APPELLATE CIVIL

1873
March 18.

Before Mr. Justice Jackson and Mr. Justice Mitter.

KALEE COOMAR CHATTERJEE (DEFENDANT) *v.* SIDDHESSUR MUNDUL (PLAINTIFF).*

Nazir, Liability of—Attachment of Property in Execution of Decree—Failure to return Property attached on satisfaction of the Decree—Beng. Act V of 1863, *ss* 4 *&* 8.

In a suit brought against the plaintiff in the Collector's Court for arrears of rent, a decree was obtained, and a warrant was issued for the attachment of certain moveable property belonging to the plaintiff. The warrant was addressed to the Nazir of the Collector's Court, and was by him delivered to one of the registered peons of the Court for execution. The peon reported to the Nazir that he had attached the property in question, and had placed it in charge of certain persons whose receipt for it he produced and filed. Subsequently the plaintiff paid the amount of the decree into Court, and an order was made releasing his property from the attachment. A peon was sent to restore the property to the plaintiff, but the persons in whose charge it was said to have been left, alleged that they had never taken possession of the property, and the peon was unable to restore the property to the plaintiff. In a suit brought by the plaintiff against the Nazir to recover the property or its value, *held* that the Nazir was not liable, Bengal Act V of 1863 having altered the relation which formerly existed between the Nazir and the peons of the Revenue Courts, and put them in the position of paid servants of Government.

THE respondent brought this suit against the Nazir of the Collector's Court of the 24-Pergunnas, to recover the value of certain property which had been attached under the following circumstances:—A suit had been brought against the respondent by his zemindar under Act X of 1859 in the Deputy Collector's Court for arrears of rent, and a decree had been given against him. In execution of that decree, a warrant was issued by the Deputy Collector to attach certain of the respondent's moveable property: and the warrant, which was a

* Special Appeal, No. 967 of 1871, from a decree of the Judge of the 24-Pergunnas, dated the 30th May 1871, affirming a decree of the Munsiff that district, dated the 31st August 1870.

written document, being one of the forms prescribed for adoption by the Revenue Courts, was addressed to the Nazir of the Collector's Court, the appellant, and delivered by him to one of the registered peons of the Court for execution. The peon reported to the Nazir that he had attached certain property which was specified, and placed it in the custody of certain persons, and he filed a document called a *zimmanama*, purporting to be a receipt for the property attached. After the attachment of the property, the present plaintiff paid the amount of the decree, and an order was obtained directing that the attached property should be released. A peon was accordingly despatched to restore the property to the present plaintiff: but the persons in whose charge it was said to have been placed alleged that they had never taken possession of the property, and the peon was therefore unable to restore the property as directed by the Court. Upon this the plaintiff brought the present suit against the Nazir of the Collector's Court for the value of the property attached, on the ground that the Court having taken possession of his property was responsible for the loss which had accrued to him in consequence, and was bound to restore to him the property or its value.

The lower Courts both held that the Nazir was liable for the full amount claimed. The Judge found that the decree-holder, acting in collusion with the peon, had, under color of the attachment, forcibly taken away the plaintiff's property; that no personal misconduct attached to the Nazir himself in the matter; but that as the warrant of attachment was addressed to him, he must be held responsible for the misconduct of the attaching peon, who was his subordinate. The material points of the Judge's decision which are referred to in the judgment of the High Court were as follows:—

"It is true that the responsibility of the Nazir is not declared in s. 99, Act X of 18 9, in the same express terms which are used in s. 233, Act VIII of 1859, but it appears to me that such an express declaration was not requisite in either case. An action assuredly would not lie against the Nazir for the act of attachment, or for any other act done in execution of the order of the Court, but it does lie here because he does not execute the order of the Court for the restoration

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of the property, and because his inability to restore the property arises from his own negligence and want of due care of the property of which he assumed the custody. The officer executing the writ is the Nazir and not the *piada*, who is a mere subordinate of the Nazir, an agent whom he is empowered to employ, but not an agent on whom he is empowered to devolve his own liabilities. The appellant contends that under the terms of s. 4, Beng. Act V of 1863, the *piada* is the only officer who can be employed in the service or execution of the process of the Court; but he selects his own *piadas*; and it does not follow that he is relieved from his responsibility by his employment of the authorized services of the persons whom he appoints with the sanction of the Court.

"It is urged that there is this difference between the Nazir, and the Sheriff of an English Country, that the Nazir cannot appoint his *piadas* without the approval of the Court, whereas the appointment of the bailiffs lies in the hands of the Sheriff alone: but I cannot see that this practice, if it be truly stated, affects in any degree the responsibility of either. The writ as the Munsif shows, is directed to the Nazir, and he is bound to see that it is properly executed either by himself or by his *piadas*; and if loss arises from his want of due care, either personally or through his subordinates, he is responsible for it.

The Judge accordingly condemned the Nazir to pay to the plaintiff the full value of the property attached. From this decision a special appeal was preferred to the High Court.

The *Legal Remembrancer* (Mr. *Bell*) and Baboos *Unnodaprosad Banerjee* and *Juygodanund Mookerjee* for the appellant.

Mr. *J. S. Rochfort* and Baboo *Mutty Lall Mookerjee* for the respondent.

The *Legal Remembrncer*, for the appellant, contended that the plaint disclosed no cause of action against the Nazir. No personal misconduct was attributed to the Nazir: the utmost that was alleged against him was that he had been guilty of constructive negligence through the misconduct of the peon, who was his subordinate. The judgment of the lower Court was based upon a fancied analogy between the Sheriff of an English county and the Nazir of a mofussil Court. But in reality there is no

sort of resemblance between the two—*Okhoy Chunder Dutt* v. *Erskine* (1). [JACKSON, J.—There is no necessity to go into that point, there is clearly no resemblance between the two.] The action of the Nazir from first to last was perfectly regular. The warrant of attachment was issued under s. 98 of Act X of 1859: and was addressed to the Nazir in the form given in the Schedule of the Act. S. 146 provides that all processes issued by a Collector shall be served "by the Nazir or such other officer as the Collector may direct." Now the word Nazir is defined in s. 168 to be "any officer of a Court authorized to serve or execute its process." The person who served the process in the present case was a peon registered under Beng. Act V of 1863. S. 4 of that Act provides that "no person who is not a registered peon shall be employed in the service of the process of any Court without the special leave of such Court." And s. 8 directs the Nazir to endorse the serving-peon's name on the back of the process. The name of the peon was duly endorsed on the back of the process, and it is difficult to see what more the Nazir could have done. These registered peons are not agents or servants of the Nazir: they are the servants of the Court. The Nazir is in no way responsible for their conduct. The Court can dismiss them: and the Nazir must employ them. The maxim of *respondent superior* does not apply to persons standing in such a relation. The Nazir derived no pecuniary advantage from the service of the writ of execution. He was merely acting as a public officer—*Hall* v. *Smith* (2). It is well established that one officer in a public department is not responsible for a subordinate in the same department, though he may appoint the Subordinate—*Whitfield* v. *Lord Le Despencer* (3), *Nicholson* v. *Mounsey* (4) and *Mersey Dock Trustees* v. *Gibbs* (5). The parties on whom the liability really falls ought to have been made defendants in the Munsif's Court.

Mr. *Rochfort* for the respondent.—The Nazir is liable in this case, he being responsible for the acts of his subordinates. He was primarily bound to execute the writ himself. If he chose

(1) 3 W. R., Mis., 11; see 14.
(2) 3 Bing., 156; see 160.
(3) 2 Cowper, 754.
(4) 15 East., 385.
(5) L. R., I. H., L. C., 93; see 124.

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to execute it through a peon, he must take the responsibility of doing so. A peon employed by the Nazir does not come under the words of s. 99, Act X of 1859, as an "officer executing the writ;" see s. 144, which provides that "every process shall be served or executed by the Nazir, or by such other officer as the Collector may direct." Here the Collector did not direct any one else to execute tho writ. That peons are not officers is also shown by s. 133 where the words are "officers holding sales under this act, and all persons employed by or subordinate to such officers" by which is meant "peons." Where a thing is intended to be done by a peon, it is so stated; see s. 124. Under s. 99 the Nazir is to approve of a fit person to take charge of the goods attached. Here he clearly did not select a fit person. He attached the property through the peon, and the peon those the custodians. The peons appointed by the Nazir under s. 3, Beng. Act V of 1863, are the Nazir's agents. He has power to dismiss them; see Regulation V of 1804, ss. 12 and 13, and Regulation VIII of 1809, s. 10. The relation between the Nazir and his peons is analogous to that between a Sheriff and his bailiffs; see Broom on the Superior Courts, p. 581. By s. 8, Beng. Act V of 1863, and ss. 12 and 13 of Regulation V of 1804, the Nazir is liable for the acts of the peons. Their appointment was subject to the responsibility prescribed by s. 2, Regulation XIII of 1793. That Regulation has been repealed since the decision in this suit by Act XXIX of 1871. By that section the Nazirs were to enter into a penal obligation for the good behaviour of the peons whom they appointed. A decree holder is not responsible for, or liable to be injured by, the act of a Court in assisting him to execute his decree—*Rajbullub Gope* v. *Issanchunder Hujrah* (1) and *Joykallee Dossee* v. *The Representatives of Chand Mala* (2). The arguments of the other side drawn from expediency might be reasons for changing the law, but not for defeating the remedies to which it is submitted the plaintiff is entitled. The Nazir ought to have enquired as to the disposal of the property attached. The Court has no power to add parties to the suit under s. 73,

(1) 7 W. R., 355. (2) 9 W. R., 133.

Act VIII of 1859, unless they are entitled to some claim or interest in the subject of the suit, or will be affected by the result—*Joy Gobind Doss* v. *Gouree Proshad Shaha* (1) and *Podmalochan Sen* v. *Lall Chund Gupta* (2). Here neither the custodians, nor the decree-holder, nor the Government, are likely to be affected by the result, or have any claim on the property taken.

The *Legal Remembrancer* in reply.

The judgment of the Court was delivered by

JACKSON, J. (who after stating the facts continued:)—The case comes before us in special appeal, and the principal point which we have to decide is whether, under the circumstances, there is any personal liability attaching to the Nazir. The view taken by the Zillah Judge in his decision, which is the one immediately before us, is contained in the part of the judgment which I am about to read. He says:—(reads the portion set out in the statement of the case.) The Government advocate appeared in this case, and although we could not see that the Government had any direct interest in the matter, not being a party to the suit, we gladly heard the learned gentleman, and are much indebted to him for the assistance which he has rendered to the Court in the decision of this case. It was contended amongst other things that both the Nazir and the peon who has the officer immediately employed to execute the warrant are paid servants of Government, and one servant is not responsible for the acts of the other; that the Nazir, like all Nazirs of the Civil Courts, has now no interest in the fees leviable as *tallubana* for serving processes; that there is no analogy between the office of a Nazir and that of a Sheriff of an English county as supposed by the Courts below; that the peon was a public servant; and that if a warrant in this case was addressed to the Nazir, it was so done in contravention of the terms of Beng. Act V of 1863; and accordingly it was contended that the

(1) 7 W. R., 202. (2) 1 B. L. R., S. N. xxvi.

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writ ought to have been addressed to the peon, and that the common practice in this matter was to make over warrants of Courts, though addressed to the Nazir, to the Subordinate *piadas* for execution. Mr. Bell, I should mention at the close of his argument, proposed to point out who was the real person who ought to have been sued, and who was liable for the demand, and he contended that the Munsif ought to have made the parties who were really liable defendants in the suit. As to this contention I may observe that, when a plaintiff brings a suit against a person who is not liable to him for the particular matter for which the suit is brought, it is not for the Court to go on and find out who is the person really liable to the plaintiff; and as it was altogether foreign to the purposes of this appeal to consider who, if not the Nazir, was liable, we did not think it necessary to enter into that part of the case.

The Munsif who decided the suit in the first instance laid considerable stress upon the terms of s. 87, Act X of 1859, and the form being, I understand, the Form (E), annexed to that Act, and which is prescribed by s. 86 of that Act. S. 86 was repealed by Beng. Act VI of 1862, and instead of that we have s. 17 of Beng. Act VI, of which the last words are "process of execution against the person or moveable property of a debtor shall be in the Form (E) or the Form (F) contained in the schedule to Act X of 1859, or in a Form as nearly resembling those Forms as the circumstances of the case may admit." Now subsequent to the passing of Act X of 1859, and before the bringing of this suit, a material change in the law regulating the machinery for executing process of Courts, including the Courts of the Collector, had taken place by the repeal of s. 14, the only then surviving part, of Regulation XXVI of 1814, and by the enactment of Beng. Act V of 1863. When Act X of 1859 was enacted, not only the Regulation of 1814, but also Regulation V of 1804, ss. 12 and 13, were in force, and by these two provisions taken together, it was provided that all orders and processes of the Civil Courts and Revenue officers were to be executed by the Nazirs of those Courts, who were permitted to appoint their own *mirdhas* and peons, and who received as their remuneration one-fourth of the *tallubana* paid in each case to the peon who

carried the several processes and orders. Under the state of things, a large portion, nearly the whole, of a Nazir's receipt, was derived from such deductions and other fees received by him, and most probably in consideration of that circumstance, the Nazir might have been held responsible for the acts of his peons resulting in wrongful damage to parties. That was entirely changed by Beng. Act V of 1863, and the peon, as well as the Nazir, became, it seems to me, a regular paid officer of Government. It was left to the discretion of the executive Government to direct that the peons should be either paid by fixed salary, or remunerated by fees, but the peculiar connection which previously existed between them and the Nazir was entirely severed. The Nazir had the nomination of them subject to the approval of the Judge (and in this case of the Collector), but he had not the power to remove them, nor had he power to employ any person other than a peon appointed under that Act in the service or execution of any process of Court, except with the special leave of the Court. I do not propose to consider here the relation between an English Sheriff and a Nazir, because I am clearly of opinion that there is no analogy whatever between the case of a Sheriff and the case of a Nazir. The Munsif observes, referring to the provisions of ss. 87 and 99, Act X of 1859:—"These provisions show that an officer, and not a peon, is to execute such writs, that he is actually and manually to take moveables out of the judgment-debtor's possession, and deposit them in some fit place, or keep them in the custody of some fit person approved by himself." I do not quite know what in the Munsif's mind was the distinction between a peon and an officer, but if he meant to say that the Nazir is an officer, and the peon is not, and that the Nazir is actually and manually to take moveables out of the judgment-debtor's possession, and deposit them in some fit custody, I fear that, unless Nazirs are provided with some physical apparatus beyond that which is commonly given to men, it would be absolutely impossible for them to undertake such duties; and if to the performance of these manual functions is to be attached the corresponding liability in such matters, I apprehend no pecuniary inducement will be sufficient to induce a person of respectability to accept

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so burthensome an office. S. 8, Beng. Act V of 1863, provides:—"On every process issued for service or execution by any peon appointed under this Act, there shall be endorsed the name of the peon deputed to serve or execute the same, the period within which the peon is required to certify service or executi n, the amount payable for the service or execution of the process, and the date of payment, and such endorsement shall be signed by the Nazir or clerk of the Court." This provision recognizes distinctly that it is the peon who serves and executes, and it is the peon from whom certificate of service or execution is to be taken, and if in addition to such certificate of service, which in my experience is always furnished by the peon, the Nazir appends some further certificate of his own, that, it seems to me, is not sufficient to entail on him any pecuniary responsibility, and does not affect the reality of the service by the peon. The Judge finds in this case that the property in respect of which the damages were claimed had been removed from the possession of the present plaintiff who was the defendant in the rent suit, but he says:—"It is not material in this suit to find whether the *zimmadars* held it or the decree-holder; for, if the Nazir is primarily responsible, he may settle with those who took the property; and if the Nazir is not primarily responsible, this suit must fail, because he has been made the sole defendant." It appears to me that it was highly material to find whether the *zimmadars* or the decree-holder held the property, because the law does not, so far as I know it, authorize the making over of the property attached to the decree-holder's custody, but it does in s. 99 expressly authorize the property being left in the custody of some fit person, meaning thereby, I suppose, some independent and respectable person. The Judge states that "an action lies here because the Nazir does not execute the order of the Court for the restoration of the property." In the present case it seems that the order of attachment was executed by one peon, and the order for restoration of the property entrusted to another, I confess I am unable to see how the Nazir, under the circumstances, failed to execute the order of the Court for the restoration of the property. Then it is said that the "inability

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of the Nazir to restore the property arises from his own negligence." It appears to me that there was no negligence on the part of the Nazir. He entrusted the *parwanna* to a peon who was appointed with the sanction of the Court expressly for the purpose of such duties; and the return of the peon with the Nazir's ceritficate upon it was submitted in due course to the officer presiding in the Collector's Court, and was presumably approved by him.

I have already said that, in my opinion, the officer executing the writ was not the Nazir, that the *piada* was not a mere subordinate of the Nazir, and an agent whom he had power to employ, but a person who, although in a subordinate capacity, was as much an officer of the Collector's Court as the Nazir himself In this view of the case, it appears to me that the Nazir is not directly liable, as held by the Courts below, to indemnify the plaintiff, and it is not our function to settle here who is the person, if any, liable.—

I am reminded that there is no specific allegation of misconduct against the Nazir in this case, but only a charge of implied neglect. The question therefore turns upon the general liability of the Nazir.

The judgment of the lower Courts are set aside, and the plaintiff's suit is dismissed with all costs.

Appeal allowed.

PRIVY COUNCIL.

BABOO BISSESSURNATH AND OTHERS (PLAINTIFFS) *v.* MAHARAJAH MOHESSUR BUX SING BAHADOOR AND OTHERS (DEFENDANTS).

P. C.* 1872 *May* 22, 23, 24, 25.

[ON appeal from the High Court of Judicature at Fort William in Bengal.]

Boundary—Riparian Proprietors—Custom—Proof—Reg. XI of 1825, *s.* 2.

The plaintiff sued to obtain possession of land on the ground of the existence of a custom in the district that where land which had once been alluvial lies between two branches of a river (or two rivers), and from time to time the volume of water shifts, so that alternately one of those channels is deep, and the other is fordable, then the whole of such intermadiate land belongs to the land-owner on the side of the

* *Present:*—THE RIGHT HON'BLE SIR J. W. COLVILE, SIR MONTAGUE E. SMITH, SIR ROBERT COLLIER, AND SIR LAWRENCE PEEL.