APPELLATE CIVIL.

Before Mr. Justice Pratt.

1929

Jan. 24.

RAMDAS

v.

KANNAMAL.*

Civil Procedure Code (*Act V of* 1908), *O.* 21, *r.* 22 (1) *and* (2)—*Notice to show cause against execution after a year, essential—Absence of notice not a mere irregularity—Question of jurisdiction not raised on arrest, effect of—No appeal—Revisonal powers.*

Where an application for execution is made more than a year after the date of the decree, the Court must issue notice to the judgment-debtor to show cause before ordering his arrest, under the provisions of O. 21, r. 22 (1). If the Court dispenses with the notice under sub-rule 2, its reasons must be recorded. Failure to observe these rules is not a mere irregularity but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction.

Shyam Mandal v. *Satinath*, 44 Cal. 954—*referred to.*

If a party however fails to raise the question of jurisdiction, the order committing him to jail is not appealable. In order that s. 47 of the Code may apply, an order under which is appealable, the debtor should have challenged the jurisdiction of the Court to pass orders in execution. In a proper case of irremediable injury to the debtor, the High Court may interfere on revision.

Sanyal for the appellant.

Tha Kyaw for the respondent.

PRATT, J.—In Civil Execution Case No. 37 of 1928 of the Township Court, Amarapura, orders were passed on the 26th March 1928, committing the judgment-debtor to jail.

Execution was taken out over one year from the date of the decree and it was therefore compulsory under Order XXI, rule 22 to issue a notice to show cause to the judgment-debtor before ordering his arrest.

It is common ground that no such notice was issued.

* Civil Second Appeal No. 99 of 1928 and Civil Revision No. 142 of 1928 (at Mandalay), from the order of the District Court, Mandalay, in Civil Appeal No. 68 of 1928.

The District Court on appeal held that the failure to issue notice was merely an irregularity which did not vitiate the subsequent arrest.

Sub-section (2) allows the Court to issue process for reasons to be recorded without first issuing notice, if it considers issue of notice would cause unreasonable delay or defeat the ends of justice.

The Judge recorded no reasons for issuing process and obviously overlooked the provisions of rule 22 of Order XXI. Under the circumstances the failure to issue notice to the judgment-debtor was not a mere irregularity but a defect which goes to the very root of the proceedings and renders them void for want of jurisdiction as was laid down in *Shyam Mandal* v. *Satinath Banerjee* (1).

There is a consensus of opinion on this point in the High Courts.

There can be no doubt that the order for arrest of the judgment-debtor and all the proceedings in execution were void in consequence of the initial failure to issue notice.

For the decree-holder in this Court, however, the objection has been taken that no appeal lies against the order in question, which was passed under section 51 and cannot be considered as a question arising between the parties to the suit in which the decree was passed relating to the execution or satisfaction of the decree. It is contended accordingly that no appeal lies.

This contention must prevail.

No question arose between the parties for determination. No objection was made to the committal to jail and the question of its legality was not then raised.

(1) (1917) 44 Cal. 954.

1929

RAMDAS v. KANNAMAL.

PRATT, J.

Had the judgment-debtor at the time challenged the jurisdiction of the Judge to pass orders in execution, then the order deciding the question of jurisdiction would have been an order under section 47 and would have been appealable.

I hold therefore that no appeal lies and the appeal is dismissed, but as the point should have been taken in the District Court there will be no order for costs.

It is conceivable, however, that the existence of the order on execution may do the judgment-debtor an irremediable injury, since he was never given any opportunity of showing cause against execution.

As the whole of the proceedings were without jurisdiction the case is one where I feel bound to take the unusual course of interfering under the revisional powers conferred by section 115.

The order appealed against is therefore set aside.

I notice the decretal amount was subsequently paid into Court. By consent it will remain there for a reasonable time, say one month from receipt of this order, to enable the decree-holder to take fresh proceedings by way of execution, if he wishes to do so.