to be given will be given in the first instance to the Court of Wards as the guardian of the first defendant. We do not think that the plaintiffs should be punished in this case by an award against them of costs, and under the circumstances we will allow them their costs. Respondents Nos. 1 and 2 must pay their own costs, and respondent No. 1 must pay full Court-fee on the ground that he is seeking to set aside the decree for Rs. 6,000.

Cross-objections allowed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

1916.
March 28.

JIVAPPA TIMMAPPA BIJAPUR (ORIGINAL JUDGMENT-DEBTOR), APPLICANT *v.* JEERGI MURGEAPPA VIRBHADRAPPA AND ANOTHER (ORIGINAL JUDGMENT-CREDITORS), OPPONENTS.*

*Foreign decree—Execution by British Court—The British Court can inquire if the decree was passed with jurisdiction—*Ex parte *decree—Absent defendant not submitting to jurisdiction—Decree, a nullity—Civil Procedure Code (Act V of 1908), section 44, Order XXI, Rule 7—Act XIV of 1882, section 229B.*

It is open to a British Court executing a foreign decree to enquire whether the foreign Court had jurisdiction to pass the decree.

A decree pronounced by a Court of a foreign state in a personal action *in absentem*, the absent party not having submitted himself to its authority, is a nullity.

THIS was an application from an order passed by F. J. Varley, District Judge of Bijapur, confirming an order passed by J. A. Saldanha, Subordinate Judge at Bagalkot.

Execution proceedings.

* Civil Extraordinary Application No. 331 of 1915.

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The opponents filed a suit in the Shimoga Court (a Court in the Mysore State) to recover a sum of money from the applicant, who was residing at Bagalkot (in British territory). The summons was served upon him through the Bagalkot Court; but he failed to appear. The Shimoga Court passed a decree against him in his absence.

The decree was then transferred by the Shimoga Court to the Bagalkot Court for execution. The applicant appeared in the Bagalkot Court and contended (1) that the Shimoga Court had no jurisdiction to pass the decree; and (2) that the decree could not, therefore, be executed by the Bagalkot Court.

The Subordinate Judge held that the Shimoga Court had jurisdiction to pass the decree; that the decree was obtained without fraud after the summons had been duly served on the applicant at Bagalkot; and that the Bagalkot Court had jurisdiction to execute the decree. The order passed to allow the execution proceedings to continue was confirmed by the District Judge on appeal.

The applicant applied to the High Court.

G. S. Mulgaonkar, for the applicant.

A. G. Desai, for the opponents.

BATCHELOR, J. :—In the Shimoga Court in the Mysore State the opponents obtained a personal decree *ex parte* against the present appellant in his absence. That decree was afterwards sent by the Shimoga Court to the Court of the Subordinate Judge of Bagalkot for execution.

Two questions arise: first, whether it was open to the executing British Court to enquire whether the Shimoga Court's decree was passed with jurisdiction,

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and secondly, if it is so open, then whether the Shimoga Court had or had not jurisdiction to make this decree *in absentem* against the appellant who is a resident of British territory.

In *Haji Musa Haji Ahmed* v. *Purmanand Nursey*,[1] Mr. Justice Farran held that the Court executing a foreign Court's decree was entitled to exercise a judicial discretion as to whether it would put into force the provisions of section 229B of the Civil Procedure Code of 1882. Section 229B of that Code is reproduced in section 44 of the present Code and deals with the power of the Governor General in Council by notification to declare that the decrees of foreign Civil Courts may be executed in British India as if they had been passed by the Courts of British India. Dealing with that provision Mr. Justice Farran says that the section "does not remove the decree of a Native State falling within its purview from the category of foreign judgments. It merely alters the procedure by which such a judgment can have effect given to it in British India. Notwithstanding the section, such a decree still remains a foreign judgment, and its effect is removed by showing want of jurisdiction in the Court which passed it. This Court is, therefore, not precluded from ascertaining whether a foreign Court had jurisdiction merely because that Court has itself decided an issue upon that point in its own favour."

Mr. Desai has contended that the grounds upon which Mr. Justice Farran's decision was based can no longer be sustained since the change made in section 225 of the Civil Procedure Code as re-enacted in Order XXI, Rule 7. For under the old section 225 it was open to the executing Judge for any special reason to call for proof of the jurisdiction of the Court which passed the

[1] (1890) 15 Bom. 216.

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decree, while under Order XXI, Rule 7 which is now the law, it is not so open to the Judge. It is argued therefore that in all cases the Judge has no longer any power to investigate the question whether the Court which passed the decree had jurisdiction to do so. The argument, however, seems to me fallacious in the case of foreign decrees, for, if Rules 6 and 7 of Order XXI be read together and in the light of the defining section, section 2 of the Code, it is clear that Rule 7 applies only to decrees of British Courts. This view was expressed by the Chief Justice in the course of the arguments in *Harchand Panaji* v. *Gulabchand Kanji*,[1] and the decision in this latter case seems to me to supply further support to the opinion which I am expressing. For, if Mr. Desai's argument was sound, then in *Harchand's case*[1] the decision should merely have been that it was not open to this Court to question whether the Baroda Court had or had not jurisdiction to pass the decree then in question. This Court's decision, however, is not based upon that ground. On the contrary, the Chief Justice and my learned brother Shah determined that the Baroda Court had jurisdiction because the defendant submitted himself to that jurisdiction. This decision, therefore, is an instance where the Court neglecting the argument now advanced by Mr. Desai did in fact examine whether the foreign Court passing the decree had jurisdiction so to do. For these reasons upon the first point the decision must, in my opinion, be in the appellant's favour.

The second point admits, I think, of no doubt, for, upon the facts stated it is directly governed by the Privy Council decision in the *Faridkot case*, *Gurdyal Singh* v. *Raja of Faridkot*.[2] It was there laid down

[1] (1914) 39 Bom. 34.

[2] (1894) 22 Cal. 222 : L. R. 21 I. A. 171.

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that in a personal action a decree pronounced by a Court of a foreign state *in absentem*, the absent party not having submitted himself to its authority, is by international law a nullity. I am of opinion, therefore, that so far as regards the Courts in British India this decree of the Shimoga Court against the present appellant is a nullity.

The result is that the order under revision must be reversed and the application for execution must be dismissed with costs throughout.

SHAH, J. :—I agree that the rule should be made absolute and the application for execution rejected with costs throughout. The first point in this application is whether the executing Court has power to consider the validity of the decree of the foreign Court sought to be executed in British India or not. It seems to me that under section 44 of the Civil Procedure Code, which is substantially a reproduction of section 229 B of the Code of 1882, the Court has the power to consider that question, as it is discretionary under that section for the executing Court to proceed with the execution of the decree. Despite the omission in Rule 7 of Order XXI of the words "or of the jurisdiction of the Court which passed it," which occurred in section 225 of the old Code, it appears that the power of the executing Court with reference to the decrees of foreign Courts is not in any way altered or modified. On this point it seems to me that the reasons given for the decision in *Haji Musa Haji Ahmed* v. *Purmanand Nursey* [1] still hold good, and that the Court is not precluded from ascertaining whether the foreign Court had jurisdiction or not. No doubt section 225 is referred to and relied upon in the judgment. But the main ground of the decision seems to me to be independent

[1] (1890) 15 Bom. 216.

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of that section and is not affected by the alteration in that section in the new Code.

Mr. Desai has relied upon the case of *Hari Govind* v. *Narsingrao Konherrao.*(1) But in that case the decree supposed to have been transferred for execution was passed by a British Court. To such a decree, undoubtedly, Rule 7 of Order XXI would apply, and the alteration already noted clearly points to the conclusion which is accepted in the case. But that decision does not, in my opinion, justify the argument advanced by Mr. Desai that the same limitation with regard to the powers of the executing Court must be deemed to exist with reference to the decress of those Courts, in respect whereof the Governor General in Council may have made the declaration contemplated by section 44 of the Civil Procedure Code.

It is true that this point is not decided in *Harchand Panaji* v. *Gulabchand Kanji*(2) ; but the fact remains that, in spite of the argument based upon Order XXI, Rule 7 and the case of *Hari Govind* v. *Narsingrao Konherrao*(1), the Court did consider the question as to whether the decree of the Baroda Court which was sent to a British Court for execution was valid or not.

It seems to me, therefore, that in this case the question whether the decree under execution is a valid decree binding upon the defendant in British India can be and ought to be considered.

The second point relates to the validity of the decree in question, and does not present any difficulty. Having regard to the decision in *Gurdyal Singh* v. *Raja of Faridkot*(3), it is clear that in a personal action a decree pronounced *in absentem* by a foreign Court, to

(1) (1913) 38 Bom. 194. (2) (1914) 39 Bom. 34.
(3) (1894) 22 Cal. 222 : L. R. 21 I. A. 171.

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the jurisdiction of which the defendant has not in any way submitted himself, is an absolute nullity. The decree in question has been obtained in the absence of the defendant, who lives in British India and is a British subject and who is not alleged to have submitted to the jurisdiction of the foreign Court. The decree under execution is, therefore, a nullity in British India and cannot be executed.

Order reversed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

1916. April 5.

PANDURANG LAXMAN UPHADE (ORIGINAL OPPONENT), APPLICANT v. GOVIND DADA UPHADE (ORIGINAL APPLICANT), OPPONENT.*

Civil Procedure Code (Act V of 1908), Order XXI, Rule 89—Sale in execution of decree—Judgment-debtor privately selling the property so sold—Application by judgment-debtor to set aside Court-sale.

A judgment-debtor whose property has been sold at a Court sale in execution of the decree against him, has a right to apply to have the sale set aside as a person owning the property sold in execution of the decree within the meaning of Rule 89 of Order XXI of the Civil Procedure Code of 1908, in spite of the fact that he has transferred his interest in the property after the Court sale.

THIS was an application against an order passed by F. K. Boyd, District Judge of Nasik, reversing the order passed by G. L. Dhekne, Subordinate Judge at Pimpalgaon.

Execution proceedings.

The property belonging to the judgment-debtor Govinda, was sold at a Court sale in execution of a decree passed against him, and was purchased by one Pandurang for Rs. 166. Subsequently, the property was

* Civil Extraordinary Application No. 337 of 1915.