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Their Lordships, therefore, are of opinion that the appeal of Radha Binode Mandal against the decree of the High Court in the suit No. 155 of 1919 fails. It follows as a necessary consequence of the findings of the High Court being upheld, that the appeal of Radha Binode Mandal against the decree of the High Court in suit No. 214 of 1919 also must fail.

Their Lordships, therefore, are of opinion that both the appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *T. L. Wilson & Co.*

Solicitor for Respondents: *Watkins & Hunter.*

A. M. T.

CIVIL RULE.

Before Panton and Mitter JJ.

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March 28.

DHARANI MOHAN RAY

v.

KSHITIPATI RAY*

Arrest of Judgment-debtor—Release of judgment-debtor after arrest on furnishing security—"Other sufficient cause" in O. XXI, r. 40, C. P. C., what it means—Sufficiency of security—Civil Procedure Code (Act V of 1908), s. 55 and O. XXI., r. 40(3).

The Court must be satisfied, on *proper* materials being placed before it that a judgment-debtor is unable from poverty or "other sufficient "cause" to pay the amount of the decree, before he can release him on his furnishing security or commit him to jail, under Order XXI., rule 40 of the Code of Civil Procedure. Such security must be substantial.

The provisions of s. 55 of the Code of Civil Procedure are mandatory.

*Civil Rule No. 330 of 1927, against the order of A. C. Banerjee, Subordinate Judge of Hooghly, dated March 7, 1927.

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CIVIL RULE obtained by the decree-holder.

This Rule arose out of a decree of the Original Side of the Calcutta High Court in favour of the applicant, who sought to realise costs in the suit amounting to Rs. 4,963 odd. An application upon notice to the opposite party was made in the High Court for execution of the decree by the arrest and detention in prison of the opposite party and, on the said application, a writ for the arrest of the opposite party was issued. The opposite party, however, keeping himself out of the jurisdiction of the High Court, the writ could not be executed from the 6th December, 1926 to the 21st February, 1927. On the latter date, an order was passed by the High Court transferring the said decree for execution to the Court of the Subordinate Judge of Hooghly and, simultaneously, the writ of attachment of the person of the opposite party in Calcutta was renewed by the said order. On the 28th February, 1927, an application was made before the 3rd Subordinate Judge at Hooghly for the attachment of the person of the opposite party in execution of the decree, upon which a warrant of arrest was duly issued. On the 6th March following, the warrant of arrest was executed and the opposite party was brought before the District Judge, who, in the absence of the Subordinate Judge, ordered the prisoner's release on the personal undertaking of his pleader that the prisoner would appear before the 3rd Subordinate Judge on the following day. On the 7th March, 1927, the opposite party appeared in the Court of the Subordinate Judge and filed a petition praying for his release on his personal recognizance pending an order for a stay of execution being obtained from the High Court. This was opposed on the ground that the Court had no jurisdiction to grant the said release, at all events except upon sufficient security and

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an affidavit was filed testifying to the fact that no payment had been made towards the satisfaction of the decree and stating that to the best of the deponent's belief the opposite party had been and was endeavouring to evade and obstruct the decree-holder in the execution of the decree and would abuse the process of the Court, in case he is released and further evade the jurisdiction, if he were released without sufficient security. The opposite party filed no affidavit in reply, neither did he tender any evidence, but it was represented on his behalf from the bar that he was a respectable man owning house property within the jurisdiction of the said Court to the value of some Rs. 35,000. The Subordinate Judge, therefore, passed orders releasing the prisoner on his personal recognizance to appear on the 7th April, 1927.

The decree-holder, thereupon, moved the High Court praying for a Rule calling upon the opposite party to show cause why the said order should not be set aside and further that, pending the hearing of the said Rule, the opposite party might be re-arrested and released only on his furnishing security in cash or by deposit of title deeds to the full extent of the decree. Rule was issued, but the prayer for re-arrest pending the hearing of the Rule was not granted.

Mr. N. Barwell (with him *Babu Manmatha Nath Ray*, Junior, on behalf of *Babu Hiralal Chakrabarti*), for the petitioner. There was no order under Order XXI. rule 37 C. P. C. The debtor actually appeared before the Court in arrest. Under such circumstances, the powers of the Court in dealing with him were carefully laid down. The Court has no option but to commit the debtor to prison unless he can get the benefit of Order XXI, rule 40, read with section 55,

sub-sections (*3*) and (*4*) of the Code. The provisions of these sub-sections are mandatory. In the present case the learned Judge gave no effect to them. If the debtor does not propose to avail himself of these provisions, he can only escape immediate detention by satisfying the Court that he is "unable" to pay by reason of some "sufficient cause" other than poverty. It is this condition of things for which Order XXI, rule 40, exists. The debtor must bring himself under that rule. The rule does not apply to people who say they *can*, but to people who say they *cannot* pay. The man who *can* pay, must do so forthwith or go to jail. The man who cannot, if his reason be poverty, will get a month to file his insolvency petition and meantime must furnish security for his further appearance by virtue of section 55(*3*) of the Code. The remaining category is the man who cannot then pay, not by reason of poverty, but for some "other sufficient cause"; upon him is the *onus* of satisfying the Court that there exists the sufficient cause. Without discharging this *onus*, he cannot bring himself within the sub-rule (*1*) of rule 40. In the present case, the debtor so far from pleading "inability" to pay, which is the essence of the rule, filed no statement at all either by way of affidavit or otherwise. On the contrary, his pleader, speaking on instruction merely, asserted that his client had property to the value of Rs. 35,000; and for this very reason ought not to be supposed to be avoiding the payment of a debt. The Judge treating this statement at the bar as if it were substantive evidence, proceeded to weigh it against the affidavit of the judgment-creditor who had alleged that for nearly a year after notice of execution for a sum of no more than Rs. 6,000 had been given him, the debtor had successfully evaded the incidence of the

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warrants against him, and having so weighed these matters, the Judge proceeded to release the debtor on a mere personal bond and without applying any relevant provisions of the Code. In so doing, he acted illegally and with material irregularity.

Dr. Radhabinode Pal (with him *Babu Narayan Chandra Kar* and *Babu Nirmal Kumar Sen*), for the opposite party. This is merely an interlocutory order and this Court cannot interfere under section 115 of the Code. The rule of the Code relied on by my friend is very wide and the Court may release the debtor on such terms (if any) as it thinks fit. It is for the judgment-creditor to show that the debtor has property and is evading payment or that there is no property which can be attached. This must be shown before attachment of the person can continue. The affidavit of the judgement-creditor made no such allegation. Moreover, it is a provisional order and the petitioner has suffered no damage.

PANTON AND MITTER JJ. Having heard the learned counsel who appeared in support of the Rule and the learned vakil for the judgment-debtor, we are satisfied that the order made by the Subordinate Judge on the 7th March, 1927, was not in accordance with law. In the first place, there was no evidence before him on which it was possible for him to arrive at the decision that the judgment-debtor was a person, who for any "other sufficient cause" within the meaning of Order XXI, rule 40, was unable to pay the amount of the decree. The mere statement made at the bar to the effect that he was owner of landed property is insufficient for the purpose. In the next place, it was clearly wrong for the learned Subordinate Judge to release the judgment-debtor on his personal security, which was absolutely

ineffective. Order XXI, rule 40, sub-rule (*3*) provides that the Court may release the judgment-debtor on his furnishing security, which means furnishing proper security and not the illusory security with which the learned Subordinate Judge has been satisfied.

We, therefore, set aside this order and direct the judgment-debtor to surrender at once before the Subordinate Judge, 3rd Court, Hooghly, who will then consider, on proper materials being placed before him, whether he should be committed to jail or released, and if released, upon what security; the learned Subordinate Judge must comply with the provisions of Order XXI, in the matter of security. We also draw the attention of the Subordinate Judge to the mandatory provisions of section 55 of the Code of Civil Procedure.

We may say here that the learned vakil for the judgment-debtor states that his client is willing to furnish security.

The opposite party will pay the costs in this Rule to the petitioner.

S. M. *Rule absolute.*