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to that property, the charge or incumbrance shall be extinguished unless he declares by express words or necessary implication that it shall continue to subsist, or, as is the case before us, such continuance would be for his benefit. It was clearly for the benefit of Baldeo Prasad when he became the absolute owner of the property that his prior charge should be kept alive, and how the lower appellate court came to hold that the property which he purchased could be sold at the instance of a puisne incumbrancer without any regard to the earlier incumbrance we are at a loss to understand. We think that the decision arrived at by the learned Subordinate Judge upon this question is entirely correct. We therefore allow the appeal, set aside the decree of the District Judge, and restore the decree of the court of first instance with costs in all courts.

Appeal allowed.

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July 29.

Before Mr. Justice Banerji and Mr. Justice Tudball.

ARDESHIRJI FRAMJI AND ANOTHER (JUDGMENT-DEBTORS) *v.* KALYAN DAS (DECREE-HOLDER).*

Civil Procedure Code, (1908), *sections* 47, 96, 104 (*b*), 135 (2)—*Execution of decree—Arrest—Privilege of exemption from arrest under civil process—Appeal.*

Certain judgment-debtors, who had come from Bombay to Benares to look after an application which they had made for the rehearing of a case decided against them *ex parte*, were arrested under a warrant taken out by the decree-holder in execution of his decree. At the time of their arrest the judgment-debtors were seated in the train at the Benares railway station and had taken tickets for Allahabad. *Held* that the judgment-debtors were not exempted from arrest under section 135 of the Code of Civil Procedure, 1908; also that the order for their arrest was appealable as a decree under section 96 of the Code. *In the matter of Siva Bux Savuntharam* (1) not approved. *Wooma Churn Dhole* v. *Teil* (2) referred to.

IN this case an *ex parte* decree was passed against the appellants, who were residents of Bombay, by the Subordinate Judge of Benares on the 8th of January, 1909. They applied to have it set aside, and the application was heard on the 22nd of March 1909. They came up to Benares from Bombay for the purpose of this application, and having arrived on the evening of the 21st

* Execution First Appeal No. 96 of 1909, from a decree of Maula Bakhsh, Subordinate Judge of Benares, dated the 29th of March 1909.

(1) (1881) I. L. R., 4 Mad., 317. (2) (1875) 14 B. L. R., App., 13.

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put up at the dâk bungalow, whence they went to court on the next day. Their application was dismissed on the same day, and they, after leaving the court, returned to the dâk bungalow. There they packed up their luggage and proceeded to the railway station, and were seated in the train when they were arrested in execution of the *ex parte* decree which they had that day failed to get set aside. The Subordinate Judge found on the evidence that they had tickets to Allahabad when arrested. They preferred objections to the order of arrest and contended that the arrest was contrary to the provisions of section 135, clause (2) of the Civil Procedure Code (Act V of 1908). The Subordinate Judge disallowed their objections, and they appealed to the High Court against that order.

Dr. *Tej Bahadur Sapru*, for the respondent, raised a preliminary objection that no appeal lay from the order complained of, as clause (*h*) of section 104 of the Code of Civil Procedure (Act V of 1908) prohibited an appeal from an order directing the arrest of any person in execution of a decree, but this objection was overruled.

Dr. *Satish Chandra Banerji*, (Babu *Satya Chandra Mukerji*, with him) for the appellants, contended that the appellants could not be arrested while returning from court to Bombay, from which place they had come. Bombay was their ordinary place of residence, and the privilege given by section 135 continued until they reached there. They had not stayed at the dâk bungalow for any length of time. Their stay there was merely for the purpose of their case. On return from court they stopped there only to pick up their luggage; *In the matter of Siva Bux Savuntharam* (1).

The protection must be effective. They were *bond fide* returning home to Bombay. They wished to proceed *vid* Allahabad for the sake of convenience; they would not forfeit their privilege by doing so; *In the matter of Soorendro Nath Roy Chowdhry* (2).

Dr. *Tej Bahadur Sapru*, for the respondent.

The omission of the word "home" or "place of residence" in section 135 is deliberate. If the contention of the other side

(1) (1881) I. L. R., 4 Mad., 317. (2) (1879) I. L. R., 5 Calc., 106.

were allowed, the result would be to reduce the law to an absurdity. The object and policy of the section is in the interests of justice and extends only so far as the justice of the case requires; the section confers no personal privilege. The privilege would avail if the judgment-debtor were going direct from the court to his home. The section, moreover, contemplates that the matter should be pending; in this case the matter had been disposed of.

No hard and fast rule as to the extent or duration of the privilege can be laid down. With reference to the facts of the present case, no case for the exercise of the privilege has been made out.

BANERJI and TUDBALL, JJ.—This appeal arises out of proceedings relating to the execution of a decree. The facts are briefly as follows. The respondent obtained an *ex parte* decree against the appellants on the 8th of January, 1909. The appellants applied to the Court to set aside the *ex parte* decree and to rehear the case. This matter came up for decision on the 27th of March 1909. The appellants, it appears, are residents of Bombay. The suit was in the court of the Subordinate Judge of Benares. Apparently for the purpose of looking after their case, the appellants proceeded to Benares and there put up at a dâk bungalow. They attended the court on the 27th of March; the case was heard and their application was dismissed. They left the court, returned to the dâk bungalow, and thence proceeded to the railway station. In the meantime the decree-holder had applied for execution of the decree and for the arrest of his judgment-debtors; warrants were issued, and the appellants were arrested when actually seated in the train. They had, it appears, taken tickets for Allahabad, at least that is the finding of the court below on the evidence before it. The appellants claimed the privilege granted by section 135 of Act No. V of 1908. They pleaded that they were exempt from arrest on the ground that they were returning from the court to their home. This plea was disallowed by the lower court. Hence the present appeal.

A preliminary objection was taken by the learned advocate for the respondent that no appeal lies. He relies upon section 104, clause (*h*), of the Code of Civil Procedure, 1908, and urges

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that though an order directing the arrest or detention of any person is appealable under that section, the clause specially exempts the case where such arrest or detention is in execution of a decree, and therefore no appeal lies. The reason of the exception in this clause is obvious. An order for arrest and detention made in execution of a decree is an order made under section 47 of the Code, being an order for the execution of the decree. Such an order is a decree which is appealable under section 96 of the Code. It is obvious, therefore, that the exception in clause (*h*) is entered therein because provision is made elsewhere for an appeal from an order of arrest in execution of a decree. Section 104 only relates to appeals from orders which do not amount to a decree. We therefore overrule the preliminary objection.

Coming to the appeal itself, the learned advocate for the appellants urges that his clients are entitled to the privilege granted by section 135 of the Code, because they had come from their home in Bombay to attend the tribunal in which their case was pending, and that at the time of their arrest they were returning home from such tribunal. He quotes the ruling *In the matter of Siva Bux Sivuntharam* (1). In that case a native of Patna went to Madras on the 24th of October, on account of a suit pending in which he was the plaintiff. The case was adjourned on the 27th of October for seven weeks. He remained in Madras on account of the suit and was arrested on the 10th of November. KERNAN, J., held that under these circumstances the defendant was within the principle of privilege as a suitor and discharged him from the arrest. In our opinion this was too great an extension of the scope of the privilege. The principle on which it is founded is that freedom from the fear of arrest encourages willing attendance and thus tends to the advancement of justice. In our opinion the decision of KERNAN, J., is not one which would be warranted by the language of section 135. It is difficult to conceive that in that case the plaintiff was either going to, attending, or returning from any tribunal at the time of his arrest. That ruling also seems to be inconsistent with the

(1) (1881) I. L. R., 4 Mad., 317.

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decision of PHEAR, J., in the case of *Wooma Churn Dhole* v. *Tail* (1). In that case a person having been summoned to Calcutta as a witness in a certain case, reached Calcutta before the case came on, and while there, he was arrested in execution of a decree. At the time of his arrest he was, as a matter of fact, actually returning from the court by a roundabout way to his place of residence in Calcutta, having gone to the court somewhat unnecessarily to find out about the case. It was held that he did not come within the privilege. In the present case the appellants had left the court and had returned to the place where they were staying in Benares; they had then left that place and were actually on their way to Allahabad, which is not their home. In these circumstances we cannot hold that they, at the time of arrest, were returning from a tribunal within the meaning of section 135. In this view the appeal fails and we dismiss it with costs.

In view of the fact that the order of the lower court rejecting the appellants' application to have the *ex parte* decree set aside has been reversed by this Court on appeal and the case has been remanded for decision on the merits after taking evidence, we think the lower court would exercise a wise discretion if it stayed execution of the decree, pending the disposal of that application.

Appeal dismissed.

(1) (1875) 14 B. L. R., App., 13.