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6th July, 1869, while the debtor was in prison, that he was discharged on 15th July as having been in prison for two years, the petition was lodged on 7th August and filed on 14th August and the adjudication was on 13th September, 1869, and the only point argued before the Chief Justice was whether the imprisonment was a satisfaction of the decree, which it was held it was not. In the present case the decree has been satisfied by the payment to the jailor of the amount for which the debtor was held in custody. The question whether "shall be" ought to be read "shall have been" was not discussed, and the case is, therefore, no authority on the point I have now decided.

Order of adjudication refused.

Attorneys for the applicant (insolvent)—*Messrs. Khanderao and Shripad.*

Attorneys for the petitioning creditors—*Messrs. Framji and Dinshaw.*

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Crowe.

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July 4 & 11.

SHAMJI DEOKARAN (ORIGINAL DEFENDANT), APPELLANT, *v.* POONJA JAIRAM AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Decree—Execution—Arrest of debtor in execution—Release of debtor from such arrest under interim protection order granted under section 13 of Indian Insolvent Act (Stat. 11 & 12 Vic., c. 21)—Re-arrest of debtor in execution of same decree—Civil Procedure Code (XIV of 1882), section 341.

A judgment-debtor who has been arrested and imprisoned in execution of a decree and has obtained an *interim* protection order under section 13 of the Indian Insolvent Act (Stat. 11 & 12 Vic., c. 21) is liable to be re-arrested in execution of the same decree.

Secretary of State v. *Judah* (1) distinguished.

In re Bolye Chund (2) not followed.

APPEAL from an order of Starling, J., in Chambers.

* Suit No. 682 of 1900; Appeal No. 1176.

(1) (1886) 12 Cal. 653. (2) (1893) 20 Cal. 874.

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On the 12th March, 1901, the plaintiffs obtained a decree for Rs. 11,729 against the defendant, and on the 4th July, 1901, he was arrested in execution and sent to jail.

On the 13th July, 1901, the defendant filed his petition in the Insolvent Court, and on the 17th July obtained an interim protection order for one week. He was thereupon released.

On the 24th July he applied to the Insolvent Court for an extension of his protection order, but his application was rejected.

On the 1st August, 1901, the judgment-creditor (plaintiff) applied for a fresh warrant of arrest against the defendant, which was granted.

On the 6th August, 1901, the defendant gave notice of motion to have the order for his re-arrest set aside as illegal.

Davar for the defendant in support of the motion. He cited sections 341, 241 and 337 of the Civil Procedure Code (XIV of 1882); *Secretary of State for India* v. *Judah*[1]; *In the matter of Bolye Chund*.[2]

Mulla for the plaintiff *contra*.

STARLING, J.:—In this matter a decree was passed against the defendant Shamji Deokaran on the 12th March, 1901, and on the 4th July, 1901, he was arrested in execution of that decree.

On the 13th July he filed his petition in the Insolvent Court, and on the 17th he obtained an interim protection order for one week. On the 24th he applied to the Insolvent Court for a further protection order, but his application was refused.

On the 1st August, 1901, on the application of the judgment-creditor, I gave leave for a fresh warrant to issue for his arrest, and on Saturday last the insolvent applied on notice to have that order set aside as being contrary to law.

The application for a fresh warrant was made and granted under the provisions of section 13 of the Insolvent Act (Stat. 11 & 12 Vic., c. 21), which provides that it shall be lawful for the Insolvent Court "to make an interim order for the protection of the insolvent from arrest ..... and any such order may be recalled ..... Provided always that no such order shall .....

(1) (1886) 12 Cal. 653. (2) (1893) 20 Cal. 874.

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prejudice the right of any such creditor to arrest the insolvent, *whether he shall or shall not have been previously arrested* for the same debt or demand, in case the order shall be recalled or shall fail by reason of the petition of the insolvent being dismissed, or the adjudication being reversed."

Mr. Davar for the insolvent judgment-debtor argued that under the Civil Procedure Code (XIV of 1882) no judgment-debtor could be arrested twice for the same debt, except as provided for by the Code in sections 241 and 337A, and he relied upon section 341 which provides that a discharged judgment-debtor shall not be re-arrested. Under the terms of that section, however, it is a judgment-debtor who is "discharged under this section" who cannot be re-arrested, and not a judgment-debtor discharged under any other provision of law. No doubt, where the Code has only to be looked to, a re-arrest can only take place where it is permitted by the provisions of the Code; but the Code does not repeal the Insolvent Act, and in my opinion section 13, under the circumstances of this case, restores to the judgment-creditor the right to re-arrest the insolvent.

Mr. Davar, however, referred to two cases decided in Calcutta as showing that that was not the case. In the first, *Secretary of State* v. *Judah*,[1] the release of the judgment-debtor was under the provisions of the Civil Procedure Code, consequently that decision is not in point in this case. In the second, *In re Bolye Chund*,[2] the release was under the provisions of the Insolvent Act and the right to re-arrest accrued under the provisions of section 13 of that Act. But Sale, J., in his judgment did not seem to have had in his mind the fact that section 341 only prohibited re-arrest in the case of "a judgment-debtor *discharged under this section*," nor to have taken into consideration the right given to the creditor by section 13 of the Insolvent Act to re-arrest the debtor under the circumstances provided for by that section; but having, to my mind, mistakenly supposed that Petheram, C.J., in the former case had held that the circumstances under which the discharge was obtained were absolutely immaterial, refused to allow the judgment-debtor to be re-arrested. I therefore decline to follow this case.

(1) (1886) 12 Cal. 652. (2) (1893) 20 Cal. 874.

The application of the judgment-debtor must, therefore, be dismissed with costs.

In order, however, to prevent it being supposed that this is a new imprisonment and not merely a continuation of the old one, I direct that the new warrant should have a memorandum thereon, that in calculating the six months after which, under the Civil Procedure Code, the defendant must be released, the time he has suffered imprisonment under the former warrant is to be taken into consideration.

The defendant appealed, contending that under the Civil Procedure Code the Court had no power to order his re-arrest and that the Insolvent Act (Stat. 11 & 12 Vic., c. 21), section 13, did not restore the right of the plaintiff to re-arrest him.

Bahadurji for appellant. He referred to Civil Procedure Code (XIV of 1882), sections 239, 241, 337A clause 4, 653 clause 4, 340 and 341, and cited *Secretary of State* v. *Judah* (1); *In re Bolye Chund*.(2)

Setalvad for respondents. He referred to sections 230, 235, 239, 241 and 341. He distinguished the case of *Secretary of State* v. *Judah*, and cited section 13 of the Indian Insolvent Act (Stat. 11 & 12 Vic., c. 21) as to restoration of right to re-arrest.

JENKINS, C.J. :—The facts of the case are concisely and clearly stated in the opening sentences of Mr. Justice Starling's judgment, and I do not propose to repeat them here. They raise the question whether a judgment-debtor, who has been arrested and imprisoned in execution of a decree and has obtained an interim protection order under section 13 of the Indian Insolvent Act (Stat. 11 & 12 Vic., c. 21), is free from liability to be re-taken in execution of the same decree.

Mr. Justice Starling has held that he is not free from this liability, and against this decision the judgment-debtor has appealed, relying principally on *The Secretary of State* v. *Judah* and *In re Bolye Chund*.

(1) (1886) 12 Cal. 652. (2) (1893) 20 Cal. 874.

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The facts in the first of these two cases are thus stated by Petheram, C.J.:

The plaintiff obtained a decree on the Original Side of this Court as long ago as the beginning of the year for the recovery of a sum of Rs. 1,14,500 from the defendant, and in execution of that decree obtained an order for the arrest of the defendant, and issued a warrant to the Sheriff for his arrest, and by the terms of the warrant the defendant was directed to be arrested or imprisoned on or before the 20th of February. In accordance with that warrant the Sheriff of Calcutta arrested the defendant on the 11th of February and lodged him in prison. Having done that the Sheriff had done his duty and the defendant was in the custody of the jailor under the jurisdiction of the Court. That being the state of things, proceedings were taken at the instance of the defendant to obtain his discharge from imprisonment by the machinery provided for in the insolvency sections of the Civil Procedure Code. These proceedings were instituted by him on the day on which he was arrested, that is, on the 11th of February. They came before the Judge who had jurisdiction in that matter on the 3rd of March after several adjournments. On the 13th of March, under section 349, pending the proceedings under the insolvency sections of the Civil Procedure Code, the Judge having jurisdiction in that matter ordered him to be released on bail; the defendant giving the bail which he was required to do accordingly was released. These proceedings went on from time to time, and defendant from time to time surrendered to his bail when he was required to do so. Bail was renewed and he was released on bail until the proceedings ultimately came to an end. Eventually they came to an end by the Judge rejecting the defendant's application, declaring that he was not entitled to the protection of sections of the Civil Procedure Code relating to insolvents. The defendant at that time had surrendered to his bail and was in Court, and was to all intents and purposes in custody then under the warrant which had been originally issued, which had been executed by the Sheriff; and if the plaintiff then intended that the imprisonment should continue, his business and duty was to have had the proper officer from the jail there who should take him into custody, his bail having expired, and reconvey him to the place from whence he had been released when he was released on bail. He did not do so for some reason or other. What that reason was I do not know; at all events he did not do so, and the defendant remained at large, and is at large at this time.

That case differs from the present only in this, that the interim order for release was made under the insolvency sections of the Civil Procedure Code. The *ratio* appears to be that the Code only contemplates one arrest; that the judgment-debtor can be in custody under the original arrest alone and under no other; that when he was released on bail he was in theory in custody

under the original warrant and his imprisonment still continued; and that if he was not remitted to jail at the end of his bail "it was the fault of the person who had to deal with the matter." Who that person was is not clearly indicated.

In *Bolye Chund Dutt's case* we have a decision on facts practically undistinguishable from the present, for the temporary release was under section 13 of the Insolvent Act. Mr. Justice Sale, considering himself bound by Sir Comer Petheram's decision, refused to re-commit the judgment-debtor to prison. He said: "I can only read the observations of the learned Chief Justice in one way, and that is that the Civil Procedure Code contemplates as immaterial the circumstances under which the judgment-debtor obtains his release, and that, as a fact, under the Civil Procedure Code, there is no power whatsoever in the Court to order a second arrest under one and the same decree." The learned Judge then goes on to say, that for this reason it can make no difference that the release was under the Insolvent Act; for that the inability to re-commit arose, according to the decision by which he was bound, from the absence of a power of re-committal under the Code. Mr. Justice Starling appears to have thought that Mr. Justice Sale overlooked the last provisions in section 341 of the Civil Procedure Code and the concluding proviso to section 13 of the Indian Insolvent Act. I doubt that: I think the learned Judge considered himself absolutely bound by the previous decision as to the limited power of arrest vested in the Court.

What we then have to determine is whether it is a sound proposition that the Civil Procedure Code (XIV of 1882) does not permit of a second re-taking of the person.

We have a statement of the law as it stood before the Civil Procedure Codes in *Haines* v. *East India Company*.[1] In delivering the opinion of the Privy Council in that case Sir John Patteson said (page 54):

> The plaintiff in any case, in order to be barred from continuing his execution, and from having the benefit of his judgment, must voluntarily discharge the defendant out of custody. If he does discharge him out of the custody, I agree that if it be only for a week, he cannot, by any agreement which he may

(1) (1856) 11 Moo. P. C. Cases, 39.

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have made with the defendant, afterwards re-take him, although the defendant may possibly have agreed that, if he does not pay the money within a week, he shall be re-taken. That is decided law.

From this, then, it is clear that before the Codes the decree-holder did not necessarily, and in all circumstances, lose his right to re-take the person of his judgment-debtor; he did so, if he voluntarily discharged the defendant out of custody. There is no suggestion here of a voluntary discharge by the decree-holder, or of any default on his part. It was under an order of the Insolvent Court that the judgment-debtor got his release, and, according to the principle enunciated by Sir John Patteson, there would, apart from the Code, be nothing to debar the petitioner from continuing his execution.

That there is a fundamental difference in its results between a discharge with the consent of the decree-holder and one directed by an order of Court is apparent from *Nadin* v. *Battie*,[1] where it was contended that the discharge under an Insolvent Debtors' Act of one of two debtors under a *ca. sa.* operated to discharge the other just as if the discharge had been with the creditor's consent. Lord Ellenborough in delivering the judgment of the Court said:

> The discharge cannot be said to have been with the plaintiff's assent, because he did not choose to detain the party in prison at his own expense. Nor can the law, which works detriment to no man, in consequence of having directed the discharge of one defendant, so far implicate the plaintiff's consent against the fact as to operate as a discharge of the other.

Before the Procedure Codes, it would ordinarily be an answer to an application for the second arrest of a judgment-debtor that the discharge of his person was a discharge of his debt. But under the Code the discharge of the person is not a discharge of the debt; the concluding provision of section 341 leaves no room for doubt on this head. Hence it became necessary to make specific provision against a second arrest in the events enumerated in that section.

I confess I do not follow the train of reasoning, which led Sir Comer Petheram to the conclusion that the Code only contemplates one arrest, if by that is meant that there is anything

(1) (1804) 5 East 146.

in the Code, which forbids a second arrest apart from the express prohibition it contains. If the Chief Justice's proposition is correct, then it is difficult to see, why a special prohibition was inserted in section 341. The mere fact that a general power of re-taking the person is not expressly given by the Code cannot be a prohibition, for, were it so, then a re-taking of property in attachment would equally, and by parity of reasoning, be illegal, but that no one suggests.

No doubt the Code specifically provides for re-taking of the person under certain defined circumstances (see sections 241, 337A, 653), but it does not follow from this that a second arrest is in all circumstances forbidden.

Thus section 241 speaks in the same breath of the re-taking of the property and re-taking of the person, but, as I have already pointed out, the power to re-take property is not questioned. Then again from the provision in section 337 (clause 4) no argument as to the original scheme of the Code can be drawn, because it was only inserted by Act VI of 1888. The same remark applies to section 653.

The only prohibition on a second arrest expressed in the Code is that in section 341, and this prohibition is limited to the cases there enumerated. The release under an interim order is not among them, so the prohibition in section 341 cannot govern this case. The conclusion, then, to which I come is that the Civil Procedure Code does not forbid, but on the contrary permits, the re-taking of person who has been released under section 13 of the Indian Insolvents' Act.

Turning to the Insolvent Act, I find nothing there to support the appellant's argument. Section 13 says that no interim order shall operate as a release or satisfaction of the debt or demand of any creditor; in fact it contemplates a second arrest, for it goes on to provide that an interim order shall not prejudice the right of any such creditor to arrest the insolvent, whether he shall or shall not have been previously arrested for the same debt or demand in case the order shall be recalled or shall fail by r eason of the petition of the insolvent being dismissed or the adjudication being reversed. Having regard to the form in which the interim order for release has been framed in this case, it is argued that it

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has not been recalled; but even if this be so, it is evident that it is not the policy of the Act that an interim order, when it has come to an end through the default of the debtor, should protect him from a second re-taking.

It only remains to be seen whether the learned Judge has erred in the means adopted by him of enforcing the decree-holder's right to re-take his debtor's person.

The old procedure on an escape shows that the Court has the power to direct the issue of a second writ. Thus in Bacon's Abridgment it is said:

> It was formerly held, that where the Sheriff suffered a prisoner in execution to make a voluntary escape, the prisoner was in such case absolutely discharged from the creditor, and that the right of action was entirely transferred against the Sheriff, who by means of such escape became debitor *ex delicto*.
>
> But the latter resolutions have been contrary; and it has been adjudged, that where a Sheriff suffered a voluntary escape, the plaintiff might have a new action of debt or *fieri facias quare executionem non* against the prisoner.
>
> Also the Statute 8 and 9, Will. III, c. 26, section 7, hath taken away all distinction between voluntary and permissive escapes with regard to the plaintiff's remedy; for thereby it is enacted "that if any prisoner, who is or shall be committed in execution to either or any of the said respective prisons, shall escape from thence by any ways or means howsoever, the creditor or creditors, at whose suit such prisoner was charged in execution at the time of his escape, shall or may re-take such prisoner by any new *capias* or *capias satisfaciend*, or sue forth any other kind of execution on the judgment as if the body of such prisoner had never been taken in execution. (Escape in Civil cases (C).) .... It has been already observed that if the Sheriff suffers the prisoner voluntarily to escape, the party at whose suit he was in custody may notwithstanding sue out any new execution against the person escaping: for it would be unreasonable that he should be allowed to take advantage of his own act." (Idem E. 3.)

It may be that we are not dealing with an escape, but what I have read shows that, in circumstances analogous to the present, a second writ can be issued. Therefore, I think the learned Judge was entitled to make the order he did; though I think it was open to him to pass an order to re-take as was done in *Beynon* v. *Jones*.[1] There a married woman was taken in execution under a *ca. sa.*; but an order was subsequently made for her discharge out of custody on the ground of her being a

(1) (1846) 15 M. & W. 566.

married woman and having no separate property. Thereupon the plaintiff obtained a rule calling upon the defendant to show cause why the order should not be set aside and why the Sheriff should not be directed to re-take her, or why the plaintiff should not be at liberty to issue execution afresh against her. The considered judgment of the Court was ultimately delivered by Pollock, C.B., who after discussing the matter at length said: "The consequence is, that the rule discharging my brother Rolfe's order, and directing the Sheriff to re-take the defendant, must be made absolute." Here, however, a second warrant of arrest has actually been issued, and nothing would be gained by substituting an order to re-take in its place. I, therefore, would confirm Mr. Justice Starling's order with costs.

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CROWE, J.:—I concur in the judgment of my Lord the Chief Justice.

Decree confirmed.

Attorneys for plaintiff—*Messrs. Mulla and Mulla.*

Attorneys for defendant—*Messrs. Malvi, Hiralal and Mody.*

APPELLATE CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Crowe.

VINAYAK SHIVRAO DIGHE AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* DATTATRAYA GOPAL AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

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AND

DATTATRAYA GOPAL AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS, *v.* VINAYAK SHIVRAO DIGHE AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.†

Mortgage—Decree for redemption—Payment of the amount of decree of lower Court and recovery of possession by mortgagors—Subsequent enhancement in appeal of amount ordered to be paid by decree—Subsequent suit by the mortgagee to recover profits of the mortgaged property for period between recovery of possession by mortgagor and payment of amount of appellate decree—Res judicata—Civil Procedure Code (XIV of 1882), section 13, explanation II.

On the 25th September, 1893, a decree in a redemption suit directed the plaintiffs (mortgagors) to pay to the defendant (mortgagee) Rs. 8,200 and costs

* Second Appeal No. 527 of 1901. † Second Appeal No. 548 of 1901.