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JOHOORY LALL v. BULLAB LALL.

and Tenant—*Rutty Kant Bose* v. *Gungadhur Biswas* (1)—holding that the mere fact that the landlord did not on breach of covenant claim interest, instalment by instalment, for the fractional time that the rent was not paid when due, does not justify the plea that such interest so stipulated for, is not due, nor does it raise the presumption that plaintiff had waived his claim to interest."

I think now that it would be monstrous to say that the mere omission to claim interest for past years from a tenant, who did not pay his rent on due dates, should be considered a waiver of the right to claim interest for all time.

We think the decision of the lower Appellate Court is erroneous, and that the case should go back to that Court in order that it may consider whether there is any ground for exercising the discretion for withholding interest for the particular arrears due.

Case remanded.

ORIGINAL CIVIL.

Before Mr. Justice Wilson.

1879
April 9.

IN THE MATTER OF SOORENDRO NATH ROY CHOWDHRY.

Privilege of Exemption from Arrest—Party to Suit—Summary Procedure—Arrest under Writ of Small Cause Court—Act X of 1877, *s.* 642.

The general rule that a party to a suit is protected from arrest upon any civil process, while going to the place of trial, while attending there for the purpose of the cause, and while returning home, applies to a defendant to a suit under the summary procedure sections of the Civil Procedure Code who has not obtained leave to appear and defend, and who, therefore, cannot be heard at the trial. Questions as to the privilege of exemption from arrest, in the case of persons arrested under writs issued from the Small Cause Courts in Calcutta, must be governed by the English law, and not by s. 642 of the Civil Procedure Code. It is not a deviation sufficient to forfeit the privilege if the *shortest* road home is deviated from and a less crowded and more convenient road adopted.

Wooma Churn Dhole v. *Teil* (2) distinguished.

THIS was an application for discharge from custody. It appeared that the arrest took place under the following circum-

(1) Marshall, 40. (2) 14 B. L. R., App., 13.

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stances:—The petitioner, on the 2nd of April, attended the High Court in pursuance of a summons in a suit under the summary procedure sections of the Civil Procedure Code, for the purpose of ascertaining the result of the suit and of making some arrangement with the plaintiff. After the disposal of the suit, the petitioner was arrested while returning to his home in execution of a decree of the Small Cause Court, and now claimed to be discharged from custody, on the ground that he was exempted from arrest under the provisions of s. 642 of the Civil Procedure Code.

Mr. *Branson* for the petitioner moved for the discharge of the prisoner under s. 148 of Act X of 1875, and referred to *In the matter of Omritolall Dey* (1).

Mr. *Allen* for the arresting creditor.—The prisoner does not say that he was coming to give evidence, and that his presence was necessary for the conduct of the cause, and in fact, in a suit under the summary procedure sections of the Code the defendant is not entitled to appear except with the leave of the Court. It is not like the case of an ordinary suit. The plaint is in a particular form; the summons does not require the attendance of the defendant, and he cannot appear and defend except under special circumstances. The defendant says, he came to the Court to make some arrangement, but it is not necessary that he should come to the Court for that purpose. The case of *Wooma Churn Dhole* v. *Teil* (2) shows that in order that the privilege of exemption from arrest may be claimed, the person claiming it must be under the real belief that his attendance was requisite for the purposes of the trial. This case must be governed by the English law. Section 642 of the Civil Procedure Code only applies to witnesses and parties arrested under writs issued by Courts to which the Code applies. The writ of arrest in this case was issued from the Small Cause Court, and there are no provisions in the Small Cause Court Act corresponding to s. 642.

(1) I. L. R., 1 Calc., 78. (2) 14 B. L. R., App., 13.

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WILSON, J.—This case gives rise to several questions of fact and law. Mr. Allen is right in his contention that the matter is not affected by s. 642 of the Civil Procedure Code, but by English law.

This arrest is under a writ issued from the Small Cause Court, the Act constituting which has no corresponding section to s. 642 of the Civil Procedure Code, and the matter must be governed by English law.

The question is, whether the defendant attending Court, under the circumstances under which this defendant attended, is privileged from arrest. The general doctrine is that parties are privileged. The proceeding under which the hearing came on is somewhat peculiar, and it is said that a defendant attending in a suit of this nature, under the circumstances which existed here, was not privileged. The suit is under chap. 39, and when the proceedings are under that chapter the writ is in a peculiar form, and the defendant is not allowed to defend without obtaining leave in the mode prescribed. If he fails to apply, the case is set down in the undefended board, and the case being called on, a motion is made for a decree. On motion being made, the defendant is not entitled to be heard. Is that sufficient to take the matter out of the rule where otherwise the party is privileged?

On the whole, I am of opinion that the doctrine of privilege should be construed as including a case of this kind. I think so even apart from any question, whether the defendant might be heard for any collateral purpose. I think a defendant, who is to have judgment passed against him, is so far interested in the proceedings that he is entitled to be present. That being so, he would be privileged. It is impossible to say that the defendant would not have considerable interest in attending for various purposes. It might be necessary for him to attend to apply to the Court as to costs. It might be necessary for him to apply for summons.

In any case, I am of opinion a defendant is within the general terms of the doctrine of the law which gives privilege to a party attending Court.

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The case of *Teil* (1) is not an authority affecting this case, because the ground of the decision was, that the defendant, though he had come to Court, had not come as a witness. He came for a different purpose, and sought to use his presence here for a different purpose. If I am right in thinking the prisoner was privileged from arrest, it extends to the time when he was coming to Court; the time he was in Court, and the time for returning. The question, therefore, is, was the judgment-debtor really returning when the arrest took place. It is clear he started from here with the intention of going home. It is also clear that those who had to make the arrest thought he was going home, and I think they intended to arrest him on his way home. They say that they thought they could, and that they intended to, arrest him if he got home and left his house again, or if he stopped anywhere in his way home. I am sorry to say so, but I think that was not their intention. They gave instructions to the bailiff to overtake him and arrest him, if they could find that he stopped in such a way as to give them a right to arrest. The bailiff was called and gave his evidence in a very straightforward way, and he is a disinterested witness. That can hardly be said of the other witnesses, except the second witness for the defendant.

What is the evidence. He started from here and went down Chitpore Road. Got into Chitpore Road, the ordinary road by which he would naturally go to Cossipore. He denies he ever went on beyond Colootollah. The other witness—the man in the buggy—says, he did go beyond that point, because he met him a distance ahead. It is impossible to say which way the truth lies. I am disposed to think he did go some distance along Chitpore Road and turn back. It is in evidence that part of the road was blocked. I take it, that having started to go a shorter way, he changed his mind and took another road. I do not think it is laid down that a man must go home by the shortest road. If a man can go by a quicker and less crowded road, his doing that does not take away his privilege.

Then did anything happen after going into Colootollah. The bailiff says, he drove into Colootollah, and then to Ruttun

(1) 14 B. L. R., App., 13.

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Sircar's lane, and there the gharry stopped. If those in charge of the matter were a little more cautious, they would not have been in such a hurry to arrest the prisoner. They did not wait to see who came out of the gharry. The bailiff says, the gharry stopped at a house of ill-repute.

The other witness says, the gharry stopped at the door of Komul Kissen Shaw, who was with the prisoner. The mere fact of driving up Chitpore Road, and returning part of the way, was not such a change of intention as to deprive the prisoner of the privilege he claims. The arrest was made before the defendant could get out. If he had got out, and was going into the house, it would have been another question. But it lies on the judgment-creditors to show that there was some deviation, and, having failed to do this, the prisoner must be discharged.

Attorneys for the petitioner: Messrs. *Pittar* and *Wheeler*.

Attorney for the arresting creditor: Mr. *Hechle*.

APPELLATE CIVIL.

Before Mr. Justice Jackson and Mr. Justice McDonell.

1879
April 17.

BEHARI LOLL MOOKERJEE (PLAINTIFF) *v.* MUNGOLANATH MOOKERJEE (DEFENDANT).*

Limitation—Review—Application for, to be made within what time, and to whom—Beng. Act VIII of 1869, *s.* 103—*Act IX of* 1871, *s.* 6—*Act XV of* 1877, *ss.* 6 *and* 12—*Act X of* 1877, *s.* 624.

Though by s. 6 of the Limitation Act, 1877, nothing in that Act affects the period of limitation prescribed by any special or local law for any suit, appeal, or application, still the rules prescribed by that Act for computing the period of limitation are applicable to such suit, appeal, or application. Section 6 of Act IX of 1871, contrasted with s. 6 of Act XV of 1877.

THIS was a case stated under s. 617† of Act X of 1877 for the opinion of the High Court. The question raised fully appears from the letter of reference and the order thereon.

The letter of reference ran as follows:—

"My *locum tenens* Mr. Brett on the 23rd September decided

* Civil Reference, No. 497 of 1879, from an order made by J. P. Grant, Esq., District Judge of Hooghly, dated the 23rd of January 1879.

† *Note.*—It seems doubtful whether this section applies to applications for review.—*Bonomally Deo* v. *Ram Sadoy Chucherbutty*, 17 W. R., 94 and 95.