

the previous section 373, which determines the consequences of the withdrawal of a suit with or without the consent of the Court. But there is no analogy between the withdrawal of suits and execution proceedings. The withdrawal of the latter is an indulgence to the judgment-debtor, and does not require the sanction of the Court to enable fresh proceedings in execution to be taken. Moreover, the application of the section to execution proceedings would be in direct conflict with clause 179 of Schedule II of the Limitation Act (XV of 1877) as construed by the case above cited. These considerations do not appear to have been brought to the notice of the Court which decided *Pirjâde v. Pirjâde* ⁽¹⁾.

We must hold, therefore, that the application did not become a dead letter for the purpose of limitation, and reverse the order of the District Court, rejecting the plaintiffs' application for execution as barred by the Statute of Limitation, and remand the case for disposal on the merits. Costs of this appeal to follow the result.

Order reversed and case remanded.

(1) I. L. R., 6 Bom., 681,

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birchwood.

KASTURSHET JAVERSHET, PLAINTIFF, *v.* RA'MA' KA'NHOJI,
DEFENDANT.*

Practice—Procedure—Decree—Execution—Decree of Small Cause Court sent for execution to Court of Subordinate Judge—Latter Court not competent to question validity of such decree—Mofussal Small Cause Court Act XI of 1865, Sec. 20, certificate under—Civil Procedure Code (Act XIV of 1882), Sec. 239.

The plaintiff having obtained a decree against the defendant in the Court of Small Causes at Poona, applied, under section 20 of Act XI of 1865, to the Court of the Subordinate Judge at the same place for execution against the immoveable property of the defendant. Notice having been issued to the defendant under section 248 of the Civil Procedure Code (Act XIV of 1882) calling upon him to show cause why execution should not issue against him, he appeared and applied to be allowed to pay the judgment-debt by instalments, alleging that he was an agriculturist,

* Civil Reference, No. 23 of 1885.

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and pleading his inability to pay in a lump sum. The plaintiff denied that the defendant was an agriculturist. The Subordinate Judge raised an issue as to whether the defendant was an agriculturist, and having, after inquiry, found the issue in the affirmative, was of opinion that the decree should be considered a nullity and should not be executed, inasmuch as the defendant being an agriculturist, the Court of Small Causes had no jurisdiction to pass it. On reference to the High Court,

Held, that the Subordinate Judge was not competent to question the validity of the Small Cause Court decree, his duty being confined to enforcing it, on the "presentation of a copy of it and certificate," as provided by section 20 of Act XI of 1865. Nor could he take any notice of the status of the defendant as an agriculturist. The only course open to the defendant was to apply to the Small Cause Court for a review of its judgment, for which purpose the Subordinate Judge might stay the execution of the decree as provided by section 239 of the Civil Procedure Code (Act XIV of 1882).

THIS was a reference by Ráv Sáheb Govind Vásudev Tullu, Joint Subordinate Judge at Pooná, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The reference was stated as follows :—

"The plaintiff obtained a decree against the defendant in the Court of Small Causes at Pooná, and having presented to this Court a copy of the judgment and a certificate under section 20 of Act XI of 1865, has applied to this Court in *darkhást* No. 250 of 1885 to issue execution upon the dwelling-house and the other immoveable property belonging to his judgment-debtor. Notice having been issued to the judgment-debtor under section 248 of the Civil Procedure Code (XIV of 1882) to show cause why execution should not proceed against him, he appeared in person and applied for instalments, alleging that he was an agriculturist, and pleading his inability to pay the judgment-debt in a lump sum. The judgment-creditor also appeared in person, and denied that his debtor was an agriculturist.

"An issue was raised whether the judgment-debtor was an agriculturist.

"On the day appointed for hearing evidence on this issue, the judgment-debtor stated on oath that he was an agriculturist, and that he had no other source of livelihood besides agriculture, and in support of his statement he produced his assessment receipt-books showing that he had been paying assessment in respect of the lands standing in his name since 1864. The

judgment-creditor appeared through his pleader, and did not offer any evidence to show that the judgment-debtor was not an agriculturist, but he pleaded that the decree which was sought to be executed having been passed by the Court of Small Causes, this Court had no power to alter it by granting the debtor instalments, and that the debtor having waived his plea of pleading in the Court of Small Causes that he was an agriculturist, the question cannot be raised and tried in this Court while executing the decree passed by the Small Cause Court.

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“On the evidence submitted by the judgment-debtor, my finding on the issue raised is that the judgment-debtor is an agriculturist.

“The points for reference are :—

“1. Whether the decree of the Court of Small Causes should be considered a nullity and not be executed at all, because it has been obtained in a Court which had no jurisdiction to pass it.

“2. Whether, in the event of such a decree not being considered as a nullity, the judgment-creditor can apply to this Court for executing the decree without producing the conciliator's certificate, under section 47 of the Dekkhan Agriculturists' Relief Act

“3. Whether a plaintiff, obtaining a decree against an agriculturist in the Court of Small Causes, can resist his application for instalments made under section 22 of the Dekkhan Agriculturists Relief Act.

“The principal point to be considered is whether this Court can take cognizance of the real status of the judgment-debtor as to his being an agriculturist at the present stage. For the reasons stated for my opinion on the first point, I think that this can be done, and the judgment-debtor having been proved to be an agriculturist, instalments should be granted to him under section 20 of the Dekkhan Agriculturists' Relief Act, with a due regard to his means and circumstances. My opinion on the third point, therefore, is that in the present case the judgment-creditor cannot resist the application of the judgment-debtor made by the latter under section 20 of the Dekkhan Agriculturists' Relief Act.”

There was no appearance for the parties.

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SARGENT, C. J.—The Subordinate Judge was not competent to question the validity of the Small Cause Court decree. His duty was confined to enforcing it, on the “presentation of a copy of it and certificate,” as provided by section 20, Act XI of 1865. Nor could he, in our opinion, take any notice of the status of the defendant as an agriculturist. The only course left to the defendant was to apply to the Small Cause Court for a review of its judgment, for which purpose the Subordinate Judge might stay the execution of the decree, as provided by Section 239 of the Code of Civil Procedure (Act XIV of 1882).

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Birdwood.

1885.
 July 23.

RA'MCHANDRA BA'BA'JI, APPLICANT, v. SITA'RA'M VINA'YAK,
 OPPONENT.*

Review—Civil Procedure Code (Act XIV of 1882), Sects. 617, 619 and 623—Subordinate Judge with Small Cause Court powers—Small Cause Court.

The High Court has no power to review a judgment passed by it on a reference from a Subordinate Judge with Small Cause Court powers. Clause (c) of section 623 of the Code of Civil Procedure (XIV of 1882), allows of a review of judgment on a reference only from a Court of Small Causes. The judgment of the High Court in such a case is not a decree or order within the meaning of clause (b) of the section, but is simply a statement of the grounds, in conformity with which the lower Court is to dispose of the case, as provided by section 619.

THIS was an application for a review of the judgment of the High Court in Reference No. 49 of 1884 made by Ráv Bahádúr Náro Mahádev Thosar, First Class Subordinate Judge of Násik, with Small Cause Court power, under section 617 of the Civil Procedure Code (Act XIV of 1882), in the case of *Sitáram Vináyak v. Rámchandra Bábáji*⁽¹⁾. The question referred to the High Court in that case was as to the effect of an agreement made between the plaintiff and the defendant. The High Court held that the decree should be for the plaintiff. The defendant now sought for a review of judgment.

* Application, No. 270 of 1885.

¹ See Printed Judgments for 1885, p. 24.