

LETTERS PATENT APPEAL.

*Before Coldstream and Din Mohammad JJ.*GHULAM MOHAMMAD KHAN (JUDGMENT-
DEBTOR) Appellant,*versus*AMIR MOHAMMAD KHAN (DECREE-HOLDER)
Respondent.

Letters Patent Appeal No. 41 of 1937.

*Punjab Relief of Indebtedness Act (VII of 1934) S. 34 —
Warrant of arrest of judgment-debtor — without giving him
an opportunity to show cause — Proper procedure explained.*

A. holding a money decree against G. sought to execute it by attachment of the judgment-debtor's property consisting of land, houses and cattle and by his arrest. The executing Court attached all G.'s property and gave him notice to show cause why he should not be arrested. On July 3rd G. put in a petition stating that he had not sufficient time to make arrangements for paying the decretal amount, and promised to pay the debt in instalments, as best he could. The Court passed an order allowing G. until the 7th August to pay the money and recording that if he had not paid by the 7th August it would be presumed that his failure had been contumacious. G. presented before the date of hearing, three applications one after the other protesting against the order of July 3rd and asking for an issue whether his failure to pay had been contumacious. On 7th August appellant's attorney being present, the Court refused to go further into the question of G.'s contumacy finding sufficient evidence for it in G.'s admission of July 3rd, that he had wheat, by the sale of which he could pay off his debt and ordered a warrant of arrest to issue against him.

Held, that G. not having been given an opportunity of showing cause against his arrest, as required by proviso 1 of s. 34 of the Relief of Indebtedness Act, 1934, the order of 7th August for issue of a warrant of arrest against him was illegal and must be set aside, and the case remanded to the lower Court for a fresh decision in accordance with the law, as explained in the judgment of this Court.

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June 4.

Letters Patent Appeal from the order of Skemp J., passed in Civil Appeal No. 404 of 1936, dated 28th January, 1937, affirming that of Lala Mela Ram, Senior Subordinate Judge, Mianwali, dated 7th August, 1936, ordering that a warrant of arrest be issued against the judgment-debtor.

MAURICE, B. H. ALI and BADR-UD-DIN, for Appellant.

MAHMUD ALI, for MOHAMMAD ALAM, for Respondent.

JUDGMENT.

COLDSTREAM J.—Malik Amir Mohammad Khan the respondent to this appeal holds a money decree against the appellant Malik Ghulam Mohammad Khan. On the 28th May, 1936, he sought to execute it by attachment of all the judgment-debtor's property and by his arrest. The Senior Subordinate Judge executing the decree ordered attachment of all the appellant's property, lands, houses and cattle and gave notice to him, presumably under Order 21, rule 37 of the Code of Civil Procedure, to show cause why he should not be arrested. On the 4th June the appellant's lands and cattle were attached. On the 3rd July the appellant put in a petition stating that he had not had sufficient time to make arrangements for paying the decretal amount, that he was not being contumacious and that he would pay the debt in instalments as best he could if given time after selling his wheat crop, which had not yet been completely harvested. The Subordinate Judge passed an order allowing the appellant until the 7th August to pay the money and recording that if he had not paid by the 7th August it would be presumed that his failure had been contumacious.

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On the 4th July the appellant submitted a petition objecting to this order and asking for an issue to be struck for trial whether his failure to pay had been contumacious. In another petition put in on the 9th July he represented that his lands could not be attached as they were ancestral property and asked that in any case he should be allowed to retain land yielding Rs. 500 per annum to maintain himself, his two wives, two daughters and three sons and to defray his expenses which were heavy as he was a Zaildar, a member of the District Board and of the Jirga and had to spend money on hospitality. On the 6th August the petitioner submitted another petition protesting that he was ready to pay the debt in instalments, and that he was not being contumacious but was ready to go to jail if it were found that he was in fact being contumacious.

On the date of hearing, the 7th August, the appellant's Mukhtar being present, the Subordinate Judge refused to go further into the question of the appellant's contumacy finding sufficient evidence for it in the appellant's admission made in the petition of the 3rd July that he was possessed of wheat by the sale of which he could and would pay off his debt and in the appellant's failure to pay anything after having been given time in consideration of this admission. He ordered a warrant to issue accordingly. Against this Malik Ghulam Mohammad Khan appealed to this Court. His appeal was dismissed by a Single Judge and he has submitted a further appeal under the provisions of the Letters Patent of this Court.

It is contended that the Subordinate Judge acted illegally (1) in issuing a warrant of arrest without giving the appellant an opportunity of showing cause

against its issue, as required by section 34 of the Punjab Relief of Indebtedness Act, VII of 1934, and (2) in refusing to strike an issue on the question whether there had been contumacy placing the onus on the decree-holder to prove that the appellant had contumaciously refused to pay the decretal amount in whole or in part without just cause. (It is also contended that the Subordinate Judge ignored the provisions of the second proviso to that section, but this part of the argument I have not understood.)

Under section 34 of Act VII of 1934 an executing Court has power to issue a warrant of arrest on two conditions :

(1) that it is satisfied that the judgment-debtor has without just cause contumaciously refused to pay the amount of the decree in whole or in part within his capacity to make payment, and

(2) that the judgment-debtor has been given an opportunity to show cause against his arrest. In deciding as to the judgment-debtor's capacity to pay regard is not to be had to the value of a temporary alienation of land which could be temporarily alienated in execution of a decree (second proviso to section 34) and only that property is to be taken into account which could be sold by a Civil Court in executing a decree (third proviso to that section). We are not concerned here with the second and third provisos.

No doubt the onus is on the decree-holder to prove the contumacy which entitled him to arrest his debtor but I see nothing in the Act to warrant the proposition that this onus cannot be discharged by merely pointing to evidence already on the record, or that before a Court comes to the conclusion that it is satisfied as to the judgment-debtor's contumacy it must in every case

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strike an issue and formally call upon the decree-holder to prove what is patent on the record. I take it that if it is established that a judgment-debtor has or had property with which he can pay or could have paid his debt or part of it and has not used it for this purpose when called upon to do so, and can offer no explanation of his failure, he may justly be regarded as having acted with contumacy. Once it is proved that the judgment-debtor had property available for discharging his debts after being called upon to pay them the onus surely falls back upon him to prove some just cause for not having discharged them, more especially when a Court has granted him time on a promise to use that property for paying his decree-holder, and if he offers no kind of explanation I have no doubt that the Court can legally conclude that he has without just cause contumaciously refused to pay the amount of the decree in whole or in part.

There is, however, force in the contention that in this case the judgment-debtor has not been given the opportunity of showing cause against his arrest as required by the law. The order passed on the 3rd July which was, in effect, that if the appellant had not paid the decretal amount by the 7th August he would be arrested, prejudged a decision as to his liability to arrest. An objection to this effect was promptly taken by the appellant, who nevertheless was not called upon subsequently to explain his conduct. In the face of this order it would have been futile for the appellant to appear on the 7th August for the question of his ability to pay and his contumacy had already been practically decided and he naturally took it for granted that if he appeared he would forthwith be arrested. It was incumbent on the Court to postpone the issue of a warrant until it had been satisfied that as a fact

the appellant had been possessed of the means to make payment before the 7th August (this was for the decree-holder to prove in any manner he could) and that in spite of his ability to pay he had deliberately and without just cause (and it would be for the judgment-debtor who had special knowledge of his own reasons to show such cause) refused to pay.

My view being that the Court has issued the warrant illegally I would accept this appeal with costs, set aside the order issuing the warrant and remit the case to the executing Court to make the enquiry required by law. The parties will appear before the executing Court on the 5th July, 1937.

DIN MOHAMMAD J.—I agree that the appeal be allowed and that the case be remitted to the executing Court for disposal in accordance with law.

The order of the 3rd July betrays on the part of the executing Court a complete disregard of the provisions of law as contained in section 34 of the Punjab Relief of Indebtedness Act, 1934. This Act introduced a salutary change in the law for the time being in force in order to afford protection to debtors against vexatious arrests. The substantive part of section 34 deals with the question of a judgment-debtor's liability to arrest and prohibits arrest for default in the payment of any money due under a decree unless and until the condition laid down therein is fulfilled. That condition is that the Court should be satisfied that—

(1) the amount of the decree in whole or in part is within the debtor's capacity to pay, and

(2) the refusal to pay that amount is without just cause and contumacious.

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In order to determine the capacity to pay, certain directions are laid down in the form of the second and third provisos. By the second proviso it is enacted that the value of the temporary alienation of the land of a judgment-debtor is not to be taken into account and by the third proviso it is enjoined that only that property is to be taken into consideration which a civil Court can under the law sell. Now, the value of the temporary alienation of the land is nothing else than the value of the produce of the land and this proviso consequently prohibits the value of the produce being calculated while determining a debtor's capacity to make payment. Similarly, the property that a civil Court cannot dispose of in execution of its decree is the land of a statutory agriculturist besides some other properties that are mentioned in section 60, Civil Procedure Code. The combined effect of these two provisions is to exclude from calculation the value of the land and its produce besides those properties which are already exempt otherwise. It follows, therefore, that it is only when in the light of these two provisions the question of a judgment-debtor's capacity to make payment is determined and the Court is satisfied that the amount demanded from him is within his capacity to pay and it further holds that he is withholding this amount from the decree-holder without any just cause and contumaciously, which again connotes want of any sound reason coupled with wilful and stubborn disobedience, that the Court can legally come to the conclusion that the debtor is *liable* to arrest. But even then it is not empowered to arrest him straightaway. There is a further safeguard provided in the form of the first proviso and by that proviso the Court is bound before issuing a warrant of arrest to give an opportunity to him to show cause against its issue. In other

words, he must be allowed time to prove that the Court has gone wrong while deducing its conclusion as to his capacity to make payment, or the absence of just cause or his contumacy. The mere fact that some money has fallen into his hands which he has not paid is not enough to establish any of these factors. He may have valid reasons not to pay that amount and unless he is allowed to prove them, how can an executing Court come to the conclusion that he is liable to arrest or an appellate Court determine that the order is just and legal.

The question of onus is simple. A duty is in the first instance cast upon the decree-holder to bring circumstances on the record from which the Court may be in a position to draw its own inference as to the conditions laid down in the substantive part of the section. This burden may possibly be discharged otherwise, as, for example, by the admission of the judgment-debtor that he owns some money or by other unimpeachable evidence that he owns it, but this, as remarked before, will not be conclusive. It will merely shift the onus on to the judgment-debtor to prove his immunity from arrest.

It may further be observed that prior to the issue of the warrant in question, a further protection was afforded to debtors in the shape of the Punjab Debtors' Protection Act, which provides among other things that such portions of a judgment-debtor's land shall be exempted from temporary alienation as is necessary to provide for his maintenance and the maintenance of those who are dependant on him. Reading section 34 of the Relief of Indebtedness Act in the light of section 5 of the Debtors' Protection Act, the inevitable conclusion is that if a debtor is able to prove that the

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produce of his land is hardly sufficient for the maintenance of himself and the other members of his family, his refusal to surrender that produce or the value thereof will not be without just cause or contumacious.

The executing Court in this case does not appear to have appreciated this position correctly and appears to have made up its mind at the very commencement of the case against the judgment-debtor. As stated above, his admission that he had realized some produce from his land or was in a position to realize it, was not enough to prove his capacity to pay, absence of just cause and contumacy, simply because he failed to place the value of that produce at the disposal of the decree-holder. The attitude of the Court is all the more inexplicable as the judgment-debtor appears to have made repeated attempts to put it on the right track. The Courts are expected to administer the law as they find it, however, repugnant to their notion of justice it might appear to be, and protective measures like these should be construed in a liberal spirit and not otherwise. The executing Court would now determine the issue before it in the light of these remarks and after paying due regard to all the mandatory provisions that the law lays down in the interest of judgment-debtors.

A. N. C.

Appeal accepted.

Case remanded.