

The respondent decree-holder must pay the costs incurred by the appellants in this Court.

C. H. O.

Appeal accepted.

MISCELLANEOUS CIVIL.

*Before Sir Shadi Lal, Chief Justice and Mr. Justice
LeRossignol.*

HARGOBIND-KISHAN CHAND } Petitioner,
JUDGMENT-DEBTOR (PLAINTIFF) }

versus

HAKIM SINGH AND CO.— } Respondent.
DECREE-HOLDER (DEFENDANT) }

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Nov. 17.

Civil Miscellaneous No. 292 of 1925.

(Civil Appeal No. 662 of 1925).

*Civil Procedure Code, Act V of 1908, section 51 (c),
Order XXI, rules 11, 17, 12 and 30—Execution of decree by
arrest of the judgment-debtor—Application for stay of execu-
tion pending appeal, on ground that the decree-holder should
proceed against the property of the judgment-debtor in the
first instance.*

The respondent H. S. obtained a money decree against the applicant K. C. and asked to have the decree executed by the arrest and detention in the civil jail of the judgment-debtor. The latter applied to the High Court for an order directing the proceedings relating to the arrest to be stayed pending the decision of the appeal in which he impeached the validity of the decree.

Held, that the law confers upon the decree-holder the right to decide whether he should execute the decree for the payment of money by the arrest of the judgment-debtor or by the attachment and sale of his property, or by both, and that while the Court has discretion (which should be exercised in a judicial manner) to refuse execution against the person and property simultaneously, it has no authority to refuse

execution against the person of the judgment-debtor on the ground that the decree-holder must in the first instance proceed against the property of the judgment-debtor, *vide* Order XXI rule 17 of the Code.

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Bakadar Khan v. Viroo Mal (1), dissented from.

The General Manager of the Raj Durbhanga v. Maharajah Coomar Ramaput Singh (2), and *Chena Pemeji v. Ghelo Bai Naraindas* (3), referred to.

Per LeRossignol J.—The decree-holder should be encouraged to proceed against both the property and the person simultaneously and the refusal of the executing Court to grant both reliefs at one time should be the exception and not the rule.

Held, consequently, that the order of the lower Court directing execution of the decree against the person of the judgment-debtor is not open to any objection and must be maintained.

Application for stay of execution proceedings pending the decision of the appeal preferred by the judgment-debtor to the High Court.

JAI GOPAL SETHI, for Petitioner.

Nemo, for Respondent.

JUDGMENT.

SIR SHADI LAL C. J.—The respondent Hakam Singh has obtained a money decree against the applicant, Kishan Chand, and seeks to execute that decree by the arrest and detention in the civil jail of the judgment-debtor. The latter has applied to this Court for an order directing the proceedings relating to the arrest to be stayed pending the decision of the appeal in which he impeaches the validity of the decree.

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Now, the law as enacted in the Civil Procedure Code recognises the arrest and detention in prison of

(1) 73 P. L. R. 1915.

(2) (1872) 14 Moo. I. A. 605.

(3) (1883) I. L. R. 7 Bom. 351.

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the judgment-debtor as one of the ordinary modes of executing a decree for the recovery of money, *vide* section 51, Civil Procedure Code, and gives an option to the creditor of enforcing the decree either against the person or the property of the debtor; and it is nowhere laid down that execution against the person of the debtor shall not be allowed unless and until the decree-holder has exhausted his remedy against the property. Indeed, Order XXI, rule 11 (1), authorises the Court to direct, on the oral application of the decree-holder at the time of the passing of the decree, immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant, if he is within the precincts of the Court. If the decree-holder subsequently applies for the execution of his decree, he must make an application in writing and state therein, *inter alia*, the mode in which the assistance of the Court is required, *vide* clause (j), sub-rule (2) of rule 11, and one of the modes specified in that clause is the arrest and detention in prison of the judgment-debtor. Rule 17 of Order XXI prescribes that if the application is not in any way defective, the Court shall order execution of the decree according to the nature of the application. In other words, if the decree-holder states in his application that he desires to execute the decree against the person of the judgment-debtor, his request cannot be refused on the ground that he must, in the first instance, proceed against the property of the judgment-debtor. The decree-holder is also allowed to execute his decree at the same time against the person and property of the judgment-debtor, but the Court has discretion to refuse simultaneous execution and to ask the creditor to avail himself of only one mode at one time, *vide* Order

XXI, rule 21. The discretion must, however, be exercised in a judicial manner; and as held by the Bombay High Court in *Chena Pemaji v. Ghela Bai Naraindas* (1), the creditor has a right to all the assistance which the law can give him and the Court is not justified in refusing a warrant of arrest simply because a warrant for the attachment of property has already issued if the Court is satisfied that the judgment-debtor is determined to evade, if possible, the payment of his debt.

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That the decree-holder can seek the assistance of the Court in either or both of the modes of execution mentioned above is expressly laid down in Order XXI, rule 30, which provides that every decree for the payment of money may be executed by the detention in the Civil prison of the judgment-debtor or by the attachment and sale of his property, or by both. There are no doubt observations in a Single Bench judgment of the Punjab Chief Court in Civil Appeal No. 1374 of 1914, *Bahadur Khan v. Viroo Mal* (2), to the effect that the decree-holder "was not justified in applying for the arrest of the appellant (judgment-debtor) in the first instance without trying to obtain execution of the decree by other means available to him, *i.e.*, by the attachment and sale of the appellant's property other than land." No authority was, however, cited by the learned Judge in support of his view which runs counter to the express provisions of the Code.

The statutory law referred to above leaves no doubt whatsoever that it is for the judgment creditor to decide whether he should execute the decree for the payment of money by the arrest of the judgment-debtor or by the attachment and sale of his property.

(1) (1888) I. L. R. 7 Bom. 301. (2) 73 P. L. R. 1915.

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or by both; and that while the Court has discretion to refuse execution against the person and property simultaneously, it has no authority to decline to make an order of committal to prison on the ground that the decree-holder should proceed in the first instance against the property of the judgment-debtor. As pointed out by their Lordships of the Privy Council in *The General Manager of the Raj Durbhunga v. Maharajah Coomar Ramaput Singh* (1), "the difficulties of a litigant in India begin when he has obtained a decree;" and it is a matter of common knowledge that far too many obstacles are placed in the way of a decree-holder who seeks to execute his decree against the property of the judgment-debtor. The Legislature has consequently provided for the execution of a decree for money by the arrest of the judgment-debtor, and there is neither justice nor equity in forcing the judgment-creditor to proceed against the property, a remedy which is not only dilatory but often proves infructuous, when he has the right of availing himself of an efficacious mode of recovering his lawful due.

For the foregoing reasons, I hold that the order of the lower Court directing the execution of the decree against the person of Kishan Chand is not open to any objection and must be maintained. I accordingly dismiss the application.

LEROSSIGNOL J.

LEROSSIGNOL J.—I entirely concur in the conclusion of the learned Chief Justice and in his reasons for his conclusion.

Experience amply proves that the epigram of their Lordships of the Privy Council in *The General Manager of the Raj Durbhunga v. Maharajah Coomar Ramaput Singh* (1), reposes upon a wide

foundation of fact. The judgment-debtor in this country as a rule is either frankly recalcitrant or averse from suffering the inconvenience of finding the decretal sum, and execution against his estate is almost invariably opposed by means of objections, generally without foundation, and more often than not, brought at his instigation in order to secure delay in the execution of the decree. The result is that the proverbial law's delay is more frequently and strikingly exemplified in execution proceedings than even in the initial dispute. In these circumstances any tenderness towards the judgment-debtor on the part of the executing Court is not only entirely misplaced but is entirely opposed to the law. Except in cases where the judgment-debtor has no property, I would go so far as to say that far from being discouraged the decree-holder should be encouraged to proceed against both the property and the person simultaneously, and the refusal of the executing Court to grant both reliefs at one time should be the exception and not the rule. The judgment-creditor, except in a few cases, is inspired not by revenge but by the desire to recover his lawful due and he will not apply for execution against the person of his debtor, except in those cases when he has good reason to believe that that form of execution will result in the payment of the debt.

I accordingly concur in the dismissal of the application.

C. H. O.

Application dismissed.

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