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bered that the suit, as brought in the first Court, was not a suit for a declaratory relief only, but a suit for that relief as also for possession. It seems to us that the plaintiffs having claimed for recovery of possession in the suit, and Mussamat Akalo having died previous to the time when the case was taken up for trial, there is no reason why the plaintiffs should be driven to a separate suit for recovery of the same relief which they asked for in this suit, but which they asked upon a ground somewhat different from that upon which they have been allowed to recover judgment. We think, upon the whole, that there are no sufficient reasons for our interference with the judgment of the Court below, and we accordingly dismiss this appeal with costs.

We may add that our attention was called by the learned vakil for the appellant to the case of *Har Saran Das* v. *Nandi* (1), in the Allahabad Court, in which the learned Judges seem to have expressed themselves to the effect that a widow, belonging to a caste which in remarriage is permitted, does not, upon her second marriage, forfeit her interest in the estate, and that section 2 of Act XV of 1856 does not apply to such a widow. It does not appear that the true position of a Hindu widow inheriting the estate of her husband was considered in that case. That was considered in the cases of *Murugayi* v. *Viramakali* (2) and *Matungini Gupta* v. *Ram Rutton Roy* (3) to which we have already referred.

S. C. C. *Appeal dismissed.*

## CRIMINAL REVISION.

*Before Mr. Justice Norris and Mr. Justice Beverley.*

DHARAM CHAND LAL (PETITIONER) *v.* QUEEN-EMPRESS (OPPOSITE-PARTY).*

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*Penal Code (Act XLV of 1860), section 186—Nazir's power of delegation—Civil Procedure Code (Act XIV of 1882), section 251—Court Fees Act (VII of 1870), section 22.*

* Criminal Revision No. 751 of 1894, against the order passed by Babu A. C. Chatterjee, Deputy Magistrate of Purneah, dated the 24th of September 1894.

(1) I. L. R., 11 All., 330.

(2) I. L. R., 1 Mad., 226. (3) I. L. R., 19 Calc., 289.

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The petitioner was convicted under section 186 of the Penal Code of obstructing a Civil Court peon, who was attaching his property in execution of a decree; the warrant of attachment was addressed to the Nazir of the Court, *who delegated its execution to the peon by an endorsement of the* peon's name:

*Held*, that the Nazir had authority thus to delegate the execution of the warrant to the peon.

The words "to be executed" in section 251 of the Code of Civil Procedure would seem to imply that it was not intended that the "proper officer" should himself execute all warrants sent to him. And there is nothing in the Code which indicates in any way that warrants, being either warrants of arrest *or* of attachment, or for distress and sale, are to be executed by the "proper officer" in any manner different from the service of summonses.

The Court Fees Act (VII of 1870) *distinctly contemplates* that the peons are to be employed, not only for the service of summonses, notices or orders, but also for the execution of other processes, such as warrants of arrest or of attachment and distress.

Though the authority may well be conferred in more clear and explicit terms than are expressed by a mere endorsement by the Nazir of the peon's name, still it is impossible to say that that is not sufficient evidence of the delegation.

THE petitioner, Dharam Chand Lal, was, on the 24th of September 1894, convicted by the Deputy Magistrate of Purneah under section 186 of the Indian Penal Code of having obstructed one Miyajan, a Civil Court peon, who was attaching some property of the petitioner in execution of a decree, and was sentenced to pay a fine of Rs. 100. The warrant under which the attachment was made was issued by the District Judge of Purneah on the 5th of May 1894, and was addressed to the Nazir of his Court, Durga Proshad Dube. On the reverse appeared the following endorsement:

*Jhumuk Lal* (which was scored through) *4 days. 14-5-94. Miyajan. (Sd.) K. Bhaduri. 15-5-94.*

The explanation given of this endorsement was that the warrant was made over for execution to Jhumuk Lal, in the first instance, on the 14th of May. He returned it on the morning of the 15th, with a verbal report that he could not execute it, as no one attended on behalf of the decree-holder to point out any property belonging to the judgment-debtor which he could attach. The warrant was on that day made over to Miyajan, whose name was endorsed on the warrant. On the 18th of May, the Nazir made a report to the

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Sessions Judge, stating that the peon had been obstructed by the petitioner in the execution of the warrant. The Sessions Judge, on the 10th of August, examined the peon without notice to the petitioner, and gave the sanction for prosecuting the petitioner. Against this conviction by the Deputy Magistrate the petitioner appealed to the Sessions Judge, and, pending the hearing of the appeal, he applied to this Court and obtained a rule to show cause why the proceedings should not be quashed as bad in law, or, in the alternative, why the appeal should not be transferred to be heard by some other Judge.

Mr. *C. P. Hill*, Sir *Griffith Evans* and Mr. *C. Gregory* appeared in support of the rule on behalf of the petitioner.

The *Advocate-General* (Sir *Charles Paul*) and the *Deputy Legal Remembrancer* (Mr. *Kilby*) appeared to show cause on behalf of the Crown.

Mr. *Hill* on behalf of the petitioner.—Miyajan, the Court peon, at the time of the occurrence, was not acting in the discharge of his public functions, and therefore the petitioner cannot be convicted under section 186 of the Indian Penal Code. The warrant was addressed to the Nazir of the Court, and he did not execute it himself. He had no authority to delegate its execution to the peon. Nor is there anything to show that he did endorse it and so delegate its execution. [NORRIS, J.—But section 251 of the Civil Procedure Code says that the warrant is to be "delivered to the proper officer to be executed." It does not say that the proper officer should execute it himself.] The form of the warrant shows that: See Civil Process No. 28 in Appendix A to the General Rules and Circular Orders of the High Court. The form there corresponds with form No. 136 of the fourth schedule to the Code of Civil Procedure. I rely upon the case of *Symonds* v. *Kurtz* (1). That was a case decided under sections 7 and 9 of 12 and 13 Vict., cap. 50. See also Criminal Revision cases No. 240 of 1894 upon a reference from the Sessions Judge of Tirhoot (2), No. 610 of 1894 (3), and No. 414 of 1894 (4). The case of *Abdul Karim* v. *Bullen* (5) seems to be against

(1) 16 Cox's C. C., 726. (2), (3) and (4) Unreported.
(5) I. L. R., 6 All., 385.

me, but that case is a marvellous instance of gross misapplication of authorities. I also contend that the accused was exercising his right of private defence: See *Queen-Empress* v. *Tulsiram* (1). The next point is with regard to the validity of the sanction. In a case of this kind notice ought to be given to show cause. The matter was not a proceeding before a Court, and that distinguishes it from the Full Bench case of *Krishnanunda Das* v. *Hari Bera* (2). Here the proceedings came before the Court on the report of the Nazir. In *Queen-Empress* v. *Sheik Beari* (3), decided by a Full Bench of the Madras High Court after the above case, it has been held that there must be a judicial enquiry, and the party to whose prejudice sanction is given must be previously heard. There being no formal complaint, the Magistrate who took cognizance of the offence had no power to do so. The proceedings are void *ab initio*. [BEVERLEY, J.—It appears from the Civil List that the Magistrate has not been empowered to take cognizance of offences under section 191, clause (*c*) of the Code of Criminal Procedure; if that is so section 530, clause (*k*) makes the proceedings absolutely void.]

The *Advocate-General* (Sir *Charles Paul*) on behalf of the Crown.—There is an appeal pending to the Sessions Judge, and this Court cannot interfere at this stage. The petitioner has not exhausted his remedy in the lower Court. All ministerial acts can be performed by delegation: See *Walsh* v. *Southworth* (4). See also Regulation XIII of 1793 and Regulation XXVI of 1814, and Bengal Act V of 1863. All these have been repealed, but they go to show that the Nazir has always been allowed to delegate his authority to his subordinates. See also section 22 of the Court Fees Act (VII of 1870) and Part I, Chapter I, Rule 9 (*m*), and Part II, Chapter VII, Rule 11 in the General Rules and Circular Orders of the High Court; these clearly contemplate that the peons are to be employed for the execution of such processes as warrants of arrest or of attachment and distress.

(1) I. L. R., 13 Bom., 168.

(2) I. L. R., 12 Calc., 58. (3) I. L. R., 19 Mad., 232.

(4) 6 Exch., 150.

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The following judgments were delivered by the Court (NORRIS and BEVERLEY, JJ.):—

BEVERLEY, J.—The petitioner, Dharam Chand Lal, has been convicted under section 186 of the Penal Code of obstructing one Miyajan, a Civil Court peon who was attaching his property in execution of a decree, and he has been fined Rs. 100. Against this conviction the petitioner has appealed to the Sessions Judge, and he has also obtained a rule from this Court to show cause why the proceedings should not be quashed as bad in law, or, why the appeal should not be transferred to be heard by some other Judge. The principal point urged before us is that, at the time of the occurrence, Miyajan was not acting in the discharge of his public functions, inasmuch as the warrant of attachment was addressed to the Nazir of the Court, and the Nazir had no authority to delegate its execution to the peon; nor, in fact, did he so delegate its execution.

A further point was raised that the Deputy Magistrate ought not to have taken cognizance of the case, inasmuch as there was no formal complaint or sanction of the Court which issued the warrant; but on this point we need say no more than this, that although there may have been some slight irregularity in the institution of the proceedings, it does not appear to us that that irregularity has occasioned any failure of justice, and we should not, therefore, be disposed to interfere with the conviction on that ground.

The warrant in question in this case is in the printed form No. 28 authorized by this Court, corresponding with the form No. 136 of the fourth schedule to the Code of Civil Procedure with such modifications as have been sanctioned by this Court under section 644.

The warrant was issued by the District Judge of Purneah on the 5th May 1894, and was addressed, as usual, to the Nazir of his Court, Durga Proshad Dube by name. On the reverse is the following endorsement: "*481, Jkumak Lal* (scored through) *4 days. 14-5-94. Miyajan. (Sd.) K. Bhaduri. 15-5-94.*"

The endorsement is thus explained in the evidence of the Nazir Durga Proshad Dube, and of the Naib Nazir Kali Nath

Bhaduri. The warrant was made over for execution to Jhumuk Lal, in the first instance, on the 14th May. He returned it on the morning of the 15th, with a report that he could not execute it, as no one attended on the part of the decree-holder to point out any property belonging to the judgment-debtor which he could attach. The decree-holder's mukhtar complained that Jhumuk Lal had never told him that he was going to execute the warrant, and at his request the warrant was that same day made over to another peon, Miyajan, whose name was then and there endorsed on the warrant.

In arguing the matter before us, Mr. Hill has relied upon the case of *Symonds* v. *Kurts* (1) and upon two unreported decisions of this Court.

In Revision case No. 240 of 1894, upon a reference from the Sessions Judge of Tirhoot, a Bench of this Court (Trevelyan and Banerjee, JJ.) set aside a conviction under section 186 of the Penal Code, on the ground that the person obstructed was not acting in the discharge of his public duties in executing a certain warrant. The warrant in that case was issued by the Magistrate for the realization of a chokidar's salary under section 45 of Bengal Act VI of 1870; it was addressed to the Court Sub-Inspector, and was by him endorsed to a peon of the Sub-divisional Court, who was the person obstructed. The Court, having regard to the words of the section in question ("*and shall therein charge some person therein named* with the execution thereof") appears to have held that the Court Sub-Inspector had no authority to delegate the execution of the warrant to any other person.

In Revision case No. 610 of 1894, another Bench of this Court (Banerjee and Sale, JJ.) set aside a similar conviction under section 186 of the Penal Code, on the ground that it was not proved that the person who was obstructed in the execution of the warrant had any authority to execute it. The warrant in that case was addressed to the Nazir of the Collector's Office at Serampore, but the person who went to execute it was the *Bakshi* or Assistant Nazir. The Court remarked: "There is nothing to show how the delegation was effected in this case, whether

(1) 16 Cox, 726.

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there was any delegation at all by the Nazir, or whether the *Bakshi* merely followed what the Deputy Magistrate calls the usual practice, and took these two *purwanahs* addressed to the Nazir for the purpose of executing them without anything express being said to him by the Nazir. Upon this point there is an utter blank in the evidence. That being so, and the person against whom the warrants were issued being, as was observed by one of the learned Judges who decided the case of *Symonds* v. *Kurtz* (1), entitled to know whether it was executed by a person who had authority to execute it, we are of opinion that the conviction under section 186 of the Indian Penal Code for obstructing a public servant in the discharge of his public functions cannot be sustained on the evidence as it stands." The further contention was raised in that case that the Nazir had no power to delegate his authority, but the Court expressly refrained from pronouncing any opinion upon that contention, there being no evidence before them that the Nazir had delegated his authority.

The case of *Symonds* v. *Kurtz* (1) arose out of the execution of a warrant of distress for sewers' rates under section 7 of 12 and 13 Vict., cap. 50. Section 9 of that statute provides that the warrant issued by the Commissioners "may be directed to the Bailiff, Expenditor, Dyke-reeve, Collector, or other sewers officer within such limits, *and to any other person* or persons, or to any one or more of them, *as by the two Commissioners of Sewers granting the same shall be deemed fit.*" The warrant in that case was directed to the Collector of the sewers rates, who made it over for execution to another person, who again handed it over to a third person. It was held that, under the statute, the Collector had no authority to hand it over to any other person for execution. Field, J., said: "It is a general principle of law that every person whose house is entered and whose property is seized, is entitled to know the authority under which it is done, and to be able to see whether that authority has been followed. Here the warrant under the statute was given to him who had no authority to hand it over to another person for execution. It

(1) 16 Cox, 726.

would be a shocking thing to say that an authorized man can give the warrant to any person he pleases, and allow that person to commit a trespass. The respondent against whom the warrant was issued was entitled to know whether it was executed by a person who had authority to execute it, and the only person who would have such authority would be the person to whom it was directed." And Cave, J., said: "I am clearly of the same opinion. The man who executed the warrant was not authorized to execute it."

It seems to me that none of the cases relied on by Mr. Hill concludes the matter now before us. In two of those cases the decision turned upon the wording of the special statute under which the warrant in question was issued, and in the third case this Court expressly refrained from deciding the point, not being satisfied that the Nazir had, as a matter of fact, delegated his authority.

On the other hand, the question appears to have been before the Allahabad High Court in the case of *Abdul Karim* v. *Bullen* (1), and that Court decided that a Nazir was not debarred by anything in the Code of Civil Procedure from authorizing a deputy to execute a warrant for him, and that the endorsement of the deputy's name on the back of the warrant was sufficient *prima facie* evidence of the delegation. The learned Advocate-General has also drawn our attention to the case of *Walsh* v. *Southworth* (2), in which it was held that a warrant directed by two Justices to the Overseers of a township could legally be executed by them by deputy. In that case Pollock, C.B., said: "It is quite clear that for mere ministerial purposes every public officer may appoint a deputy as for the performance of acts which do not require any exercise of discretion or judgment." Parke, B., said: "A public officer, whose duty is purely ministerial, may always appoint a deputy." And Martin, B., said: "I think that the execution of a warrant is purely such a ministerial duty as to justify the Overseers in deputing it to other parties."

It seems to me, however, that this is not a matter to be decided in accordance with English law and precedents, but that

(1) I. L. R., 6 All., 385. (2) 6 Exch., 150.

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we should rather look to the practice and procedure which obtains and has obtained in Bengal in respect of the service and execution of processes. There is no analogy whatever between the legal status of a Sheriff in England and the office of the Nazir of one of our Mofussil Courts. The question before us is simply, whether, under the law and practice obtaining in the Mofussil, a Nazir has authority to execute processes addressed to him through his deputies or subordinates; and this is really the only question in the present case, because the evidence clearly shows that the peon, Miyajan, was deputed by the Nazir to execute the warrant of distress.

Now it may be convenient, in the first instance, to examine the provisions of the Code of Civil Procedure as regards the service and execution of processes of Court.

Section 72 deals with the summons to a defendant, and it prescribes that the summons shall ordinarily be delivered or sent to the proper officer, *to be served by him or one of his subordinates.*

Section 94 prescribes that all notices and orders required by this Code to be given to or served on any person shall be . . . served in the manner hereinbefore provided for the service of summons.

Section 166 provides that every summons to a person to give evidence or produce a document shall be served as nearly as may be in manner hereinbefore provided for the service of summons on the defendant.

Section 251 relates to the issue of a warrant for the execution of a decree and runs as follows: "Such warrant shall be dated the day on which it is issued, signed by the Judge or such officer as the Court appoints in this behalf, sealed with the seal of the Court, and *delivered to the proper officer to be executed.* And a day shall be specified in such warrant on or before which it must be executed, and the proper officer shall endorse thereon the day and manner in which it was executed, or, if it was not executed, the reason why it was not executed, and shall return it with such endorsement to the Court from which it issued."

The words "to be executed" in this section would seem to imply that it was not intended that the "proper officer" should

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himself execute all warrants sent to him. And indeed there is nothing in the Code which indicates in any way that warrants, being either warrants of arrest or warrants of attachment or for distress and sale, are to be executed by the "proper officer" in any manner different from the service of summonses. In the case of attachment of moveable property, for instance, the warrant is directed to the Nazir, and section 269 of the Code provides that "the attaching officer shall keep the property in his own custody, or *in the custody of one of his subordinates*, and shall be responsible for the due custody thereof."

Section 336 treats of the arrest of a judgment-debtor and speaks of the officer authorized to make the arrest; and section 337 speaks of "*the officer entrusted with the execution of the warrant.*"

Now the "proper officer" to whom all summonses and warrants are sent in the ordinary course of business in accordance with the provisions of sections 72 and 251 of the Code is the Nazir, and in the case of warrants they are expressly directed to him for execution. That is clear from the printed forms prescribed by the High Court.

The Nazir has been recognized as the proper officer of the Court for the purpose of executing its processes from the earliest times of the British administration of justice in Bengal. In Regulation IV of 1793, which was the first enactment on the subject of procedure in civil cases, it was laid down in section 5 that the summons on the defendants was to be served "by the Nazir or his inferior officer;" and section 6 provided that when material witnesses did not appear upon summons, the Court might issue an order to the Nazir to seize and bring the witnesses before the Court; section 13 prescribed that "every process, rule, order or decree of the Zillah and City Courts . . . . was to be immediately served or executed without application to any person or the interference of any individual whomsoever, according to the requisition of it within the limits of the special jurisdiction of each Court."

Section 21 provided for the service of summonses and the execution of processes by peons, and fixed their scale of remuneration. The name of each peon deputed to serve the process,

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the amount of his subsistence money, and the number of days for which he was to receive it, were to be endorsed on the writs.

Regulation V of 1804 provided for the appointment and removal of native officers of Government in the Judicial and other departments; but the Regulation was not to affect the "Naib Nazirs, mirdahs, peons and *burkundazes*, and similar descriptions of public servants who are nominated and removed upon sufficient cause by their immediate superiors under the responsibility of the latter for their good conduct;" and section 12 allowed the Nazirs "as heretofore to appoint their own naibs and the mirdahs and peons or any similar descriptions of public servants employed under their immediate direction and control."

By Regulation II of 1806, section 2, clause (3) the summons was to be served on the defendant "through the Nazir of the Court by a single *chaprassi* or *peon;*" Regulation XXVI of 1814 again dealt with the same subject of procedure in civil cases; and section 13 treated of the *peons* employed under the Nazir for the execution of processes. Those peons who were not salaried servants of Government were to be registered and to wear a distinguishing badge, and the section provided for their remuneration out of the *tallubbanah*. By Regulation VII of 1825, section 3, the Judges and Registrars of the Zillah and City Courts, who usually employ the Nazirs of those Courts to conduct the public sale of personal property in execution of decrees, or other judicial process, were authorized to employ the same officers in the public sale of immoveable property.

By Regulation VII of 1832, section 5, Munsifs were authorized to levy *tallubbanah* for the service of processes, but by clause 4 of that section the duties assigned to the Nazir in Regulation XXVI of 1814 were to be performed by the Munsifs themselves. This rule was abrogated by Act XIV of 1845, which enacted that Munsifs also should retain Nazirs on their establishments.

In the third edition of his *Procedure of the Civil Courts of the East India Company in the Presidency of Fort William in Regular Suits" (1856)* Mr. William Macpherson says at p. 181: "The process is executed by the Nazir of the Court through his inferior officers, the peons attached to the Court." And a

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pp. 190, 196, and 423 forms are given of writs, addressed in every instance to the Nazir of the Court.

The old Regulations to which I have referred were repealed some years ago, but it has been thought necessary to refer to them, in order to show that the present system under which all processes of the Civil Courts are executed through the Nazir's establishment is a system that has been in existence for over a century. Certain changes in details have been effected of late years, but they do not affect the general principle that the Nazir has always been regarded as the "proper officer" responsible to the Court for the execution of its processes, and that he is allowed to entertain a subordinate establishment to whom the duty of personally serving or executing the processes sent to him may be delegated. The Nazir is now one of the ministerial officers of the Court referred to in Chapter VI of Act XII of 1887; he is a salaried officer of Government, giving security to Government for the due performance of his duties. The Naib Nazir and the peons are also now salaried officers of Government, subordinate to the Nazir. The number of the peons to be employed for the service and execution of processes in each district is by section 22 of the Court Fees Act fixed by the District Judge, and the remuneration is by section 20 settled by the High Court. The Court Fees Act distinctly contemplates that the peons are to be employed, not only for the service of summonses, notices or orders, but for the execution of other processes, such as warrants of arrest or of attachment and distress. By the rules of this Court, Nazirs are held "responsible for the due and regular service of all processes entrusted to them for service by themselves *and their subordinates*, and in each case for the correctness of the statements made in the return."—Civil Rules and Orders, Part I, Chapter I, section 9 (*m*). The rates of salaries fixed by the Court are given in Part II, Chapter VII, section 10.

The practice of endorsing the name of the peon upon the back of the process, as evidence of his being delegated or deputed to execute it, dates, as has been said, from 1793, and although, as was pointed out by the learned Judges who decided the case of *Abdul Karim* v. *Bullen* (1) above referred to, the authority might

(1) I. L. R., 6 All., 385.

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well be conferred in more clear and explicit terms than are implied by the mere endorsement of the peon's name, still it is impossible to say that that is not sufficient evidence of the delegation. Nor would it seem that the person against whom such a warrant is issued has any real ground for questioning the peon's authority to execute it, or that he has any right to complain that he is left in ignorance as to that authority. The warrant itself bears the seal and signature of the Court from which it issues ; the peon who executes it wears a badge on which is engraved the name of the Court to the establishment of which he belongs ; he is a salaried Government servant, and his name is endorsed on the back of the warrant. It would seem, therefore, that there are sufficient safeguards against a person being subjected to illegal process, and sufficient material to enable any person so subjected to obtain redress.

I am of opinion, therefore, that Mr. Hill's contention in this case fails. I find that the Nazir had authority to delegate the execution of the warrant to Miyajan peon, and that it is proved that he did so delegate it.

At the same time I think that, having regard to the fact that the person alleged to have been obstructed was a peon on the establishment of the District and Sessions Judge of Purneah, and that the conduct of the Nazir of the Judge's Court is called in question, it will be more satisfactory to all parties if the appeal is heard by some other Judge. As we intimated at the hearing, therefore, the appeal is transferred for trial to the Sessions Judge of 24-Pergunnahs, and we direct that the records be sent direct to his Court with a copy of this order, in order that there may be no further delay in the hearing of the appeal.

NORRIS, J.—I am of the same opinion and for the same reasons.

S. C. B.