APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Ramesam.

KASI VISWANATHAN CHETTY (PETITIONER), APPELLANT, 1921, December 20.

v.

A. S. P. L. S. SOMASUNDARAM CHETTY AND OTHERS (RESPONDENTS), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XXI, r. 22 (1) and (2)—Execution of decree, more than a year after date of decree—Omission to give notice to judgment-debtor—Omission of Court to record reasons for not issuing notice—Sale—Validity of—Void or voidable—Jurisdiction of Court to execute decree—Material irregularity or illegality affecting jurisdiction of Court—Proof of substantial loss for setting aside sale.

Omission to issue notice to the judgment-debtor under Order XXI, rule 22 (1), Civil Procedure Code, is only a material irregularity in procedure and not an illegality affecting the jurisdiction of the Court in executing the decree.

The provision in Order XXI, rule 22, sub-rule (2), requiring the Court to record reasons for not issuing notice under sub-rule (1), is only directory, and the omission to record reasons will not invalidate the proceedings in execution.

Where therefore a sale was held in execution of a decree on an application for execution made more than a year after the date of the decree but the Court did not issue notice under Order XXI, rule 22, sub-rule (1), nor record reasons for not doing so under sub-rule (2) of the same rule,

Held, that there was only a material irregularity in procedure and that the sale could not be set aside in the absence of proof of substantial loss by reason of such irregularity.

APPEAL against the order of L. R. ANANTANARAYANA AYYAR, Temporary Subordinate Judge of Sivaganga, in Execution Application No. 117 of 1919 (Execution Petition No. 1100 of 1918) in C.R. Suit No. 474 of 1910 on the file of the Chief Court of Lower Burma.

* Appeal against Order No. 119 of 1920.

VISWANATHAN CHETTY v. SOMASUNDARAM CHETTY.

This Appeal arises out of an order in an application filed by the judgment-debtors to set aside a sale held in execution of a decree passed on the 8th August 1912 by the Lower Burma Chief Court. The decree-holders applied to that Court in 1914 for transmission of the decree to the District Court of Rāmnād and it was accordingly transferred by an order, dated 4th May 1914. But notice under Order XXI, rule 22, sub-rule (1), was not issued to the judgment-debtor before the Lower Burma Chief Court passed its order. The District Court of Rāmnād in its turn transferred the decree for execution to the Sub-Court of Rāmnād; the decree-holders applied to this Court for execution on 9th July 1914; though some properties were attached, no sale took place, but the decree-holders received rateable distribution in proceeds realized by another decree-holder in execution of his decree. On 5th March 1918, the decree-holders applied to the Rāmnād Sub-Court for transfer of the decree to the Rāmnād District Court and the latter Court directed the Sivaganga Sub-Court to attach certain properties on an application made to it by the decree-holders on 18th March 1918. The attachment was made by the Sivaganga Sub-Court, but no sale was held as an encumbrance certificate was not filed by the decree-holders; subsequently on 12th November 1918, the decree-holders applied to the latter Court for sale of the properties attached. Sale proclamation was settled on 7th January 1919, and the property (a house) was sold to a stranger on 3rd April 1919. The judgment-debtors filed the present application to set aside the sale, contending, inter alia, that the proceedings were void as there was no notice of the execution proceedings either in the Lower Burma Chief Court or in the British Indian Courts. The lower Court dismissed the application. The first defendant preferred this Appeal.

A. Viswanatha Ayyar for appellant.—The sale is void. There was no notice of execution proceedings to the judgment-debtor in any Court. The lower Courts had no jurisdiction to execute the decree without notice under Order XXI, rule 22, sub-rule (1), Civil Procedure Code. See *Raghunatha Das* v. *Sundar Das Khetri*(1). The omission to record reasons for not giving notice is fatal. The Judge exercised no discretion in not issuing notice, because he was not asked by the decree-holder to issue execution without notice to judgment-debtor. Leave to sue, if given, will give jurisdiction to a Court in a certain class of suits, otherwise the Court has no jurisdiction in such cases.

A. Krishnaswami Ayyar, *K. Raja Ayyar* and *V. Ramaswami Ayyar* for respondents.—The judgment-debtor had notice of the execution proceedings by the notice affixed to his house. He had knowledge of execution proceedings at the settlement of the sale proclamation; there had also been two rateable distributions. The objection was not taken at the time of proclamation and so there was waiver.

There is no want of jurisdiction by the non-issue of notice; there is at the most only a material irregularity, which can be waived, and there is no proof of substantial loss by the sale. Both under the old Code and the new Code, absence of notice to *judgment-debtor* is not on the same footing as absence of notice to his *legal representatives*. Even though absence of notice to the legal representatives may cause want of jurisdiction, want of notice to judgment-debtor is only an irregularity of procedure. See Maxwell on Interpretation of Statutes, 6th Edition, page 680. Even though the Court did not record reasons for not issuing notice, there is no want of jurisdiction. See *Gopal Singh* v. *Jhakri Rai*(2).

(1) (1915) I.L.R., 42 Calc., 72 (P.C.). (2) (1886) I.L.R., 12 Calc., 87.

VISWANATHAN CHETTY v. SOMASUNDARAM CHETTY.

JUDGMENT.

This Appeal is against an order refusing to set aside a sale in execution of a money decree against the appellant first defendant and other members of his family.

The lower Court was asked to set aside the sale on several grounds. Only one argument has been attempted here, that the sale is bad for want of notice to appellant as required by Order XXI, rule 22, Civil Procedure Code. The necessary facts are that a decree passed on 8th August 1912 by the Chief Court of Lower Burma was transmitted to the Rāmnād District Court in May 1914 and thence to the Rāmnād Sub-Court. It was returned to the Rāmnād District Court; the application for execution there was treated as one for transfer to the lower Court, Sivaganga Sub-Court, and the decree and execution petition, by a possibly lax procedure to which however no objection is taken at present, were transferred accordingly. In the lower Court the present proceedings followed. It is admitted by the respondent that there was no notice of the proceedings in the Lower Burma Chief Court, and no notice of other proceedings has been proved. The question is whether this renders them and in particular the latest proceedings in the lower Court, invalid. Is there an illegality established or merely an irregularity? In the latter event the Appeal must fail, because the lower Court has found in its judgment, paragraph 27, that the price realized was not inadequate and that finding against substantial loss to the appellant has not been attacked.

An attempt has been made to argue that absence of notice can be justified with reference to rule 22, clause (1) proviso, because rateable distribution was once allowed in the Rāmnād Sub-Court by an order adverse to the appellant on 20th February 1916 and although

that order was set aside by the High Court, rateable distribution was again allowed by the Coimbatore District Court on 16th January 1917. But these adverse orders are not within one year of the present application for execution contemplated by the proviso. For the present application (Execution Petition Application No. 1100 of 1918) was presented on 12th November 1918. It was for sale after a previous application for sale had become inoperative owing to the respondent's failure to produce an encumbrance certificate and had been dismissed, the attachment being maintained. Much less are these orders within the one year, if on the view most favourable to the respondent, the date of presentation of the original application for execution in the Rāmnād District Court is taken as 9th April 1918.

Next it is suggested that the appellant's objection to the absence of notice must be regarded as waived by him, because he was served with notice of the settlement of sale proclamation in the present proceedings and did not appear and take objection to the validity of those proceedings up to that stage. We agree with the finding that there was service in accordance with Order V, rule 17, on the appellant since the evidence is clear that there was affixture, during his temporary absence on his house where his wife was living and we agree that this was rightly declared sufficient. It may, however, be doubtful whether the argument based on a waiver can be sustained if illegality affecting the jurisdiction of the Court and not irregularity is in question. We therefore have to decide between the two, which of them is established. That is the substantial issue before us.

The answer proposed by the respondent is that illegality is not established in view of sub-rule (2) of rule 22, the contention being that that sub-rule is applicable none the less, because the Court did not record its reasons

VISWANATHAN CHETTY v. SOMASUNDARAM CHETTY.

for dispensing with the issue of notice, the provision for such record being directory not mandatory.

The appellant relies on authorities that notice is essential. Some of these the respondents distinguish on the ground that they relate to cases in which notice is necessary not because of the lapse of one year since the passing of the decree and the last application for execution, but because devolution of interest has occurred. That distinction, however, is negatived by the absence of anything in the rule to support it, the same language being used as applicable to both classes of cases. The real ground of distinction to be drawn seems to us to be between the cases under the former Code and under this, there being nothing in the former Code corresponding with sub-rule (2) now under consideration. The cases accordingly under the former Code to which we have been referred, *Gopal Chunder Chatterjee* v. *Gunamoni Dasi*(1), *Gurudas Biswas* v. *Bhowanipore Zamindary Co., Ld.*(2) and *Raghunath Das* v. *Sundar Das Khetri*(3), must be dismissed from consideration. In the cases decided under the present Code in *Shyam Mandal* v. *Satinath Banerjee*(4), *Ram Kinhar* v. *Sthiti Ram*(5), no mention was made of the sub-rule (2), and in *Srinivasa Aiyangar* v. *Narayana Aiyangar*(6), although it was mentioned, there was no full discussion of its implications. On the other hand *Blanchenay* v. *Burt*(7), relied on by the respondent deals with English procedure in 1843 and is not of assistance. In *Mahomed Meera Rowther* v. *Kadir Meera Rowther*(8), the Court at least doubted whether omission of the notice would be more than an irregularity with reference to sub-rule (2).

---

(1) (1893) I.L.R., 20 Calc., 370.
(2) (1921) 25 C.W.N., 972.
(3) (1915) I.L.R., 42 Calc., 72 (P.C.).
(4) (1917) I.L.R., 44 Calc., 954.
(5) (1918) 27 C.L.J., 528.
(6) (1917) 40 I.C., 670.
(7) (1843) 4 Q.B., 707.
(8) (1914) M.W.N., 63.

Turning to principle, there is good reason for holding that no illegality is in question when once, even conditionally, the issue of notice is made by sub-rule (2) discretionary. Notice may under sub-rule (2) be omitted at the discretion of the Court. It may further be pointed out, with reference to the application of the sub-rule for failure to record reasons, that such application is consistent only with the directory character of the provision since it imposes a duty on the Court, which the party interested in its performance has no means of enforcing and as to the performance of which he has indeed no means at the time of satisfying himself. We have been referred to other cases in the Indian authorities in which the Court is required to record its reasons before using its powers. In *Gopal Singh* v. *Jhakri Rai*(1), its obligation to do so before admitting evidence on appeal and in *Kamal Kutty* v. *Udayavarma Raja Valia Raja of Chirakkal*(2). a similar obligation before passing a preliminary order under section 145, Criminal Procedure Code, are considered. In both these cases it was held that the omission to record reasons did not deprive the Court of jurisdiction, the provision of law being merely directory. In *Kanchan Mandar* v. *Kamala Prosad*(3), the direction to record reasons before granting a review and in *Yacoob* v. *Adamson*(4), the duty of the Presidency Magistrate to give reasons before convicting are dealt with. In these two cases it was held that the omission invalidated the proceedings ; but the language used indicates that, if the matter had been considered on its merits and if the superior Court had been able to satisfy itself of the propriety of the lower Court's action the conclusion would have been different. In these circumstances we hold that the provision in sub-

(1) (1886) I.L.R., 12 Calc., 37.
(2) (1913) I.L.R., 36 Mad., 275.
(3) (1915) 29 I.C., 734.
(4) (1886) I.L.R., 13 Calc., 273.

VISWANATHAN CHETTY v. SOMASUNDARAM CHETTY.

rule (2) requiring the Court to record its reasons is only directory, and that failure to issue a notice in the present case was not necessarily fatal to the validity of the proceedings. It would of course ordinarily be open to the appellant to ask us to consider the Court's use of its discretion on its merits. But firstly there is, as already observed, the finding of the lower Court that no substantial loss resulted against which nothing has been said, and secondly it is not difficult with reference to the facts mentioned in paragraph 24 of the lower Court's judgment, to infer the reasons on which it acted.

The result is that the Appeal fails and is dismissed with costs.

K.R.

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice Odgers.

1922, March 23.

MUHAMMAD ALIAS BAVA (FIFTH DEFENDANT), APPELLANT AND PETITIONER,

v.

MANAVIKRAMA AND THIRTEEN OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 TO 4 AND NOS. 6 TO 13), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XLI, r. 17—Absence of appellant at hearing—Pleader instructed only to ask for adjournment—Withdrawal of pleader on refusal of adjournment—Court dismissing appeal on merits, legality of.

Where the pleader of an appellant who was absent represented to the Court at the hearing of the Appeal that he had instructions only to apply for an adjournment and withdrew from the appeal when the adjournment was refused.

Held that the Court had thereafter no jurisdiction to dismiss the Appeal on the merits, but should have dismissed it for "default" both of the party and of his pleader within the meaning of Order 41, rule 17, Civil Procedure Code; *Satish*

* Second Appeal No. 1499 of 1920 and Civil Revision Petition No. 682 of 1920.