

The last point on which the District Judge dismissed the claim is that the suit being merely for a declaration could not lie. The plaintiffs seek for a declaration that they are entitled to enjoy the lands without paying the summary settlement, the local fund cess or any kind of assessment to Government; they have not asked for any consequential relief by way of injunction which they could have claimed. We agree with the District Judge that the suit in the form in which it was brought was bad, but we think that when the plaintiffs asked to be allowed to claim relief by way of injunction also, the District Judge should have exercised his discretion in their favour although the prayer for amendment was made very late. It was a mere matter of form which could not affect the merits of the claim or transform the nature of the suit. The plaintiffs were no doubt responsible for asking for the amendment at a late stage, but for that they should have been made to bear the costs up to the date of the application.

The amendment asked for should be allowed, the plaintiffs paying the costs up to the date when they made the application for amendment to the lower Court.

We reverse the decree of the lower Court and remand the suit for a decision on the merits.

Costs, except those mentioned in the judgment with reference to the amendment, to be costs in the cause.

Decree reversed. Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston:

LAKSHMISHANKAR DEVSHANKAR (ORIGINAL SURETY), APPELLANT, v.
RAGHUMAL GIRDHARILAL (ORIGINAL PLAINTIFF), RESPONDENT.*

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Civil Procedure Code (Act XIV of 1882), section 253—Decree—Execution—Surety—Notice to the surety—Court executing the decree can give the notice.

The intention of section 253 of the Civil Procedure Code (Act XIV of 1882) is that when a person has made himself liable as a surety for the performance

* Second Appeal No. 753 of 1903.

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of a decree passed against another, he must have notice in writing that the decree is going to be executed against him. It is immaterial whether such notice is given by the Court which passes the decree or the Court to which it is sent for execution.

SECOND APPEAL from the decision of S. L. Batchelor, District Judge of Ahmedabad, confirming the order passed by Chandulal Mathuradas, First Class Subordinate Judge at Ahmedabad.

The plaintiffs, Raghumal and Jugalkishor, obtained a decree against one T. Ralph Douse. They applied to the District Court of Delhi to issue execution of the decree against the defendant. Execution was accordingly issued, when one Laxmishankar Devshankar became the defendant's surety and undertook, under section 336 of the Civil Procedure Code, to produce the defendant before that Court or in default to pay Rs. 2,500 on or before the 13th January, 1900.

The surety failed to do as promised. The plaintiffs, therefore, applied to execute the decree against him in the District Court at Delhi. The usual notices were issued against the surety : but they were returned unserved as they were made out in a wrong name. Subsequently the Court, at the request of the plaintiffs, endorsed on the application this order : "The decree-holder now says that transfer certificate for Zilla Ahmedabad, Deccan, should be prepared and given. All necessary steps about notice will be taken there. Ordered that a transfer decree, Zilla Ahmedabad, being prepared should be given."

The decree was accordingly transferred to the District Court of Ahmedabad, which transferred it to the Court of First Class Subordinate Judge at Ahmedabad. The surety contended there that as the Delhi Court issued no written notice to him as required by section 253 of the Civil Procedure Code (Act XIV of 1882), the Ahmedabad Court could not proceed with the execution at all. In dealing with this contention the Court said :—

"I venture to think that no security can be ordered to be realized before the issue of the notice, and though as an executing Court I can realise the security, I can only do so under and according to an order properly passed to realise it. No such order appears to me to have yet been passed and I cannot issue the notice or pass it, and so, I think, I would be acting without jurisdiction if I issued execution against Laxmishankar at this stage of the proceedings. It is

therefore necessary that Laxmi Shankar should move the District Court at Delhi to cancel the order of that Court transferring execution against him to the District Court here. It would be harsh if I exacted security from him under the circumstances and I therefore grant him six weeks' time to apply to the District Judge of Delhi under section 239 of the Civil Procedure Code."

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The surety appealed against this order, but it was confirmed by the lower Appellate Court.

The surety then preferred a second appeal contending (1) that the lower Court erred in referring the surety to the Delhi Court in spite of its own finding that the orders of the Delhi Court issuing execution against the surety without notice to him under section 253 of the Civil Procedure Code were irregular; and (2) that the lower Court ought to have returned the darkhast with accompaniments to the Delhi Court and should have thrown on the execution creditor the burden of moving the Delhi Court to make the necessary amendments and have execution issued regularly.

The plaintiffs filed a cross-objection that the lower Courts ought themselves to have issued, under section 228 of the Civil Procedure Code, the notice required by section 253 of the Code.

T. R. Desai, for the appellant (surety).

Ratanlal Ranchhodas, for the respondent (plaintiffs).

CHANDAVARKAR, J. :—The facts of this case are not disputed and are stated as follows in the judgment of the Subordinate Judge :—

"It appears that one Raghmal and another had obtained a decree against Mr. T. Ralph Douse. Execution was issued against him by the District Court of Delhi and Mr. Laxmishankar Devshankar, a pleader practising in the Ahmedabad Courts, became his surety and undertook, under section 336 of the Civil Procedure Code, to produce Mr. Ralph Douse before that Court, or, in default, to pay Rs. 2,500 on or before the 13th January, 1900. It appears that Mr. Laxmishankar failed to do as promised and so the execution of that decree was transferred to the District Court of Ahmedabad which transferred the execution of the said decree to this Court (see section 226 of the Civil Procedure Code)."

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Before the Subordinate Judge the surety Laxmishankar contended that as no notice in writing had been given to, or served on, him as required by the proviso to section 253 of the Code of Civil Procedure, the decree could not be executed against him. The Subordinate Judge has found that no regular notice had been issued before execution was ordered by the District Court at Delhi, and if issued, that it was not served on Laxmishankar as a surety. The Subordinate Judge, however, was of opinion that the giving of notice was a condition precedent to the order for execution against the surety, and that such notice could only be given by the Delhi Court before passing the order and transmitting the decree to the Ahmedabad Court for execution. This view of the Subordinate Judge has been upheld by the District Judge in appeal. The District Judge says:—

“Respondent urges that under section 228, Civil Procedure Code, the Subordinate Judge himself should have issued the requisite notice. I cannot, however, accept this view. In my opinion section 228 only empowers the executing Court to do certain things when once an execution has been legally and properly launched; but section 253 requires by a proviso ‘that such notice in writing as the Court in each case think sufficient has been given to the surety;’ and the words underlined seem to me to show that the notice must be given before the execution can be properly begun.”

In arriving at the conclusion that such notice cannot be given by the Court to which the decree has been transmitted under section 223 of the Civil Procedure Code for execution, the District Judge appears to have ignored the distinction which exists between an application to send a decree for execution to another Court and an application for execution.

No doubt a notice, as required by the proviso to section 253, must be given before the decree can be executed against the surety. But still the question remains—which is the Court that can or should give the notice? Both the Subordinate Judge and the District Judge seem to be of opinion that the function of an executing Court is purely ministerial, and that it is no part of its duty to give the notice required by the proviso. If by this the Courts below mean that in every case without any distinction a Court to which a decree has been transmitted for execution is called upon to perform merely a ministerial function, that view of the law is clearly opposed to the sections of the Civil

Procedure Code which deal with the execution of decrees. Confining ourselves at the outset to section 253 it should be remembered that it occurs under the heading "E—Of the mode of Executing Decrees." A decree passed against a defendant may be executed in several modes and these modes are specified in the sections which occur under the heading E. One of those modes is the execution of the decree against a surety. It is only a Court executing a decree that is concerned with and called upon to adopt any of those modes. Sections 245 to 249 relate to "the preliminary measures, if any, required" for execution. The subsequent sections of the part headed E point out the modes of execution. So far, then, as the arrangement of the scheme of which section 253 forms a part goes, it is the executing Court which has to adopt one or other of the modes for execution. Then if we look to the language itself of section 253, there is nothing in it to show that the notice required by the proviso should be given only by the Court which passed the decree and not by the Court executing it. The section provides that "the decree may be executed" against the surety—and then comes the proviso in these terms: "provided that such notice in writing as *the Court* in each case thinks sufficient has been given to the surety." "The Court" here must be taken to include the Court by whom "the decree may be executed" as directed in the previous part of the section.

Further, although the giving of a notice in writing to a surety is a condition precedent to the validity of an order for execution against such surety, there is nothing in the terms of the proviso to section 253 which also requires that the notice should be given by the Court and none else. All that the proviso requires is that the notice should be in writing and that it should be such as in each case the Court thinks sufficient. This language of the proviso becomes significant when we compare it with the language of section 248, according to which "the Court shall issue a notice to the party against whom execution is applied for." The intention of section 253 seems to be that when a person has made himself liable as a surety for the performance of a decree passed against another, he must have notice in writing that the decree is going to be executed

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against him, and it is immaterial whether such notice is given by the Court or by the decree-holder. All the surety is entitled to is previous intimation in writing. If then the language of the proviso to section 253 is wide enough to make a notice valid even when it has not been given by the Court, it is immaterial whether the notice is given by the Court which passed the decree or by the Court to which it is sent for execution. If notice is not given by the former Court, it is competent to the latter to give it and proceed with the execution.

This conclusion is further supported by other considerations. According to section 224, the Court transmitting a decree for execution has to send, among other things, a copy of any order for the execution of the decree, and if no such order has been made, a certificate to that effect. Now, it has been held by this Court in *Husein Ahmad v. Saju Mahamad*⁽¹⁾ that where a Court makes an order for execution of a decree and transmits the decree for execution to another Court, the latter Court has no power to determine whether execution is barred by limitation. The order for execution made by the transmitting Court is binding on the parties until reversed on appeal. It is otherwise, however, where the transmitting Court has made no order for execution, but has merely transmitted the decree and the certificate of non-satisfaction. In the latter case, the Court to which the decree has been transmitted for execution has power to determine whether the decree can be executed. Now in the present case, it is clear upon the facts as they have been stated in the Subordinate Judge's judgment and as they appear from the papers of the Delhi Court, that that Court simply transmitted the decree for execution against the surety without any order for execution. The District Judge is wrong in supposing that the Delhi Court has passed such order. So far from passing any order for execution against the surety, the Delhi Court has itself left it to the Court executing the decree to give notice to the surety. The transmission order of the Delhi Court is as follows :—“The decree-holder now says that transfer certificate for Zilla Ahmedabad, Deccan, should be prepared and given. *All necessary steps about notice will be taken there.* Ordered that a transfer decree, Zilla Ahmedabad, being

(1) (1890) 15 Bom, 28.

prepared should be given." The application, then, to the Delhi Court was not an application to execute the decree under section 230 of the Civil Procedure Code, but an application by the decree-holder under section 223 to send it for execution to the Ahmedabad Court. The Delhi Court simply granted the application and sent the decree to the Ahmedabad Court. It passed no order for execution—and that for the simple reason that no application was made to it under section 230 for such order. When the decree came to the Ahmedabad Court, the decree-holder made an application to the latter Court under section 230 for execution (see Exhibit 1). The Ahmedabad Court was, therefore, the Court entrusted with the duty of executing the decree and empowered to exercise all the powers incidental thereto. Under section 244 it has jurisdiction to determine all questions between the parties. As it was the Court which received the application for execution, it had power, under section 245, to determine whether the application fulfilled the requirements of sections 235 to 238 and then to proceed according to the law prescribed in the Code for "the mode of executing decrees." Execution of the decree against the surety being one of the modes prescribed by section 253, the Ahmedabad Court had power to decide whether the requirements of that section were fulfilled.

We, therefore, reverse the orders of the Courts below and remand the *darkhást* to the Subordinate Judge for disposal according to law. Costs to be costs in the *darkhást*.

Orders reversed. Darkhást remanded.

CRIMINAL REVISION.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

EMPEROR v. NADIRSHA H. E. SUKHIA.*

City of Bombay Municipal Act (Bom. Act III of 1888), sections 231 and 471—Municipal Commissioner—Notice to construct drains—Effect of Negotiations—Limitation.

Accused was convicted and fined Rs. 25 for not complying with a notice issued by the Municipal Commissioner of Bombay under section 231 of Bombay Act

* Criminal application for Revision, No. 96 of 1904.

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