1931

RAM KHELAWAN v. SHEO NANDAN.

sel went into details of the case and pointed out that it was a case where the complainant stated that he had sowed a certain crop as a tenant and the accused as zamindars had uprooted that crop by force and taken it away. The two Magistrates who acquitted the accused considered that it was not satisfactorily proved that the complainant sowed the crop or that the accused uprooted it. If the complainant succeeded in proving his case the complainant would probably receive compensation from the accused and therefore the matter would be one of importance to him. Under these circumstances I consider that this order of acquittal should be set aside, and I accordingly set it aside and direct that the case be retried according to law.

Before Mr. Justice Bennet.

1931 *December*, 8.

ALI HUSAIN AND ANOTHER *v.* LACHHMI NARAIN MAHAJAN AND OTHERS.*

Criminal Procedure Code, sections 243, 244—*Plea of accused that acts alleged constituted no offence—Duty of Magistrate to take the evidence for the prosecution—Provincial Insolvency Act (V of* 1920), *sections* 28(2) *and* 31—*Protection from arrest upon adjudication order—Criminal Procedure Code, section* 439—*Revision from acquittal— Discretion.*

Section 28(2) of the Provincial Insolvency Act, 1920, does not operate as any protection from arrest of a judgment-debtor who has been adjudicated an insolvent. Such protection is dealt with by section 31, under which a specific protection order has to be passed.

Upon the arrest of an insolvent in execution of a decree he obstructed the process server by refusing to accompany the latter. At his trial for an offence under section 186 of the Indian Penal Code the accused pleaded that the acts alleged formed no offence. Thereupon the Magistrate did not take the evidence of any of the prosecution witnesses but proceeded to decide upon the argument of law that by virtue of section

* Criminal Reference No. 657 of 1931.

28 (2) of the Provincial Insolvency Act an insolvent could not be lawfully arrested in execution of a decree, and accordingly acquitted the accused. It was *held*, in revision, that the language of section 244 of the Criminal Procedure Code was compulsory and the Magistrate was bound by its provisions to proceed to take the evidence for the prosecution; the trial was, therefore, illegal. Also, the acquittal was based on a wrong view of law. As the case was, from its nature, of some public importance, it was a fit case in which the High Court should, in the exercise of its discretion, interfere and order a retrial.

Mr. *S. N. Verma*, for the applicants.

Mr. *G. S. Pathak*, for the opposite party.

BENNET, J.:—This is a reference by the learned Sessions Judge of Farrukhabad of an acquittal by a Magistrate of five persons who were charged under section 186 of the Indian Penal Code. The complaint was made by the Subordinate Judge. The Magistrate recorded no evidence but he made an order on the 8th of August, 1931, setting forth the facts of the case and stating that the contention on behalf of the defence was an argument of law. The facts set forth were as follows: "The said Lachhmi Narain has been declared an insolvent on the 14th of September, 1927. In execution proceeding the request was to arrest Lachhmi Narain. Lachhmi Narain was arrested on the 4th of June, 1931. On the 5th of June, 1931, Lachhmi Narain was put up before the court which had ordered the arrest. The court ordered a peon to take Lachhmi Narain to the latter's house and realise the decretal amount. The peon took Lachhmi Narain to his (Lachhmi Narain's) house. Lachhmi Narain while going to his house got into the shop of Lalman and refused to accompany the process server. The accused obstructed the process server doing his duty of taking Lachhmi Narain to court." Now the offence of section 186 of the Indian Penal Code was a summons case and the procedure of the Magistrate should have

1931

ALI HUSAIN v. LACHHMI NARAIN MAHAJAN.

been governed by chapter XX of the Code of Criminal Procedure. The accused had appeared on this date and under section 242 the Magistrate should have stated the substance of the accusation to the accused and asked if they had any cause to show why they should not be convicted . Under section 243 if the accused admitted the offence they might have been convicted; but that is not the case here. The accused pleaded that the acts alleged formed no offence. The duty of the Magistrate therefore lay under section 244 to hear all the evidence in support of the prosecution. The language is compulsory and says: "The Magistrate shall . . . . take all such evidence as may be produced in support of the prosecution." There were eleven witnesses named in the complaint and it was the duty of the Magistrate to take the evidence of these eleven witnesses. The Magistrate did not take the evidence of any of these witnesses apparently, as the order sheet is silent on this point, but the Magistrate proceeded to write an order ending with the words: "I therefore discharge the accused, this being a summons case." Later the Magistrate altered the word "discharge" to "acquit". Learned counsel for the accused cannot point to any section of the Code under which the procedure of the Magistrate could be justified. There was therefore no trial at all before the Magistrate. The learned Sessions Judge has not made the reference on account of this defect in procedure but because he considers that the legal reasons given by the Magistrate are incorrect. The Magistrate relied on the following rulings of other High Courts: *Solayappa Naicker* v. *Shunmugasundaram Pillai* (1), *Partap Singh Pardhan Singh* v. *Bhai Mewa Singh Jodha Singh* (2) and *Tan Seik Ke* v. *C. A. M. T. Firm* (3). These rulings lay down that under section 28(2)

(1) A.I.R., 1926 Mad., 510. (2) A.I.R., 1928 Lah., 258.

(3) A.I.R., 1928 Rang., 109.

of the Provincial Insolvency Act, Act V of 1920, a creditor is barred from applying in execution for the arrest of a judgment-debtor against whom an order of adjudication is passed. A contrary view has been taken in *Maharaj Hari Ram* v. *Sri Krishan Ram* (1) by a Bench of this Court which has held that section 28 does not operate as any protection from arrest of a judgment-debtor who has been adjudicated an insolvent. There is also a similar ruling in *Mahomed Roshan* v. *Gulam Mohiddin* (2). The ruling of a Bench of this Court is binding on a single Judge, and therefore I am bound to follow it. Learned counsel has however addressed me on the strength of various rulings with the request that for the reasons given in those rulings I should ask that this question should be referred to a Full Bench. I find myself unable to see any merit in the rulings to which counsel refers, and they seem to me to be singularly devoid of reasons for what they state. In *Hit Narayan Singh* v. *Brij Nandan Singh* (3) there is a mere statement that the latter part of section 28(2) of the Provincial Insolvency Act would refer to the person. This is what it is required to prove, and merely stating a proposition is not the same as adducing reasons for that proposition. *Alamelu Ammal* v. *Venkatarama Iyer* (4), a single Judge ruling, made no reference at all to section 31 of the Provincial Insolvency Act, which deals with the question of the freedom from arrest, and again there is a mere assumption that section 28 will be a bar. *Easwara Iyer* v. *Govindarajulu Naidu* (5) deals with the Presidency Towns Act and not with the Provincial Insolvency Act and again there is an absence of reasons for the conclusion, even if we assume that the language of the various sections in the Presidency Towns Act is similar. Part of the reasoning is based

(1) (1926) I.L.R., 49 All., 201. (2) A.I.R., 1929 Bom., 135.
(3) (1930) I.L.R., 10 Pat., 422. (4) (1927) I.L.R., 50 Mad., 977.
(5) (1915) I.L.R., 39 Mad., 689.

1931

ALI HUSAIN v. LACHHMI NARAIN MAHAJAN.

on "section 41 of the old Act" and that does not appear to refer to any of the Provincial Insolvency Acts.

I may briefly set forth the reasons which lead me to conclude that the ruling of this Court reported in *Maharaj Hari Ram* v. *Sri Krishan Ram* (1) is correct, and a ruling from which I see no reason to differ. In the former Act, the Provincial Insolvency Act III of 1907, there was a paragraph in section 16(2) which ran as follows: "On the making of an order of adjudication . . . . no creditor to whom the insolvent is indebted in respect of any debt payable under this Act shall, during the pendency of the insolvency proceedings, have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceeding except with the leave of the court and on such terms as the court may impose". Now section 28 (2) of the Provincial Insolvency Act, V of 1920, reproduces these provisions with an important difference. In place of the words "no creditor . . . . shall have any remedy against the property or person of the insolvent" we now have the phrase "no creditor shall have any remedy against the property of the insolvent". The difference is that the two words "or person" have now been omitted. Learned counsel for the accused admits that under Act III of 1907 it was these words, "or person", which prevented a creditor from applying to an execution court for process of arrest against a judgment-debtor when his judgment-debtor had been adjudicated an insolvent. It would follow therefore that if this is provided by that part of section 16 of Act III of 1907, the remaining words which are separated by the conjunction "or", that is "or commence any suit or other legal proceeding", are not the words under which a creditor was prevented from applying for arrest of his judgment-debtor.

(1) (1926) I.L.R., 49 All., 201.

Now in the present Act (Act V of 1920) the words "or person" no longer exist, but the rulings on which learned counsel for the accused relies assume that the words "or other legal proceedings" are words which now bar a creditor from applying for execution by arrest of his judgment-debtor. It is to me a very strange method of construction to hold that the question of freedom from arrest could come under one part of the paragraph in Act III of 1907 and, when that part is omitted in Act V of 1920, that the same provision should be held to exist under another and separate part of that paragraph. It appears to me that the courts have gone out of their way to hunt about in various parts of this paragraph and have seized on any phrase which they think can give shelter to the provision in question. I consider that this method of construction, of changing the meaning of words from one Act to another Act, and of holding that in one Act they bear one meaning and in another Act the same words bear another meaning, is a method which is radically unsound.

There is another reason as to why the ruling of this Court is sound. In the present Provincial Insolvency Act there is a new section introduced, section 31, which provides for an insolvent applying for a protection order to the insolvency court. The language used is that the court "*may* make such an order on application" and that the order may "apply to any or all of the debts as the court thinks fit". There is therefore a discretion granted to the court either to make such an order or make a limited order or not to make a protection order at all. It is no longer a matter of right for a judgment-debtor to apply in insolvency and be *ipso facto* absolved from liability to arrest. It appears clear to me that the words "or person" were deliberately taken out of the present section 28 by the legislature, because provision was made in section 31 for

1931.

ALI HUSAIN v. LACHHMI NARAIN MAHAJAN.

dealing with this particular matter of how far insolvency proceedings bar the arrest of a judgment-debtor. When we find that in the new Act certain changes have been made in the old Act by the omission of a provision dealing with a certain matter and the introduction of new provisions dealing with that matter, the natural conclusion should be that the new provisions are intended to deal solely with that matter and that the courts should look for guidance to these new provisions and not attempt to read provisions into general words in other parts of the Act. I note that the rulings on which learned counsel for accused relies do not in general deal with this point of view. For these reasons I consider that in the present case the judgment-debtor was not barred from being arrested in execution and the action of the learned Subordinate Judge in issuing a warrant of arrest was perfectly legal and the warrant was a perfectly legal warrant. The persons who were carrying out that warrant would be protected by section 186 of the Indian Penal Code. The Magistrate therefore was not only wrong in his procedure but he was wrong in his substantive law. Having been wrong on both points, it appears to me that his proceeding was an absolute miscarriage of justice.

Further argument has been made as to whether the case is not one in which this Court should exercise its discretion and interfere in revision. Learned counsel for the complainant has pointed out that this Court has ordered a retrial where there was an acquittal in *Nand Ram* v. *Khazan* (1) and *Musammat Nanhi Bahu* v. *Dhunde* (2). In the present case it appears to me that the trial is of some public importance because it is a case of the execution of a warrant by the civil court process servers, and it is necessary that such process servers should be supported in the

(1) (1921) 19 A.L.J., 589. (2) (1909) 6 A.L.J., 758.

exercise of their duties. For these reasons I accept this reference and I set aside the order of acquittal of the Magistrate and I direct that the accused shall be retried by a Magistrate having jurisdiction. The record will be sent to the District Magistrate for directions for retrial.

REVISIONAL CIVIL.

Before Mr. Justice Pullan.

RAGHUNANDAN CHAUBE (DEFENDANT) *v.* BHUWAL TEWARI (PLAINTIFF).*

1931 *December* 8.

Civil Procedure Code, order IX, rule 13—Ex parte *decree—Decree dealt with by appellate court—Application for setting aside the* ex parte *decree—Whether trial court can entertain it—Limitation Act (IX of* 1908), *section* 14(2)—*Exclusion of time during which application for similar relief was being prosecuted in another court—Civil Procedure Code, order XLI, rule* 21.

Where a decree specified the liability of each of the defendants and was *ex parte* as against one of them, and an appeal by the other defendants, relating to their own specific liability, was dismissed, and the absentee defendant was impleaded in the appeal but was not served with notice, it was *held* that there was still a subsisting decree against him in the trial court and his application for setting aside the *ex parte* decree lay rightly to that court and not the appellate court.

Held, also, that section 14 of the Limitation Act applied in express terms to applications, and the time during which the defendant had been prosecuting the application in the lower court for setting aside the *ex parte* decree should be excluded in computing the limitation for an application by him to the appellate court to rehear the appeal decided by it *ex parte* from that decree.

Messrs. *N. P. Asthana, B. N. Sahai* and *Shankar Sahai Verma*, for the applicant.

Mr. *A. P. Pandey*, for the opposite parties.

* Civil Revision No. 328 of 1931.