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It appears from the evidence of Mr. Tilemann and Mr. Sonderegger that when questioned as to this deficiency Kellie admitted that he had taken the money, and their evidence is borne out by the terms of a letter (Exhibit G.) written by Kellie to Mr. Sonderegger on the 30th of August 1894.

The learned counsel for the applicant also addressed the Court in mitigation of sentence. The punishment which has been sustained was a sentence of two years' rigorous imprisonment. Having regard to the circumstances of the case, I am of opinion that this punishment was not a bit too severe. This was not the case of an employé yielding on a solitary occasion to temptation. A large amount was embezzled, and it appears from the evidence of Mr. Sonderegger that Kellie admitted that peculation had been going on for some eighteen months. The nature of the defence set up by the applicant does not tell in his favor, as it amounted to an insinuation that the missing amount had been taken by Messrs. Tilemann and Sonderegger, an insinuation which I concur with the lower Courts in thinking to be baseless.

For the above reasons I reject the application and direct that the records be returned.

APPELLATE CIVIL.

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January 22.

Before Mr. Justice Knox and Mr. Justice Aikman.

HAIDAR SHAH (APPLICANT) *v.* JAMNA DAS AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, ss. 350, 359—*Insolvency—Powers exercisable by Court under s.* 359—*Withdrawal of application by applicant without permission to renew—Court not competent to make payment of costs a condition precedent to the granting of permission to withdraw.*

A Court acting under s. 359 of the Code of Civil Procedure may, on the motion of a creditor under certain circumstances, order the imprisonment of an applicant for a declaration of insolvency, or it may, under certain circumstances of its own motion, send the applicant to be dealt with by a Magistrate; but it cannot, unless moved by

* First Appeal No. 91 of 1893, from an order of A. M. Markham, Esq., District Judge of Meerut, dated the 12th June 1893.

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a creditor, pass an order of imprisonment under that section ; and if on the motion of a creditor it has ordered the imprisonment of the applicant, it cannot subsequently act under the last clause of s. 359. *Kadir Bakhsh* v. *Bhawani Prasad* (1) referred to.

Where, an application for a declaration of insolvency having been filed, the applicant asked and obtained permission to withdraw the application absolutely, *i.e.*, without permission to renew the application, it was *held* that the Court could not make the payment by the applicant of the opposing creditors' costs a condition precedent to the granting of such permission so as to enable the Court subsequently to revive the proceedings commenced by the application, but that such proceedings were finally determined by the applicant's withdrawal.

THE facts of this case were as follows :—

One Hafiz Syed Haidar Shah applied on the 4th of February 1891 to the District Judge of Meerut under s. 344 of the Code of Civil Procedure to be declared an insolvent. With his application he put in a schedule setting out the amount and particulars of his property and other matters which the law requires should be set out in such an application. A day was fixed for hearing the application, and on the 20th June 1891, the application was heard and the applicant was examined. On the 22nd of June 1891 the applicant stated to the Court that he withdrew his application for being declared an insolvent and prayed that the insolvency case might be struck off. Upon this the District Judge passed the following order :— "On application of the applicant in person, the petition of insolvency may be permitted to be withdrawn on the costs of the opposing creditors being paid." Nothing further took place until the 16th of November 1892, when one of the creditors, *i.e.*, The Bank of Upper India, Ld., a creditor in whose presence the order of the 22nd of June 1891 had been passed, represented to the Court that the costs, payment of which had been ordered, had not been paid, and asked that the proceedings might be revived. No section of the Code was quoted as supporting such a request, but an order was passed calling upon the appellant to appear and show cause why his application to be declared an insolvent should not be revived. No cause was shown within the time granted, and on the 29th of November 1892 the Court directed that the application to be declared

(1) I. L. R. 14 All. 145.

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an insolvent be revived and taken up at the point it had reached on the 20th of June 1891. The parties and their witnesses were directed to be present on the date fixed for their presence. The appellant did not appear, but on behalf of the Bank of Upper India an affidavit was filed declaring that Hafiz Syed Haidar Shah had, on the 12th of June 1892, transferred his entire property to his wife in lieu of dower with the object of defrauding creditors. No other evidence of any kind appears to have been taken, but the Court recorded an order setting out that—"as it would appear that this transfer amounts to a fraudulent transfer to defeat creditors and that the applicant has been guilty of concealment of debts, the Court orders that the applicant be called upon to appear on Saturday the 22nd instant at 11 A.M. and show cause why he should not be committed to prison under cl. 5 of s. 359, C. P. C., at the request of the opposing creditors." On this adjourned date an appearance was made on behalf of Haidar Shah, and it was argued that s. 359 would not apply, as there had been no decision under s. 350 of the Code of Civil Procedure. It was further contended that no fraud of any kind on the part of Haidar Shah had been proved, and the jurisdiction of the Court to revive, as it was called, the proceedings which had come to a close on the 22nd of June 1891, was disputed. The objections were overruled, the learned Judge holding that no decision under s. 350 was required, and that all that was necessary was that at any time during the hearing under s. 350 it should have been proved that there had been a fraudulent transfer or an act of bad faith. Upon the affidavit already mentioned, and upon an admission by the vakíl for Haidar Shah that on the 12th of June 1892 his client had transferred a portion of his property in favor of a person whom the Judge terms a creditor not named by the applicant in his list of creditors, it was held that there had been a fraudulent transfer and an act of bad faith regarding the matter of his application. The objection taken to the jurisdiction of the Court was also overruled. The Judge held that his order permitting withdrawal was only conditional; that as the condition had not been fulfilled, sanction

was finally refused, and the hearing under s. 350 was still subsisting on the 12th of June 1892. The Judge then proceeded to order that Haidar Shah be, at the instance of the represented creditors, and at their costs, "imprisoned in the civil jail for one year, unless he shall sooner satisfy the said opposing and represented creditors." On the same date, and on the representation of the vakíl for those of the creditors who were present, the above order was amended, and a new order issued directing that the applicant was under s. 359 to be arrested and conveyed to the jail to suffer simple imprisonment for six months. It is this last order from which the present appeal has been filed That order was, however, followed by a further order directing that, as Haidar Shah had absconded, the case under the last clause of s. 359 of the Code be referred to the Magistrate of the District to the end that Haidar Shah might be dealt with under s. 87 and the following sections of the Code of Criminal Procedure.

The judgment of the Court (Knox and Aikman J. J.) after stating the facts as above, thus continued :—

Mr. *Abdul Majid*, and Pandit *Sundar Lal*, for the appellant.

Babu *Jogindro Nath Chaudhri*, and Munshi *Jwala Prasad*, for the opposite parties.

This order (*i.e.* that under the last clause of s. 359 of the Code of Civil Procedure), it is hardly necessary to point out, was certainly not one in accordance with law. All that the last clause of s. 359 authorises, under certain circumstances, which did not arise in the present case, as there had been an order passed under the first clause of the section, is that the Court may send an applicant for insolvency before it to the Magistrate to be dealt with according to law. In the present case the Judge had already adopted the first of the two courses prescribed in s. 359 and had no power to have recourse to the second alternative. The meaning of this section appears to have been somewhat misunderstood. What the section requires is that if a Court be moved thereto by a creditor it shall, under the circumstances set out in the section, sentence the applicant to imprisonment. This is the only course open to a Court when set in motion at the instance of

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the creditors. If there be no application by any creditor, the Court is still empowered, if it consider the case calls for such an order, to proceed *suo motu* and to send the applicant to the Magistrate. It cannot, unless moved by a creditor, pass an order of imprisonment. The case of *Kadir Bakhsh* v. *Bhawani Prasad* (1) (Edge, C. J., and Straight, J.) was cited to us in the course of the argument. There are certain expressions in the judgment in that case which appear to be opposed to the view we have taken. Straight, J., there held that when a creditor applied to a Court to exercise its jurisdiction under s. 359 it was open to the Court either itself to punish the applicant for insolvency or to send him before a Magistrate to be dealt with according to law. In our opinion the wording of the section is against this interpretation. Omitting the words immaterial to the decision of the point raised, the section runs as follows :—

"Whenever at the hearing under s. 350 it is proved that the applicant has (*a*) been guilty, &c.,—the Court shall, at the instance of any of his creditors, sentence him by order in writing to imprisonment for a term which may extend to one year from the date of committal; or, the Court may, if it think fit, send him to the Magistrate to be dealt with according to law."

The repetition in the last clause of the words "the Court," and the fact that the word "shall" is used in the one clause and the word "may" in the other lead us to think that the one course is not intended to be an alternative to the other when the Court is set in motion by a creditor. Had an alternative been intended we should have expected to find the word "shall" in both clauses or the word "may" in both clauses.

The insertion of the words "at the instance of any of his creditors" between the words "shall" "and sentence" support the same view.

The intention of the Legislature apparently was to restrict the Court to the one course of sending the applicant to be dealt with by a Magistrate when the Court of itself, and without being moved

(1) I. L.R. 14 All. 145.

thereto by a creditor, comes to the conclusion that the applicant should be punished for any act of bad faith he is proved to have committed; and the reason probably is that, in this event, the Court is, as it were, itself the prosecutor.

We have the authority of the learned Chief Justice for saying that he concurs in the interpretation which we now put upon this section.

To return to the order from which this appeal is filed. It is contended that that order and all the proceedings taken after the 22nd of June 1891 are without jurisdiction; that the Judge could not revive the proceedings, and that no fraud on the part of the appellant had been proved at any hearing under s. 350. It appears to us that this contention is good and must prevail. The only authority in the Code of Civil Procedure for withdrawal of proceedings once commenced before a Civil Court is that contained in s. 373, which by s. 647 applies to proceedings under Chapter XX of the Code. That section gives a plaintiff, and similarly in the case before us gave the applicant, a choice of withdrawing from a suit or application with or without the permission of the Court before which his suit or application stands. No restriction of any kind is placed upon his withdrawing without permission of the Court: he is liable, if he so withdraws, for such costs as the Court may award, and is precluded from bringing a fresh suit or application in the same matter. This is totally different from a power given to a Court, as is given in other sections of the Code, to make the payment of costs precedent to an order which the Court intends to pass. The only case in which a Court may, under this section, impose any condition upon a plaintiff who seeks to withdraw is where that plaintiff asks the Court for permission, not only to withdraw, but also for liberty to bring a fresh suit for the same subject matter In this case the applicant stated that he withdrew without any further thought or suggestion that he intended to, or wished to, bring a fresh application. The case fell within the second paragraph of section 373, and the order passed by the Court should have been to

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the effect that as the applicant has asked to withdraw from the application he be adjudged to pay the costs of the opposing creditors. It follows therefore that any condition imposed by the Judge as to costs being paid precedent to permission to withdraw was without jurisdiction and must be regarded as mere surplusage. The proceedings determined on the 22nd of June 1891, and no longer subsisted after that date for any purpose whatsoever. At the hearing it was contended that an applicant for insolvency finding the case going against him, and after trouble taken by the creditors to prove fraud, might, if he could withdraw unconditionally, by so doing escape the penalties provided by law under section 359 for the punishment of fraudulent debtors. Such an argument overlooks the existence in the Code of s. 643, which in our opinion does provide for and meet such a contingency. In view of the above finding it becomes unnecessary for us to take up the question of fraud, and we would only remark here that up to the 22nd of June 1891 no fraud had been proved, and no evidence of fraud given even after that date. The affidavit filed by the Bank and the very qualified admission made by the pleader for Hafiz Syed Haidar Shah, do not amount to proof of fraud. For these reasons we allow this appeal and set aside the order of the Court below with costs. There was an application filed in connection with this appeal by one Shankar Lal. It was not supported, and therefore it stands dismissed.

Appeal decreed.

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January 28.

Before Mr. Justice Blair and Mr. Justice Burkitt.

ABDUR RAHMAN (DECREE-HOLDER) *v.* SHANKAR DAT DUBE (OBJECTOR).*

Civil Procedure Code, s. 234—Execution of decree—Attachment during lifetime of judgment-debtor—Application after death of judgment-debtor to bring his representatives on to the record of the execution proceedings—Procedure.

In execution proceedings if the decree-holder desires to proceed after the death of the judgment-debtor against property which has not been attached during the lifetime of the judgment-debtor, his proper course is that marked out by s. 234 of Act No XIV of 1882: but if the property has been attached during the lifetime of

*First Appeal No. 248 of 1892, from an order of Kuar Bharat Singh, Officiating Judge of Jaunpur, dated the 3rd September 1892.