

Before Mr. Justice Trevelyan and Mr. Justice Banerjee.

HARO PRIA DABIA (DECREE-HOLDER) *v.* SHAMA CHARAN
SEN (JUDGMENT-DEBTOR).*

1889
April 16.

Insolvency—Insolvent debtors under Civil Procedure Code—Civil Procedure Code, ss. 344, 350, 352, 357, 358—Debt not in Schedule—Omission to come in and prove debt.

A judgment-debtor, arrested in execution of a decree, filed his petition and was adjudicated an insolvent, under the insolvency sections of the Code of Civil Procedure, and the decree-holder was, among other creditors, called upon to prove her debt. She, however, omitted to attend; and her name was not included in the schedule of creditors. The insolvent was discharged under s. 355. The creditors who proved their debts were paid, and the residue of the property was paid out by the receiver to the insolvent. In an application by the decree-holder to execute her decree against the property of the insolvent: *Held* that the discharge of the insolvent did not operate as a discharge of the debt under s. 357 of the Civil Procedure Code, and she was therefore entitled to proceed with execution of her decree against the insolvent's property.

Sembla.—Under s. 352, a creditor, by omitting to come in and prove his debt, would apparently prevent an insolvent obtaining the relief which the Code contemplates giving him, unless that section be read as allowing the insolvent to prove the debts of such creditors as omit to appear and prove them.

SHAMA CHARAN SEN, the judgment-debtor having been arrested in execution of a decree obtained by Haro Pria Dabia, applied to be declared an insolvent under s. 344 of the Code of Civil Procedure, duly setting forth in his application the names and residence of his creditors, amongst them his decree-holder, Haro Pria Dabia. A day was fixed for hearing the application, and notices were served on Haro Pria and the other creditors. Haro Pria and certain other creditors opposed the application, but eventually, on 22nd April 1887, Shama Charan was declared to be an insolvent and a receiver of his property was appointed. On the same day, in the presence of the opposing creditors or their pleaders, the Court fixed a day, 26th May, for the creditors to

* Appeal from Order No. 45 of 1889, against the order of F. H. Harding, Esq., Judge of Chittagong, dated the 10th of November 1888, reversing the order of Baboo Debender Chunder Mookerjee, Munsiff of that District dated the 16th of August 1888.

produce evidence of the amount and particulars of their respective claims against the insolvent. Haro Pria Dabia did not appear to prove her claim; but some of the other creditors appeared and proved the amount due to them, and a schedule was framed by the Court of those creditors and their debts proved, a copy of which schedule was stuck up in the Court-house. On the 29th October 1887, no other creditor having applied under s. 353 of the Code of Civil Procedure, the receiver was directed to proceed under s. 356, and to report the result to the Court, and in his report the insolvent was, on 2nd March 1888, discharged under s. 355; the money in the hands of the receiver was disbursed to the scheduled creditors under s. 356, and the surplus was made over to the insolvent. Subsequently, on the 20th March 1888, Haro Pria applied to the Court for execution of the decree obtained by her against Shama Charan previously to the insolvency proceedings by attachment and sale of the insolvent's property.

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The Munsiff allowed the application, holding that the discharge of the insolvent was no bar to the execution.

The Judge on appeal reversed that order and held that the execution of the decree could not be allowed. The decree-holder appealed to the High Court.

Munshi *Seraj-ul-Islam* for the appellant.

Baboo *Jogender Chunder Ghose* for the respondent.

The judgment of the Court (TREVELYAN and BANERJEE, JJ.) was as follows:—

It seems to us clear that the learned District Judge is wrong in the conclusion at which he has arrived. The material facts are shortly as follows:—The appellant obtained a decree against the respondent. The respondent on being arrested on this decree, filed his petition under the insolvency section of the Code of Civil Procedure. The procedure laid down in Chapter XX seems to have been carried out, and, in course of time, the creditors were required to prove their debts. The appellant before us, although she seems to have received notice, did not attend, and, in the result, her name was not included in the schedule. The scheduled creditors, that is to say the persons who proved

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their debts, have been paid and the residue of the property in the hands of the receiver has been paid out to the insolvent. Now this decree-holder seeks to execute her decree against the property of the insolvent.

We have heard argument on behalf of the respondent, and the effect of that argument is shortly this: The learned pleader contends that, as the decree-holder did not attend before the District Judge and give evidence, the whole debt is wiped off, and he argues that his client having got a discharge from his scheduled debts, they are not debts at all.

There can be no doubt that, where a person has got a right, and it is contended that that right is taken away by statute, the right cannot be held to have been taken away except by express words in the statute, or by inference so clear from the terms of the enactment, that there can be no doubt about it. The section of the Code as to discharge, is s. 357. The first portion of that section gives an insolvent a release, so far as arrest and imprisonment are concerned, from his scheduled debts. It then goes on not to give him a discharge in respect even of the scheduled debts, but it goes on to say this: "Subject to the provisions of s. 358, his property, whether previously or subsequently acquired, except the particulars specified in the first proviso to s. 266, and except the property vested in the receiver, shall, by order of the Court, be liable to attachment and sale, until the debts due to the scheduled creditors are satisfied to the extent of one-third or until the expiry of twelve years from the date of the order of discharge under s. 351 or 355." That is to say, all the property in the hands of the receiver is to be sold, and the proceeds paid to the scheduled creditors; and besides that, his other property is liable to be attached and sold until the debts due to the scheduled creditors are satisfied to the extent of one-third or until the expiry of twelve years. Probably the effect of that would be to discharge him from the debts to the scheduled creditors entirely, but there is no reference there to any persons whose names are omitted from the schedule. We do not think that the fact that a creditor is invited to prove his claim limits or destroys his rights. There is no doubt that, if he had not been so invited, a creditor would not be affected by s. 357.

It is said that the effect of her omission to come in operates as a decree dismissing her claim. We cannot hold that when we have here a decree-holder, whose decree is admitted, and execution of whose decree is the cause of these insolvency proceedings being taken.

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We think it is necessary for us to notice what does appear at first sight to be somewhat anomalous in the provisions of s. 352. As the learned pleader points out, although an insolvent may come into Court seeking to be released from his debts, and although the object of those proceedings is to release him from those debts, if a creditor does not come in and prove his debts, this would prevent an insolvent acquiring the relief that the Code contemplates giving him.

That is unfortunate, but unless the Act takes away existing rights, we cannot say that the rights have ceased to exist. This question is not for us, but for the Legislature to consider. But as Mr. Justice Banerjee pointed out during the argument, it is possible to read s. 352 a little less strictly than is suggested, and to say that an insolvent might come in and prove the debts of the creditors if he wishes to get a discharge from them. That would get rid of the difficulty.

It seems to us that as s. 357 does not give the debtor any right to get his discharge from this debt, we must allow execution to go. In the result we set aside the order of the District Judge, and restore that of the Munsiff. The judgment-creditor is entitled to her costs in the lower Appellate Court and in this Court.

J. V. W.

Appeal allowed.