

plaintiffs among the rest, and it would be inconsistent with the policy of the insolvency law that they should obtain a further remedy by an independent execution of their own, an advantage not shared by the other creditors. "So completely does the bankruptcy of one partner sever the joint rights and interests of the partnership, that even an execution issued against the partnership effects subsequently to the act of bankruptcy, will be invalid and inoperative upon these effects; for the act of bankruptcy overreaches the execution; and it is not competent for the execution creditors to disappoint the arrangements made in bankruptcy for the equal distribution of the effects of the partnership among all the creditors; since it would defeat the just policy of the bankrupt laws"—Story on Partnership (5th Ed.), p. 537. Substituting "the adjudication" for "the act of bankruptcy," these principles appear to me to be equally applicable to this country.

The Judge's summons must be made absolute, and the claim allowed with costs, subject to the amendment of the summons by substituting the name of the official assignee of Madras for that of Mr. Turner. I certify for counsel.

Attorneys for plaintiff:—Messrs. *Hirálál, Mulla and Mulla.*

Attorneys for claimant:—Messrs. *Craigie, Lynch and Owen.*

Attorneys for defendant:—Messrs. *Chitnis, Motilál and Malvi.*

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

BHOMSHETTI JINAPPASHETTI (ORIGINAL DEFENDANT), APPLICANT, v.
 UMA'BA'I (ORIGINAL PLAINTIFF), OPPONENT.*

*Practice—Procedure—Summons—Service of summons—Civil Procedure Code
 (Act XIV of 1882), Secs. 80-82.*

Where a defendant is temporarily absent from home, and is not represented at his house by an agent or male member of his family, a Judge is not justified in treating the fixing of a summons to his door as due service. The summons should be again sent to the defendant's house to be served upon him when the inquiries made show that he is likely to be at home and to be found there.

* Application No. 204 of 1894 under extraordinary jurisdiction.

1895.

SARDARMAJ
 P.
 ARANVAYAL
 SABIAPATHY.

1895.

November 14

1895.

BHOMSHETTI
v.
UNÁBÁI.

The Civil Procedure Code (Act XIV of 1882) in the matter of the service of a summons does not take into account the female members of a defendant's family, and does not rely upon the presumption that they will take steps to inform the defendant of what takes place in his absence.

APPLICATION under the extraordinary jurisdiction (section 25 of the Provincial Small Cause Courts Act IX of 1887) against an order passed by Ráo Bahádur Jayasatya Bodhráv Tirmalráo, First Class Subordinate Judge of Belgaum.

Application by the defendant to have the decree passed against him on the 13th April, 1894, set aside on the ground that the summons had not been duly served upon him.

It appeared that on the 3rd April, 1894, the bailiff went to the house of the defendant, but could not find either the defendant or any male upon whom service could be effected; that he was told by the defendant's wife that the defendant had gone to Gokák and would return in two or four days; that thereupon the bailiff had posted "copy of the summons on the outer door of the defendant's house."

The Subordinate Judge held that this was sufficient service, and passed a decree against the defendant *ex parte* on the 13th April, 1894.

In the following May the defendant having heard of the decree applied to the Subordinate Judge to set it aside under section 108 of the Civil Procedure Code, but the Subordinate Judge rejected the application.

The defendant applied to the High Court under its extraordinary jurisdiction and obtained a rule *nisi*, calling on the plaintiff to show cause why the order of the Subordinate Judge should not be set aside.

Vásudeo G. Bhandárkar appeared for the applicant (defendant) in support of the rule :—The summons was not properly served. The record, if correct, shows that the plaintiff was informed of the place where defendant had gone. There was no report by the bailiff that defendant could not be found, or that attempts had been made to effect service on defendant and that he had evaded it. Under sections 80 and 82 of the Civil Procedure Code, the Court must be satisfied that the defendant is evading service of

the summons—*Rama Ray v. Shridhar Pershad*¹⁾; *Cohen v. Nursing Dass*⁽²⁾. The fact that the defendant's wife knew that the bailiff came to the house to serve the summons on her husband does not show that the defendant came to know of the suit. A wife cannot be said to be an agent under the provisions of the Civil Procedure Code, nor does it contemplate that females should be treated as agents.

There was no appearance for the opponent (plaintiff) to show cause.

FARRAN, C. J. :—We think that in this case the order of the Subordinate Judge exercising Small Cause Court jurisdiction refusing to set aside the decree, was not according to law.

The defendant applied to set aside an *ex-parte* decree passed against him on the 13th April, 1894, on the ground that the summons had not been duly served. From the affidavit of the serving officer it appeared that he went to the house of the defendant at Hasur on the 3rd April, 1894, and not finding the defendant there, nor any male upon whom service could be made, was told by the defendant's wife that the defendant had gone to Gokak, a neighbouring village, and would return in a period, according to the bailiff's statement, of four, and according to that of the plaintiff's servant, of two days. Thereupon the serving officer posted a copy of the summons on the outer door of the house. The Subordinate Judge treated this as due service. We are of opinion that he was in error in doing so.

The object of the service of a summons in whatever way it may be effected (other than substituted service to which other considerations apply) is that the defendant may be informed of the institution of the suit in due time before the day fixed for the hearing, and when from the return of the serving officer it appears that there is no likelihood that the summons will come to the defendant's knowledge in due time, or a probability that it will not so come to his knowledge, it cannot be said that there has been due service. When a defendant is temporarily absent from home and is not represented at his house by an agent or male member of his family, we think that a Judge is

1895.

BIOMENETTI
v.
UMÁBÁI.

(1) 4 Cal. L. R., 337.

(2) I. L. R., 19 Cal., 201.

1895.

BHOMSHETTI

v.
UMÁBAI.

not justified in treating a summons affixed to his door as due service. The summons should be again sent to the defendant's house to be served upon him when the inquiries made show that he is likely to be at home and to be found there. The Civil Procedure Code in the matter of the service of a summons does not take into account the female members of a defendant's family, and does not rely upon the presumption that they will take steps to inform the defendant of what takes place in his absence.

In the present case it appears from the petition of the defendant that he did not hear of the institution of the suit until after the decree had been passed. That fact was not, however, before the Subordinate Judge. The defendant there relied upon the technical insufficiency of the service of the summons, as we think he was justified in doing. Section 108 provides that if the defendant satisfies the Court that the summons was not duly served, it shall pass an order to set aside the decree. There was no evidence before the Subordinate Judge that the defendant knew of the service of the summons before the hearing.

We make the rule absolute, and setting aside the decree direct the Subordinate Judge to restore the suit to his file and dispose of it on the merits. Costs of this application to be costs in the case.

Rule made absolute and decree set aside.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

1895.

November 14.

PARASHRAM HARLAL (ORIGINAL PLAINTIFF), APPLICANT, v. GOVIND GANESH PORGAUMKAR (ORIGINAL APPLICANT AND ORIGINAL DEFENDANT), OPPONENTS.*

Mortgage—Equity of redemption—Execution—Attachment of equity of redemption—Civil Procedure Code (Act XIV of 1882), Secs. 266 and 274—Transfer of Property Act (IV of 1882), Sec. 60.

The equity of redemption of the mortgagor is immoveable property, and is, as such, liable to be attached and sold in execution of a decree under section 266 of the Civil Procedure Code (Act XIV of 1882). Its attachment can be effected under section 274 of the Code by an order prohibiting the judgment-debtor from dealing with it

* Application No. 146 of 1895 under extraordinary jurisdiction.