

1875.

BA'BA'JI
HARI
v.
RA'JA'RAM
BALLAL.

cause to the District Court, that the Judge, after determining what portion of the claim relates to lands, as distinguished from money allowances, may pronounce on the other points that arise, viz., as to whether the suit was barred by limitation, and as to what deductions, if any, are to be made on account of expenditure necessarily or properly incurred by the defendants out of the property in which the plaintiff claims a share. He will take such evidence as the parties may adduce on these points respectively.

Issues sent for trial accordingly.

[APPELLATE CRIMINAL JURISDICTION.]

Application for Revision No. 193 of 1875.

IN RE JAGJIVAN NA'NA'BHA'I.

1876.

Jan. 19.

Sanction for prosecution—Decree of Bombay Court of Small Causes—Reference by District to Subordinate Judge to execute it—Power of latter to proceed against immovable property—Section 287 of the Code of Civil Procedure (Act VIII. of 1859) and Section 78 of Act IX. of 1850.

Although the Court of Small Causes at Bombay has power to enforce its decree against moveable property only, yet if that decree be transmitted to a Court to which the Code of Civil Procedure applies, the latter can, under Section 287 of that Code, enforce it against immovable property also.

Query—Whether a Court executing the decree of a Small Cause Court under Section 78 of Act IX. of 1850 could enforce it against immovable property.

THIS was an application for revision, under Chapter XXII. of the Code of Criminal Procedure, of the order of W. M. P. Coghlan, Judge of Tháná, sanctioning the institution of criminal proceedings against the petitioner.

In 1872, Premá Paná and two others obtained a decree against Shridhar Bálkrishna in the Bombay Court of Small Causes. For the enforcement of this decree they presented to the District Judge of Tháná an application in the form prescribed by Section 212 of the Code of Civil Procedure, and alleging that the judgment debtor had two salt-pans at Trombay, in the Tháná District. The application did not, however, on the face of it state whether it was made under the Civil Procedure Code, or under Act IX. of 1850. The Judge entrusted the application for execution to the Subordinate Judge, who ordered an attachment and sale of

these salt-pans. In the course of the proceedings which followed, the Subordinate and District Judges considered that the present petitioner Jagjivan Nánabhái had given and fabricated false evidence. On the 25th of October 1875 the District Judge gave his sanction for the prosecution of Jagjivan and others.

1876.
 IS RE
 JAGJIVAN
 NA'NA'BHA'I.

Jagjivan prayed the High Court to annul the sanction, alleging in his petition that the proceedings before the Subordinate Judge were, *ab initio, coram non iudice*, as he had no authority to attach and sell immoveable property in execution of a decree of the Bombay Court of Small Causes.

WEST and NA'NA'BHA'I HARIDA'S, JJ., on the 24th November 1875 granted a rule *nisi* in the following terms :—

“There appears to be some room for question whether, according to Section 78 of Act IX. of 1850, the Court of the Subordinate Judge at Tháná had jurisdiction, notwithstanding Section 382 of the Code of Civil Procedure, to entertain the application for execution made by the judgment-creditors Premá Paná and others; and, if there was a want of jurisdiction, whether the statements made before the Subordinate Judge in the subsequent proceedings can be the subject of a prosecution for wilfully giving false evidence or for producing forged documents in a judicial proceeding. The Court sends for the proceedings, and calls upon the complainant to show cause why the sanction should not be annulled. The District Judge to be informed of this order that he may, if he thinks it desirable, instruct counsel or pleader to support the order made by him.”

January 19, 1876.—Marriott instructed by Dhirajlál Mathurá-dás, Government Pleader, appeared to show cause :—“The petitioner and the other defendants are themselves the parties who set the Courts of the District and Subordinate Judges in motion. Supposing the action taken by them was under Act IX. of 1850, the provisions of Section 78 of that Act have been complied with, as the first application for execution was made to the District Court. But the application was really under the Code of Civil Procedure. It is in the form prescribed by Section 212; and Section 382 shows that the Code extends to execution of decrees passed by Presidency Small Cause Courts. This being so, Section 287 of the Code en-

1876.

IN RE
JAGJIVAN
NA'NA'BHAI.

ables the District Court to refer the application for execution to the Subordinate Court, and the latter Court to execute it as if it were a decree of its own ; in other words, it could proceed against immoveable as well as moveable property. In a preliminary question like this it is sufficient to make out only a *prima facie* case of jurisdiction. It is quite open to the petitioner to object to the jurisdiction at his trial. *Prima facie* jurisdiction having been shown, and the District Judge having actually granted the sanction in the exercise of his discretion, it is not competent to the High Court to disturb it.

Branson (with him *Shivshankar Govindram*) in support of the rule :—It is certain that the Presidency Small Cause Courts cannot enforce their decrees against immoveable property ; and it is strange that other Courts which must, in execution matters, in a sense act ministerially, should possess the power denied to those Courts which passed those decrees. Under Section 78 of Act IX. of 1850 the jurisdiction cannot be supported, and the Code of Civil Procedure in its entirety has never been extended to Presidency Small Causes Courts. Act XXVI. of 1864, Section 15, enabled Government to declare the whole or any part of the Code applicable to Small Causes Courts ; and accordingly they did on the 12th September 1872 extend the operation of certain sections, but amongst these the sections as to execution of decrees are not included. Moreover, the fact that, to enable the Mofussil Small Cause Courts to enforce decrees against immoveable property, the Legislature had to enact Section 20 in Act XI. of 1865, and impose the condition of first proceeding against and exhausting moveable property, shows conclusively that immoveable property was not meant to be touched by any Court in execution of decrees of Presidency Small Cause Courts. *Heeralaul Bose* (1). All the proceedings are thus *ultra vires*, and the sanction must be quashed.

WEST, J., in delivering the judgment of the Court, after stating the facts, proceeded as follows :—

In arrest of these proceedings [the criminal proceedings], which are now pending, Jagjivan applies to us and urges, *inter alia*, that the proceedings before the Subordinate Judge of Tháná were *coram non iudice*, he having no authority to attach and sell

immoveable property in execution of the decree of the Bombay Court of Small Causes, which itself could proceed against moveable property only. It was argued by Mr. Branson on his behalf that Section 287 of the Code of Civil Procedure did not give to the Subordinate Judge greater power in execution matters than the Court which passed the decree.

1876.

IN RE

JAGJIVA
NANSA/DAI

We cannot say why, when the Legislature enacted Section 287 of the Civil Procedure Code, it allowed Section 78 of the Presidency Small Cause Court Act IX. of 1850 to stand. Looking, however, to the wording of the former enactment, we find that it runs as follows:—"The copy of any decree, or of any order for execution, when filed in the Court to which it shall have been transmitted for the purpose of being executed as aforesaid, shall for such purpose have the same effect as a decree or order for execution made by such Court." Section 78 of Act IX. of 1850 runs thus:—"Whenever any defendant, against whom judgment shall have been given in the Court of Small Causes, shall go, before execution thereof, out of the jurisdiction of the Court, the Judge of any zillah or town where he shall be found, upon receiving from the plaintiff, either in person or by vakil, an application in writing setting forth these facts, with a duly authenticated copy of the judgment of the Court, shall execute the said judgment in the manner prescribed by law for execution of his own decrees." There is a difference in the language of the two enactments, and the difference is significant. The former attaches the same effect to the decree of the Court which passed it as if it were the decree of the executing Court; the latter prescribes that the procedure in execution shall be the same, but this is not inconsistent perhaps with the execution's being limited by the nature of the decree. An exception may be imagined excluding particular species of property from being touched at all. This change of expression in the later law cannot be ascribed to mere carelessness or oversight; it is capable of being explained; and the intention of the Legislature is to be ascertained from the grammatical sense as applied to the object in view: *Eastern Counties Railway Company v. Marriage* (1). The Bombay Court of Small Causes had no ma-

(1) 9 H. L. Ca. 32. See p. 36. S. C. 31 L. J. Exch. 73. 7 Jur. N. S. 53.
8 W. R. 748.

1876.

IN RE
JAGJIVAN
NAN'A'BHA'I.

chinery to execute decrees against immoveable property; but the Legislature, having amply provided for it in the Code of Civil Procedure, might well have given to the Courts (governed by the Code of Civil Procedure a power which it denied to the former Court. Section 284 of the Code enacts that "a decree of any Civil Court within any part of the British territories in India * * * which cannot be executed within the jurisdiction of the Court whose duty it is to execute the same, may be executed within the jurisdiction of any other Court in the following manner." By this provision the Legislature has placed the entire machinery which it has constituted by the following sections at the disposal of every Civil Court within any part of the British territories in India, irrespective of its jurisdiction, except where special limitations are prescribed, as in Act XI, of 1865, and it cannot be denied that the Bombay Court of Small Causes is such a Court as comes within the provisions of Section 284. The construction contended for of Section 287 cannot be put upon it without the addition of some such words as the following:—"But if such a decree or order shall be that of a Court of Small Causes, it shall have the same effect as if the executing Court were acting as a Small Causes Court." We cannot, of course, make such an addition to the section when we find that the grammatical construction of its words, as they stand, is quite consistent with the general purpose of the Act.

The decree of the Small Cause Court in this case was referred for execution by the District to the Subordinate Judge, and this was perfectly legal under the concluding clause of Section 287.

The District Judge was, therefore, quite within his province in giving his sanction to the prosecution of the applicant who, he as well as the Subordinate Judge thought, had committed perjury and forgery before the latter. With the exercise of his discretion on the merits of the case we do not interfere. The application must be rejected.

Note.—In *Reg. v. Hayestibi* (unreported) WEST and NAN'A'BHA'I HARIDA'S, JJ., held that the High Court had no authority to interfere with the discretion to grant a sanction for prosecution, even in a case in which the High Court would not have granted the sanction itself. See also on this subject *Barkhatsul-ah v. Rennie* [1 Ind. L. R. (Allahabad) 17].