

APPELLATE CIVIL.*Before James and Rowland, JJ.*

KAMALDHARI LAL

v.

RAI BAHADUR KAMLESHWARI SAHAY.*

Execution—decree-holder, right of, to proceed in the first instance against either the person or property of judgment-debtor—Court, whether can impose restriction on this freedom of choice.

A decree-holder has the right to decide whether he should execute the decree for money by arrest of the judgment-debtor or by attachment and sale of property, and, except as specifically provided in the Code, it is not for the Court to impose restrictions on this freedom of choice of the decree-holder. *Hargobind-Kishan Chand v. Hakim Singh & Co.*(1), *Chena Pemaji v. Ghelabhai Narandas*(2), *Raj Chandra Roy v. Shama Soondari Debi*(3) and *Johari Mal v. Sant Lal*(4), followed.

Appeal by the decree-holder.

The facts of the case material to this report are set out in the judgment of Rowland, J.

S. N. Bose, for the appellants.

D. L. Nandkeolyar, for the respondent.

ROWLAND, J.—This is an appeal by the decree-holder who sought to execute a decree for money against one of his judgment-debtors who happened to be in the original transaction not the person primarily liable but a surety. The decree-holder has applied to the executing Court to execute the decree by the arrest of this judgment-debtor and the latter objected, first,

*Appeal from Original Order no. 125 of 1938, from an order of Babu Nirmal Chandra Ghosh, Subordinate Judge at Bhagalpur, dated the 20th April, 1938.

(1) (1925) I. L. R. 6 Lah. 548.

(2) (1883) I. L. R. 7 Bom. 301.

(3) (1879) I. L. R. 4 Cal. 583.

(4) (1887) I. L. R. 9 All. 484.

that he being the surety and not the principal person liable, execution should not be levied against him until all means of execution against the principal judgment-debtors had been exhausted. That first objection was disallowed by the Subordinate Judge and rightly so. The second objection was that the decree-holder, if he could proceed against this judgment-debtor, ought in the first instance to levy execution against the property and only be permitted to levy execution against the person on failure of his remedy against the property. This objection the Subordinate Judge allowed on the grounds that the objector had sufficient properties against which the decree-holder might proceed in the first instance and that there was nothing convincing to show that the objector was likely to obstruct or to leave the jurisdiction of the Court or that he had dishonestly transferred, sold or removed any of his property or committed any other act of bad faith. For the appellant decree-holder it is argued that these are not grounds on which a Court should disallow an application for the arrest of a defaulting judgment-debtor; that the decree-holder is given by the Code the option of choosing the manner in which he will ask the Court to execute his decree and that except as specifically provided in the Code it is not for the Court to impose restrictions on this freedom of choice of the decree-holder. Reference is made to the decision in *Hargobind-Kishan Chand v. Hakim Singh*(1) in which it was held that the decree-holder has the right to decide whether he should execute the decree for money by arrest of the judgment-debtor or by attachment and sale of property or by both; and that the discretion given to the Court by Order XXI, rule 21, to refuse simultaneous execution against the person and the property did not extend to compelling the decree-holder to take either one of these methods. The decision was founded on an examination of section 51 of the Code of Civil Procedure and of Order XXI, rules 11(1), 11(2), and particularly

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clause (j), and 17. Rule 30 is also referred to. Reliance is placed on observations of the Bombay High Court in *Chena Pemaji v. Ghelabhai Narandas*(1) to the effect that the creditor has a right to all the assistance which the law can give him. For the respondent we have been referred to the amendment made in section 51 of the Code subsequent to the above decision. The Amendment Act of 1936 inserted a proviso placing some restrictions on the right of the decree-holder to obtain an order for arrest against the judgment-debtor. The Court must be satisfied either

(a) that the judgment-debtor has done or is likely to do certain things designed to defeat the decree; or

(b) " that the judgment-debtor has or had since the date of the decree the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same " or

(c) that the decree was for a liability of a peculiar nature.

Now in dealing with the objection of the judgment-debtor the Subordinate Judge has referred to the absence of matters referred to in clause (a) of the proviso; but he has not paid any attention to clause (b) and it is substantially the case of the decree-holder that arrest ought to be ordered on the ground that the judgment-debtor is perfectly capable of paying but is unwilling to do so. The objector took the following as grounds 10 and 11 of his petition of objection in the lower Court :

(10) " That the petitioner is a man who holds high position in society and it is only with a view to lower him in the estimation of the public that such a wrong step is taken ".

(11) " That the petitioner has got sufficient properties and hence the decree-holders ought not to have prayed for warrant of arrest ".

It has been submitted to us that the application for arrest was made with the purposes of humiliating

(1) (1883) I. L. R. 7 Bom. 301.

the judgment-debtor. On the other hand the appellant maintains that the sole purpose of applying for arrest was to obtain payment of the judgment-debt. The objection taken shows in my opinion a misconception of the principles which should govern the relations between creditors and debtors. If it is considered an abnormal thing for a gentleman of wealth and position to be arrested this should be because it is an abnormal thing for such a gentleman to evade, avoid, delay and obstruct payment of his just debts; and a debtor who is able to pay but does not pay is in the position of a person in contempt of Court. The proper course for such a person is to purge his contempt by fulfilling the order of the Court and pay the decretal amount. The petitioner before the Subordinate Judge took an objection that he was not liable; but this was asking the Court to go behind the decree and a party against whom a decree has been passed is not entitled to be the judge in his own cause and to chose whether it should or not be executed against him. He is not entitled to resist execution merely because he is dissatisfied with the decision in the suit.

On the legal point, I entirely agree with the decision in *Hargobind-Kishan Chand v. Hakim Singh*⁽¹⁾ which seems to be in accordance with the current of authority in earlier decisions under the old Code in the Calcutta and Allahabad High Courts—*Raj Chunder Roy v. Shama Soondari Debi*⁽²⁾ and *Johari Mal v. Sant Lal*⁽³⁾. The Lahore decision which I have cited shows that the view of the Bombay High Court is on similar lines.

I would allow the appeal and set aside the order of the Subordinate Judge. I would disallow the objection of the judgment-debtor and direct that the execution case be restored and do proceed according to law. Mr. Bose for the appellant has assured us that in order to give the respondent an opportunity of

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satisfying the decree and avoiding arrest, his client will not take steps for the arrest of the respondent within two months. The appellant will get his costs of this appeal and of the objection in the Court below.

JAMES, J.—I agree.

Appeal allowed.

ROWLAND, J.

S. A. K.

APPELLATE CIVIL.

Before James and Rowland, JJ.

GANJHU UPENDRA SINGH

v.

GANJHU MEGHNATH SINGH.*

Crown Grants Act, 1895 (Act XV of 1895)—grant of Jagir by Government—stipulation as to restraint against alienation—tenure, whether can be sold in execution of money decree—measure of liability to involuntary transfer.

In 1842 a tenure was granted as jagir in favour of G's ancestor in consideration of certain services, but the estate was subsequently forfeited to Government. In 1881 there was a formal dispensation with the services and a new grant, freed of those services, was made at a fixed annual rent. The new grant created a jagir for the descendants of an earlier jagirdar to enjoy so long as any descendants of the jagirdar should survive. There was a stipulation that the jagirdar had no power to transfer by sale or by creation of mukarrari tenures with a liability to resumption if unauthorised transfer should be made. When the tenure was sought to be sold in execution of a money decree against the jagirdar, the latter objected, but his objection was overruled by the executing Court.

Held, on appeal, (i) that the tenure was a Crown grant affected by the Crown Grants Act of 1895 in such a manner

*Appeal from Appellate Order no. 257 of 1938, from an order of T. Luby, Esq., i.c.s., Judicial Commissioner of Chota Nagpur, dated the 29th July, 1938, confirming an order of Babu Hargobind Prasad Singh, Subordinate Judge at Ranchi, dated the 23rd May, 1938.