APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Jacob.

1903. *July* 16.

DAMODAR SHALIGRAM, DECREE-HOLDER, *v.* SONAJI, JUDGMENT-DEBTOR.*

Limitation Act (XV of 1877), schedule II, article 179 (5)—Civil Procedure Code (Act XIV of 1882), section 248—Decree—Execution—Notice to show cause why decree should not be executed—Date of the order—Step in aid of execution.

Where a notice to show cause why a decree should not be executed is issued under section 248 of the Civil Procedure Code (Act XIV of 1882), the time provided for by article 179 (5) of the Limitation Act (XV of 1877) runs from the date of the order directing the same: actual service of the notice is not necessary.

REFERENCE by R. D. Nagarkar, Subordinate Judge of Yeola in the Násik District, under section 617 of the Civil Procedure Code (Act XIV of 1882).

The facts were as follows:—

On the 2nd June, 1897, the plaintiff, Damodar Shaligram, obtained a money decree in his favour in a suit cognizable by a Court of Small Causes. Subsequently on the 9th June, 1903, he applied to the Subordinate Judge's Court at Yeola in its Small Cause jurisdiction for the execution of the decree. The application was made three years after the previous application for execution which was presented on the 30th May, 1900, and a question having arisen as to whether it was barred under clause (4), article 179, schedule II of the Limitation Act (XV of 1877), the plaintiff contended that clause (5) of the article was applicable and the application was not time-barred, inasmuch as a notice under section 248 of the Civil Procedure Code (Act XIV of 1882) had been prepared and sent for service on the defendant sometime after the 9th June, 1900, on the application of the 30th May, 1900.

The record of the case showed that the Court-fee for a notice under section 248 of the Civil Procedure Code was paid on the 8th June, 1900, and a notice was prepared on or after the 9th June, 1900. This notice was sent to the Názir of the Court for service,

* Civil Reference No. 7 of 1903.

but it was returned unserved. There was no evidence before the Court showing that though the notice was not served, the defendant was aware *aliundee* of the fact that a notice under section 248 was prepared and sent for service upon him under the orders of the Court.

The Subordinate Judge having entertained a doubt on the point, he submitted the following question :—

Whether a notice prepared under section 248 and sent to the Názir for service upon a judgment-debtor but not actually served upon him, in the absence of evidence to show that the judgment-debtor had knowledge of the fact of preparation and transmission for service to the Názir, amounts to "issuing a notice" under clause 5, article 179 of schedule II of the Limitation Act?

The opinion of the Subordinate Judge was in the negative for the following reasons : —

As remarked in the commentary under section 248 in Suntoke's Civil Procedure Code, Edition of 1898 :—"A notice issued under section 248 calling upon the judgment-debtor to show cause why execution should not issue against him is called a notice for revival or renewal of judgment because under the Limitation Act, article 179, clause 5, the decree-holder gets a fresh period of limitation from the date of issuing such notice. The issuing of this notice is not a mere formality, but a condition precedent to the valid execution of a decree in cases falling under clause (*a*) or (*b*) of section 248 : *Gopal Chunder* v. *Gunamoni*.(1) " Proceedings in execution without such notice having been given were held to be void and of no effect whether the auction-purchaser was the decree-holder or a third party : *Sahdeo* v. *Ghasiram*.(2) In the former of these cases Beverley, J., remarked :—"Having regard to the provisions of sections 248, 249 and 250 of the Code of Civil Procedure, it seems to me clear that until notice is issued on the legal representative of the judgment-debtor, the Court has no jurisdiction to issue its warrant for the execution of the decree." In the same case Norris, J., remarked :—"The issuing of the notice required by section 248 of the Code of Civil Procedure is a condition precedent to the execution of the decree against the representative of the deceased judgment-debtor." This case arose under section 248, clause (*b*), but no distinction is made in the Code or in any of the cases that have come to my notice between this clause and clause (*a*) under which the present application for execution falls as regards the effect of the notice proscribed in this section. The point is not discussed in *Hari Ganesh* v. *Yamunabai*,(3) which is a case falling under clause 5 of article 179 of the Limitation Act. The case at I. L. R. 3 Cal. 518 refers to a notice under section 248 which was served on the judgment-debtor.

(1) (1892) 20 Cal. 370. (2) (1893) 21 Cal. 19.

(3) (1897) 23 Bom. 35.

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Section 249 of the Civil Procedure Code runs thus :—

"If the person to whom notice is issued under the last preceding section (248) does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed."

"If he offers any objection to the enforcement of the decree, the Court shall consider such objection and pass such order as it thinks fit."

No question can arise as to the person to whom notice is issued not appearing or not showing cause unless the notice is served upon him. The only notice which this section contemplates is, I think, a notice served upon the party against whom it is issued. The notice contemplated in section 248 is, I believe, the same, namely, a notice served upon the party against whom execution is applied for. The term "issuing notice" in clause 5 of article 179, schedule II, of the Limitation Act, is obviously used in the same sense which it bears in sections 248 and 249 of the Civil Procedure Code. The term is probably borrowed in the Limitation Act which is a later enactment from the Code of Civil Procedure (Act X of 1877), for section 248 of the Civil Procedure Code is specifically mentioned in clause 5, article 179, of the Limitation Act. If the term "issuing a notice" includes its service, as I think it does, then a notice prepared for the purpose of section 248 will be ineffectual to keep a decree alive unless it is actually served upon the judgment debtor, or unless the judgment-debtor is otherwise aware that such a notice was prepared and handed over to the Názir for service upon him.

The practice in some Subordinate Courts is to regard the date of preparation of the notice under section 248 irrespective of its service as equivalent to date of issue of such notice for the purpose of clause 5 of article 179 of the Limitation Act. I am not able to find any ruling of the Bombay High Court dealing with this question which is of great importance in determining questions of limitation under the above clause 5 that frequently occur.

I entertain a reasonable doubt upon the point considering the practice abovementioned that prevails in some Courts, and have therefore of my own motion submitted it for the decision of the Honourable the High Court.

The importance and effect given to the notice under section 248 requires that the notice should be one served upon a party and not one which is returned unserved. It is called a notice for revival of judgment probably under a fiction that the service of notice gives to a judgment-debtor from its date as much knowledge of the judgment as if a new judgment was passed against him. On general considerations also the Legislature could hardly have meant by the words "the Court shall issue notice" used in section 248 of the Civil Procedure Code, a notice not served; for a notice not served or not known to the judgment-debtor is practically no notice at all. In the Select Committee's Report, lately published, on a Bill for the amendment of the Code of Civil Procedure, now before the Legislative Council of the Government of India, in clause 248 (*j*), paragraph 1, provision is made for setting aside an order passed *ex-parte* "after notice to a judgment-debtor." This refers to a notice under section 248 and contemplates a notice served. The term "issue of a notice" is not altered

apparently because it has been understood that the issue of a notice includes its service and not merely its preparation and despatch for service, in cases in which it has not been served.

The present application for execution being made to a Court invested with the jurisdiction of the Court of Small Causes in a suit which is cognizable exclusively by such Court, no appeal lies from an order that may be passed by the Court in execution, the order being final.

Dattatraya W. Vilvaumkar (amicus curiæ), for the decree-holder (plaintiff):—Notice need not be served. The expression "issuing notice" in clause (5), article 179, schedule II, of the Limitation Act, means the date on which the order directing the issue of notice is passed by the Court: *Udit Narain* v. *Rampartap Singh*.[1] Section 248 of the Civil Procedure Code deals with the manner of the execution of the decree. It has nothing to do with limitation: *Bimola Soondurree* v. *Kalee Kishen*.[2]

Krishnaji H. Kelkar (amicus curiæ), for the judgment-debtor (defendant):—We rely on *Raj Bullub Shaha* v. *Gossain Dass Shaha*,[3] which shows that the notice must be served on the defendant.

JENKINS, C. J.:—In our opinion actual service is not necessary. But where notice has issued, time runs from the date of the order directing the same under section 248, Civil Procedure Code (XIV of 1882). This case must be determined by reference to that date.

(1) (1881) Weekly Notes, All. 120. (2) (1874) 22 Cal. W. R. 5.

(3) (1870) 13 Cal. W. R. 400.