

*Before Sir Barnes Peacock, Kt., Chief Justice, and Mr Justice Mitter.*

IN RE COMPTOIR D'ESCOMPTE DE PARIS v. M. R. CURRIE AND COMPANY.\*

1869  
Sept. 18.

*Rule to show Cause—Sufficiency of Affidavit.*

A recorder refused an application for execution against certain defendants, who came in and confessed judgment before any issue of summons in the suit. The plaintiffs then appealed to the High Court by petition, for an order that the Recorder should issue execution against the defendants, or that he should show cause for not doing so. The affidavit did not state whether any decree had actually been made.

*Held*, the affidavit was insufficient; the Court cannot grant a rule to show cause, unless it is satisfied that the rule should be made absolute, if no cause be shewn.

THIS was a petition on behalf of Francis Choisy, of Maugoe Lane, Calcutta Manager of the Comptoir D'Escompte de Paris, on the facts as stated in his affidavit, which was as follows :

1. " That the Comptoir D'Escompte de Paris, on the 23rd August 1869, filed a suit in the Court of the Recorder of Moulmein, against Messieurs M. R. Currie and Co., merchants of Moulmein, for Rs. 1,10,247-0-4, whereupon, and before the issuing of the summons in the said suit, the defendants came into Court and confessed judgment in favor of the Comptoir D'Escompte.
2. " That, on the 25th of August, the plaintiffs, the Comptoir D'Escompte applied to the learned Recorder of Moulmein, for execution in manner and form prescribed by the 212th section of the Code of Civil Procedure.
3. " That the learned Recorder refused to grant execution to the plaintiffs on the ground that, in the case of *The Bank of Bengal v. Currie and Co.* (1) in which the Bank of Bengal were the plaintiffs, and Messieurs M. R. Currie and Co. were defendants, he the learned Recorder had submitted a case, for the opinion of this Honorable Court, under the provisions of Act XXI. of 1863, section 22; and that as the same question would arise in the case in which the Comptoir D'Escompte were plaintiffs, he was precluded from granting execution to the plaintiffs, the Comptoir D'Escompte, by Act XXI. of 1863, section 23.
4. " That the suit in which the Comptoir D'Escompte are plaintiffs has not been submitted to this Honorable Court under Act XXI. of 1863, section 22, or otherwise.
5. " That the decree in the said suit is still wholly unsatisfied.

" Your petitioner, therefore humbly prays your Lordships' order that the learned Recorder of Moulmein shall issue execution to the plaintiffs in the suit in which the Comptoir D'Escompte de Paris are plaintiffs and Messrs. M. R. Currie and Co. are defendants, in the form in which and as of the date on which the said plaintiffs applied for execution to the said learned Recorder; or that your

\* Motion No. 770, of 1869.

(1) 3 B. L. R., A. C., 396.

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"Lordships will order the said learned Recorder to show cause why he should not issue execution in the said suit in form and of the date aforesaid."

PEACOCK, C. J.—It is quite clear that, upon the materials which we have before us, we cannot order the Recorder to issue execution. The affidavit does not state in terms that the plaintiffs have got a decree. It merely says that an application for execution was made in proper form, and that the Recorder has refused the application on the ground that he had reserved a question for the consideration of the High Court. The nature of the question is not stated in the affidavit, but we are referred to the case of *The Bank of Bengal v. Currie and Co.* (1), which is now here; and we see that the question which the Recorder has referred is whether a judgment can be given upon confession under the Code of Civil Procedure. We therefore see that the Recorder has refused to grant execution until he knows whether he can give a decree upon confession. Whether a decree upon confession has been given or not, we cannot say. If a decree upon confession has been entered up, the Recorder may have held, as a matter of law, that the decree is void, and that no execution can be issued upon it; and if he has so held, any objection to his decision would be a ground of appeal, and not for an application for a rule calling upon him to show cause why he should not issue execution. Further, it does not appear whether the application for execution was general against all the property of the defendant or specific against particular property specified in the application. If the application was on the latter form, the Recorder might have good reasons for refusing to grant the execution against that property, and the objection to his ruling would form a ground of appeal if the property was of sufficient value. At all events we cannot, upon the materials before us, say that there is a *prima facie* case made out against the Recorder, that he was so far wrong in refusing to issue execution, that we in the exercise of our powers under section 15 of the Act, under which the Letters Patent of this Court were issued, ought to order him to do that which he has refused to do, or to show cause. Before we can grant a rule to show cause, we ought to be satisfied that if no cause be shewn, we ought to make the rule absolute. Upon this affidavit we are quite in the dark as to whether if no cause be shewn we should be promoting the ends of justice by making the rule absolute, and therefore we cannot issue a rule to show cause.

The application may be renewed upon an affidavit sufficiently detailing the facts.