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they are to be exercised in my opinion whenever the necessity for doing so is made apparent, so long as the case is *sub judice*. Any other view would, I think, lead to disastrous consequences. It was suggested in the present case that, though the Court might act at any time of its own motion, it could not act on the application of any person if the right of that person to claim relief were barred. I do not think that is so. I do not see how the fact of any person's making an application, whether in time or out of time, can take away from the Court a power given to it to act at any time, either upon or without application.

Lastly, it was argued, that the Banque de la Reunion had been guilty of such laches that its petition ought to be rejected. But we see no laches. The practical necessity for its intervention arose when it became aware of the agreement of last October.

The appeal is dismissed with costs.

Appeal dismissed.

Attorney for appellants: Messrs. *Barrow and Orr.*

Attorney for the second defendant: Messrs. *Sanderson & Co.*

T. A. P.

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice.

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April 1.

SECRETARY OF STATE FOR INDIA IN COUNCIL (EXECUTION-CREDITOR) v. JUDAH (JUDGMENT-DEBTOR.)*

Arrest—Escape—Release on recognizance—Surrender under recognizance—Recognizance, Expiry of—Arrest, Fresh application for—Civil Procedure Code (Act XIV of 1882), ss. 239, 241, 341, 349, 357—Writ of attachment—Criminal Procedure Code (Act X of 1882), s. 491.

A judgment-debtor once arrested and imprisoned in execution of a decree cannot under the Civil Procedure Code be again arrested under a fresh writ of attachment on the same decree.

THIS was an application for a second warrant of arrest against A. N. E. Judah, the previous warrant being taken for the purposes of this application as expired.

The facts were as follows:—

In execution of a decree obtained by the Secretary of State for India in Council against A. N. E. Judah, a writ of attachment was

issued against the person of the defendant on the 20th January 1886. On the 11th February 1886 the defendant surrendered himself into the custody of the Sheriff, and was brought up before the Court under arrest and applied to be declared an insolvent under chapter XX of the Civil Procedure Code. The Court thereupon fixed March 3rd for the hearing of the application, and directed the defendant to issue notices to his creditors under s. 350 of the Code, and ordered that on the defendant giving security he should be released, or otherwise should be committed to jail. The defendant being unable to find security was committed to jail, and on the 3rd March was brought up before the Court in custody, apparently under the powers given by cl. (*a*) of s. 491 of the Criminal Procedure Code; on that day Counsel for the plaintiff applied for a postponement of the hearing of the defendant's application, and the Court allowed the postponement, but directed that the defendant should be released on his own recognizance of Rs. 500 on his undertaking to come up again before the Court on the 10th March.

The defendant surrendered himself on the 10th March, and his application was in part gone into and the further hearing adjourned until March 24th; the Court again directing the defendant to be released, and enlarged on his own recognizance of Rs. 500 and to come up again on the 24th March. On the 24th March the defendant appeared, and his application under chapter XX of the Code of Civil Procedure was dismissed. It appeared from the affidavit made use of on behalf of Judah in this present application that the jailor was not in attendance at Court on the 24th March, and the *Advocate-General* (Mr. *Paul*) on behalf of the plaintiff, therefore, applied to the Court for an order for the recommitment of the judgment-debtor, but the Court refused to make such an order, and the judgment-debtor without further interference took his departure from Court; in giving judgment on the judgment-debtor's application under chapter XX of the Code, the learned Commissioner made the following remarks: "It is with regret that I refuse the defendant's application under chapter XX of the Code. What the effect of my order will be, it is not for me to say. I can only venture to express a hope that the Advocate-General and the learned Counsel, who represent the Government,

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will see their way to advise the Government not to pursue these proceedings to a dire extremity, and not to allow them to go beyond what they may think a just and legitimate length. It is not as if this gentleman had introduced this system (referring to the practice in vogue at the Government opium sales) himself. He has only followed a system adopted by the Government themselves for years. It has turned out unfortunately for him, and, I think, I may safely express a hope that Government will exercise a righteous and legitimate clemency."

On the 25th March 1886 notice was served upon the attorney of A. N. E. Judah, the latter having been at large since the 24th March, that a fresh application would be made on the 26th instant for the arrest of the defendant (judgment-debtor.) This application was not actually made until the 27th, when A. N. E. Judah appeared by Counsel to oppose the application, and succeeded in doing so on the ground that no "tabular statement" had been filed by the plaintiff in accordance with the provisions of the Civil Procedure Code. On the 1st April the application was made in due form.

The *Standing Counsel* (Mr. *Bonnerjee*), appearing for the Crown, contended that he was entitled to the issue of a fresh warrant of arrest; that s. 254 allowed two executions to issue at once, one against the person of the judgment-debtor, and the other against his property; that there was no express provision against such an application; that s. 341 did not apply, as the judgment-debtor has never been discharged from jail under the circumstances required in that section; that it was under that section alone that a discharge could be obtained.

Mr. *Pugh* for A. N. E. Judah.—There is no provision in the Code for such an application as the present. Section 241 of the Code cannot be construed as giving a power to issue a new writ: the section merely intends that if a person is discharged under s. 239, he can be re-arrested, but if discharged under any circumstances, or in a way which cannot be said to fall under s. 341, there is no provision made for re-arrest. As to s. 357, it merely shews that it was not the intention of the legislature to interfere in any way with the liberty of the subject, and were it not for that section, other creditors might

come in and arrest an insolvent. [PETHERAM, C.J.—In England, where there is an escape there may be another arrest.] Yes, but is not that in the case where there is an escape before a man is taken to jail?

The nearest case to this is *In the matter of Dwarkaloll Mitter* (1), where it was held that a prisoner once discharged on non-payment of diet-money could not be re-arrested.

The case of *Blackburn* v. *Stupart* (2) lays down that a man cannot be taken in execution twice on the same judgment.

Mr. *Bonnerjee* in reply.—The release was not with the consent of the judgment-creditor, but even if it be so considered, s. 241 would apply. The release was obtained under s. 349, and cannot be said to have been obtained with consent. None of the circumstances mentioned in s. 341 have arisen: he was out on bail, and he cannot be said to have been discharged from jail under that section. Granting for the sake of argument that the old writ came to an end, there is nothing in the Code to show that where a judgment-debtor gets out of jail, under other circumstances than those mentioned in s. 341, he cannot be re-arrested afresh. The case of *Blackburn* v. *Stupart* (2) was a release under an arrangement come to by the parties, and under those circumstances a re-arrest was not allowed; here there was no such arrangement.

PETHERAM, C.J.—I think this application must be refused. It is an application made under these circumstances. The plaintiff obtained a decree on the Original Side of this Court as long ago as the beginning of the year for the recovery of a sum of Rs. 1,14,500 from the defendant, and in execution of that decree obtained an order for the arrest of the defendant, and issued a warrant to the Sheriff for his arrest, and by the terms of the warrant, the defendant was directed to be arrested or imprisoned on or before the 20th of February. In accordance with that warrant the Sheriff of Calcutta arrested the defendant on the 11th of February and lodged him in prison. Having done that the Sheriff had done his duty, and the defendant was in the custody of the jailor under the jurisdiction of the Court. That being the state of things, proceedings were taken at the

(1) Bourke Pt. I. 109. (2) 2 East 242.

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instance of the defendant to obtain his discharge from imprisonment by the machinery provided for in the insolvency sections of the Civil Procedure Code. These proceedings were instituted by him on the day on which he was arrested, that is, on the 11th of February. They came before the Judge, who had jurisdiction in that matter, on the 3rd of March, after several adjournments. On the 13th of March, under s. 349, pending the proceedings under the insolvency sections of the Civil Procedure Code, the Judge having jurisdiction in that matter ordered him to be released on bail; the defendant giving the bail which he was required to do, accordingly was released. These proceedings went on from time to time, and defendant from time to time surrendered to his bail when he was required to do so. Bail was renewed and he was released on bail until the proceedings ultimately came to an end. Eventually they came to an end by the Judge rejecting the defendant's application, declaring he was not entitled to the protection of the sections of the Civil Procedure Code relating to insolvents. The defendant at that time had surrendered to his bail and was in Court, and was to all intents and purposes in custody then under the warrant which had been originally issued, which had been executed by the Sheriff; and if the plaintiff then intended that the imprisonment should continue, his business and duty was to have had the proper officer from the jail there who should take him into custody, his bail having expired, and reconvey him to the place from whence he had been released when he was released on bail. He did not do so for some reason or other. What that reason was I do not know; at all events, he did not do so, and the defendant remained at large, and is at large at this time. Now what the rights of the plaintiff are with reference to the existing warrant is not for me to say. Having regard to the provisions of s. 341 and subsequent sections, I am clearly of opinion that the Code only contemplates one arrest; and if the defendant is to be remitted to jail, or if he is in custody now, he is in custody under the original arrest, and can be in custody under no other. Section 254 is the section which provides that the decree or order which directs the payment of the money may be enforced in two ways: it may be

enforced by the imprisonment of the judgment-debtor, or the attachment and sale of his property, and then the imprisonment which is directed under s. 254 is governed by the provisions of s. 341. Section 341 provides that if a man has been imprisoned, he shall be discharged in various ways, that is to say, upon the money being paid, the decree being satisfied, the creditor consenting to his release, the non-payment of the allowance by the creditor, the insolvency of the judgment-debtor, and the term of his imprisonment having expired. Now all these things obviously deal with one imprisonment only, and one arrest under s. 254, which is the arrest to enforce payment of the money. With that provision must be taken the insolvency section, which provides that, pending the enquiry as to whether the man shall be declared an insolvent, he is to be released on bail. The meaning of a man being released on bail, in theory at all events, is that he still remains in custody under the original warrant. The consequence is that, during the whole of the time that the defendant was out on bail, he was, in theory, in custody under the original warrant; his imprisonment still continued; and if he was not remitted to jail at the end of his bail, it was the fault of the person who had to deal with the matter. Then comes s. 241, which provides that, where a man has been discharged under certain circumstances, he may be re-arrested, but this is a provision applying to a case where execution has been stayed for a limited time, and the man released under that stay. That is a totally different state of things, it stays the execution and release of the man, because there is no execution under which he should be in custody, and the provisions in the subsequent sections merely provide that, where proceedings have been stayed, and consequently the arrest has been inoperative, there may be another imprisonment, which shall be the one imprisonment under the section. I am of opinion, therefore, that the defendant having been once arrested there can be no other writ which can issue from this Court. Whether the party has the right to re-arrest him under the original writ, or what are those rights, or what his liabilities may be, is a totally different matter. As I said before, I think, that this Court having once granted an order for the defendant's arrest, and he having been arrested under that

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order, it is not open to it to grant another order, and therefore this application must be refused.

Application refused.

Attorney for the plaintiff: Mr. *R. L. Upton.*

Attorneys for the defendant: Messrs. *Gregory and Moses.*

T. A. P.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice.

1886 *April* 14.

MOORAJEE POONJA (PLAINTIFF) (OPPOSITE PARTY) *v.* VISRANJEE VISENJEE AND OTHERS (DEFENDANTS) (APPLICANTS.)*

Appeal to Privy Council—Practice—Appeal struck off for want of prosecution—Civil Procedure Code (Act XIV of 1882), ss. 598, 599, 600.

A on the 8th September 1885 filed his petition of appeal to Her Majesty in Council against a decree obtained against him by *B* on the 19th May 1885. On the 11th September 1885 *A*'s attorney received for approval from the Registrar the usual draft notice calling upon *B* to show cause why the case was not a fit and proper one for appeal to Her Majesty in Council; this draft notice was never returned as approved or otherwise to the Registrar, and no further steps were taken to prosecute the appeal.

On the 1st April 1886 *B* applied to have the appeal struck off for want of prosecution,—*held* that he was entitled to the order.

THIS was an application to make absolute a rule obtained by the defendants calling upon the plaintiff to show cause why a petition of appeal, filed by the plaintiff to Her Majesty in Council, should not be struck off the file for want of prosecution.

It appeared that on the 14th March 1884, the plaintiff obtained a decree against the defendants on certain bottomry bonds, and that on the 19th May 1885 this decree was in part reversed by the Appellate Court.

The plaintiff on the 8th September 1885 filed his petition of appeal to Her Majesty in Council against the decree of the 19th May 1885, and on the 11th May, in accordance with the usual practice, a draft notice to show cause why a certificate, that the case as regards amount or value and nature

* Application in Appeal No. 8 of 1884.