe and Mr. Justice Chandavarkar.

1904
April 7.

GOVIND VALAD DHOND PATIL (JUDGMENT-CREDITOR), *v.* DADA VALAD UDAJI PATIL (JUDGMENT-DEBTOR).*

Limitation Act (XV of 1877), schedule II, article 179, clause 5—Decree—Execution—Application for execution—Civil Procedure Code (Act XIV of 1882), section 248—Notice—Date of the order.

The date of issuing a notice under section 248 of the Civil Procedure Code (Act XIV of 1882) is the date on which the Court orders that it should issue, and not the date on which the notice is formally drawn up afterwards and signed. The limitation therefore under article 179, clause 5, of the second schedule to the Limitation Act (XV of 1877) runs from the former date.

REFERENCE by J. D. Dixit, Subordinate Judge of Sinnár in the Násik District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The facts in the reference, the question referred and the reasons for the opinion of the Subordinate Judge appear from the reference, which was as follows :—

"The present darkhast was filed by the decree-holder Govind Dhond Patil on the 11th January, 1904, for the execution of the decree in Civil Suit No. 474 of 1902 by attachment and sale of moveable property. The last darkhast was filed on the 15th December, 1900, and the present darkhast having been filed more than three years from the date of the last is barred under clause 4 of article 179 of the second schedule of the Limitation Act, unless it comes within clause 5 to the said article. In the previous darkhast an order for issuing notice under section 248 of the Civil Procedure Code was made on the 15th December, 1900, *i.e.*, the day on which the darkhast was filed. The process fee for the notice was paid on the 10th of January, 1900, and the notice was prepared and was ready on the 12th January, 1901. If the date of issuing the notice be held to be the date on which the order was passed the darkhast is clearly barred; but if the date of issuing the notice be considered to be the date on which it was actually prepared, the darkhast would be in time. Many other similar darkhasts have been filed in this Court and would

* Civil Reference No. 1 of 1904.

be barred if the date of the order be held to be the date of issuing the notice. The darkhast is a Small Cause darkhast and my decision in it is final. The point besides is one of general occurrence, and as I entertain doubts as to the correct view of the law, for the reasons which I propose to give below, I humbly and respectfully beg to refer the following question for the decision of the Hon'ble the Chief Justice and Judges of His Majesty's High Court :—

"(1) Whether for the purposes of clause 5 of article 179 of the second schedule of the Limitation Act 'the date of issuing a notice under the Code of Civil Procedure, section 248,' means the date on which the order for the issue of the notice was passed or the date on which the notice was actually prepared and issued by the proper authority of the Court? My opinion on the point is that the date on which the notice is ready and signed by the proper authority of the Court is the date referred to in clause 5.

"The ground of my opinion is based on the plain grammatical meaning of the words 'the date of issuing a notice.' The whole of clause 5 is as follows :—'(where the notice next hereinafter mentioned has been issued) the date of issuing a notice.' The clause is only applicable in cases where a notice has actually issued. It does not save limitation if only an order is made for the issuing of a notice. The making of the order and the issuing of a notice are not identical acts. Issuing means something more. Before a notice is issued the decree-holder must pay the necessary process fee. Under High Court Civil Circular No. 120, page 70, before any process is *issued* in any Court, the proper officer of the Court has to calculate the amount to be paid as Court fees and to give information of it to the person by whom the fees are payable. Then again there is a limit of time prescribed by the same rule within which the person applying for the process has the right to pay it. No process can be issued unless an order is made in the first instance for its issue. The circular makes the issue of the process quite distinct from the order. Without, therefore, doing violence to the language of clause 5, the date of issuing cannot be considered to be the date of the order. For if the legislature had intended to count the

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period from the date of the order, they would have said so in so many words. There is again no reason why the word 'issued' where it first occurs in clause 5 should be construed differently from the word 'issuing' occurring thereafter. The word 'issued' has been construed as referring to the actual issuing of a notice and not to the order made for the purposes of the issue of the notice (*Hari Ganesh* v. *Yamunabai*[1] and *Damodar* v. *Sonaji*.)[2] The ruling in *Koong Beharee's* case[3] given at page 399 of O'Kinealy's notes on the Civil Procedure Code (5th edition) is to the effect that limitation runs from the date on which the notice was issued and served. This is a ruling under the old Code. Not only this but the remarks in the Bombay cases cited above and the cases relied on therein have created grave doubts in my mind as to whether the date of issuing a notice is to be considered the date of the order for its issue. There is no positive ruling one way or the other so far as I am aware, but the remarks in the cases cited above, though perhaps *obiter dicta* on the point in question deserve great weight. I am informed that the practice of this Court was to count the periods of limitation from the date on which the notice was prepared and issued, but since the ruling in the case of *Damodar* v. *Sonaji*[2] referred to above it seems to have been disturbed. The point is thus one of considerable importance and I have ventured to bring it to their Lordships' notice. The remarks which seem to have caused the disturbance in the practice are these: 'In our opinion actual service is not necessary. But where notice has issued, time runs from *the date of the order directing* the same under section 248, Civil Procedure Code' (*Damodar* v. *Sonaji*[4]). The point had not directly arisen in the case for their Lordships' decision. The only point there being whether serving of the notice was necessary. Then again in the case of *Hari Ganesh* v. *Yamunabai*[1] Parsons, J., has observed at page 38 of the report 'as no notice was ever issued, time cannot here be counted from the date of the order of the Court though it may be that when an order has been issued, the date of its *issue* would be the date, on which the Court ordered its issue, as was ruled by the Allahabad

(1) (1897) 23 Bom. 35.
(2) (1903) 27 Bom. 622.
(3) (1874) 22 W. R. 484 (Civ. Rul.).
(4) (1903) 27 Bom. p. 625.

High Court in the case quoted from the Weekly Notes by the lower Court.' Here again the question, raised at present, was not directly before the Court. The only point was whether a notice ought to issue. The construction placed on the first word 'issued' was the actual issuing of the notice. But it would appear from the *obiter dictum* that the construction put on the word 'issuing' following the word 'issued' is different. This has enhanced my doubt. It would be inconvenient to construe clause 5 as above, for generally orders directing issue of notice under section 248 are made on the day the darkhast is filed and clause 5 of article 179 of the second schedule would be a dead-letter in such cases, notwithstanding that the decree-holder took the further troubles of paying the process fee and getting a notice. Statutes of limitation being in restriction of the natural right of subjects ought to be construed strictly and in favour of the right of the public."

J. R. Gharpure, (*amicus curiæ*), for the judgment-creditor:—We submit that the date of issue is the date on which the notice was ready for being despatched. The case of *Damodar* v. *Sonaji*[1] does not apply here. In that case notice was issued and the question was whether time should run from the date of the order or of its actual service upon the opponent. There it is assumed that notice was *issued*. If it is issued then the decision should apply. We submit the *issuing* of a notice contemplates two stages—(1) the order of the Court for its *issue*, and (2) its actual *issue* from the office after payment of process fee, etc. Moreover, article 179 (5) of schedule II of the Limitation Act (XV of 1877) has no application to such a case. Notice must be issued and the mere order of a Court that a notice should issue, which, in fact, is not issued is not sufficient: see *Hari Ganesh* v. *Yamunabai*.[2] By comparing the wording and spirit of clause (1) of the same article and rulings thereon, it will be seen that the order must be one that is capable of being executed: see *Dildar Hossein* v. *Mujeedunnissa*[3]; *Mahabir Prasad* v. *Sital Singh*.[4]

D. W. Pilgaumkar, (*amicus curiæ*), for the judgment-debtor:—The point referred is decided in *Damodar* v. *Sonaji*[1]; *Udit*

(1) (1903) 27 Bom. 622.
(2) (1897) 23 Bom. 35.
(3) (1878) 4 Cal. 629.
(4) (1897) 19 All. 520.

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Narain v. *Ram Pertab Singh* (1); and *Baldeo* v. *Harrison*.(2) In the last case the meaning of the word 'issue' is defined. Preparing and signing an order is embodying the order under the seal of the Court, just as preparing and signing the decree is embodying an adjudicating order under the seal of the Court. Decree is prepared some days after the judgment is delivered, but it bears the date on which the judgment is pronounced; and limitation runs from the date on which the judgment is pronounced, and not from the date the decree is ready.

CHANDAVARKAR, J.:—The notice must be taken to be issued when the Court orders that it should issue, the order of the Court being itself the issue of the notice, though owing to the exigencies of business the notice has to be formally drawn up afterwards and signed and then despatched. These subsequent acts are all mere matters of routine following as a matter of course the first act of the Court which consists in judicially ordering under section 248 the issue of the notice. The judicial pronouncement that there shall be notice is itself the issuing, just in the same way that there is a decree made, not when it is drawn up and the Judge signs it, but the moment it is pronounced by the Judge in Court. This view is in accordance with the decision of this Court in *Damodar Shaligram* v. *Sonaji*.(3)

(1) (1881) Allahabad Weekly Notes, 120.
(2) (1890) *Ibid*, 245.
(3) (1903) 27 Bom. 622, 5 Bom. L. R. 594.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904. *January* 20.

DAGDU VALAD JAIRAM AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* BHANA VALAD JAIRAM AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Contract—Proposal with unqualified assent—Mistake in expression—Common mistake—Unilateral mistake—Evidence Act (1 of 1872), section 92, proviso 1—Contracting party not able to read—Contract differing from that pretended to be read.

It is of the essence of a contract that there should be (expressly or by implication) a proposal to which an unqualified assent has been given: without

* Second Appeal No. 78 of 1903.