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admitted by the plaintiff, and I do not therefore think myself bound to express any opinion upon it. I wish to state, however, that, as a matter of principle, the shareholders of an undivided estate have no right to divide a holding or tenure without the consent of the tenant. The payment to each shareholder of his quota of the rent is of itself no evidence of such consent; although when coupled with other facts and circumstances, it may justify a Court of Justice in coming to the conclusion that the tenant actually consented to the division of his tenure into a corresponding number of distinct holdings.

[ORIGINAL CIVIL.]

Before Sir R. Couch, Kt., Chief Justice, and Mr. Justice Macpherson

C. SETON AND ANOTHER (PLAINTIFFS) *v.* A. S. BIJOHN (DEFENDANT).

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Jan. 22.

Execution of Decree—Attachment of Person of Debtor—Onus—Act VIII of 1859, *ss.* 201,207,212,221,273,274.275,280,281—*Act XXIII of* 1861, *ss.* 8,13.15

Where a judgment-creditor had obtained a writ of attachment against the property of his judgment-debtor, but the debtor had no property to the knowledge of the creditor against which the attachment could be enforced,—*Held* (reversing the decision of the Court below), that he was entitled to an order for execution of the decree by attachment of the person of the debtor.

In an application for such an order, the *onus* is on the judgment-debtor to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct, and not on the creditor to show that, by sending the debtor to prison, some satisfaction of the debt would be obtained.

THIS was an appeal from a decision of Mr. Justice Phear, dated 26th August 1871, refusing an application made by the plaintiffs, who carried on business in Calcutta, under the name of the Bengal Oil Company, for execution of a decree obtained by them in this suit on 2nd June 1871, against the defendant who carried on business in Calcutta as a merchant, by attachment of the defendant's person.

The application was by petition verified by affidavit which set out the following circumstances:—

"That on 2nd June 1871, the plaintiffs obtained a decree in the suit against the defendant for for Rs. 2,227-15-6, with interest at 6 per cent

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until realization and costs amounting to a further sum of R. 4 81-6; that on or about 19th May 1871, the Sheriff of Calcutta attached five casks of linseed oil, the property of the defendant, under a writ of attachment before judgment obtained by the plaintiff; and on or about 30th May, a claim was preferred by one Sapoorjee Byramjee, who alleged that he was the owner thereof, and prayed that the attachment might be removed; that on 27th June 1871, the claim came on for hearing and was dismissed with costs; that on 6th July, the plaintiffs obtained a writ of attachment under the decree of 2nd June against the five casks of oil, and on 13th July an order for the sale of the said oil; that the property so attached was sold on 3rd August 1871, and realized Rs. 367-7-8, after deduction of poundage and charges, and that the balance under the said decree still remained due and unsatisfied; that the defendant was a prisoner for debt in the Presidency Jail, and the plaintiffs had been unable to discover any other property of the defendant which could be attached in execution of the decree."

The plaintiffs prayed for an order that a writ of attachment should issue against the person of the defendant, in exscution of the decree of 2nd June.

Mr. *Phillips* for the plaintiffs.

PHEAR, J.—It appears to me, Mr. Phillips, that on the facts which you disclose in yoor affidavit, I ought not to issue execution against the person of the defendant. In the case of a first application for execution, all things being regular, the Court is obliged under our Civil Procedure Code to issue execution in whichever form the judgment-creditor asks it, but when the aid of the Court process is invoked a second time, the matter is I think different. In my opinion the Court has then a discretion to enquire what has been done with the first process, why it has not proved fully fructuous, and whether there is any reason for any beneficial result to the creditor as the effect of issuing another process. The Court is of course bound to do all in its power to compel obedience to the order which itself has passed; but in execution proceedings its action should be limited to this end; it should not allow its process to be used for any purpose; it is bound to take care that the judgment-debtor, however worthless a man he may be, is not uselessly harassed by

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process which cannot lead to satisfaction of the decree. The Court ought not to arrest a judgment-debtor merely to punish him. I have always held in this Court that, after process of execution has been once granted to a judgment-creditor in accordance with his request, it becomes matter of judicial discretion with the Court to decide whether or not a second application for execution should be granted, a discretion to be exercised in view of all the facts of the case; and I have reason to know that the Judges of both the Bombay and North-West High Court have followed a like practice, Now the affidavit on which you move shows that the judgment-debtor has no property; as the plaintiff knows, the judgment-debtor is also already in prison at the suit of another creditor, from which facts I infer that other persons are equally unable with the present applicant to find any property of his. Your client does not venture to say that he has reason to think the judgment-debtor has means of satisfying the decree, which he, the creditor, is unable specifically to ascertain or to get at, and this omission is the more important, because when you first made the present application two days ago, I said I would grant it, provided something of this kind were made out to me. It is therefore, I think, clear by your own showing that, if I issued the execution which you ask, it could only end in the debtor being brought before me and discharged. And I do not think I ought to cause the man to be arrested merely by way of punishing him for his conduct in incurring the debt, however gross that may have been. The criminal tribunals should be resorted to, if such a purpose as this actuates the creditor. I refuse the application.

From this decision the plaintiffs appealed.

The appeal was heard *ex parte*.

Mr. *Phillips*, for the appellants, contended that the sections of Act VIII of 1859, relating to the attachment of the person in execution, show that the Judge has no discretion to refuse to grant execution against the person after the execution against the property has failed—see section 201; the creditor has a discretion in the first instance as to which he will

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proceed against. The limit is that the creditor cannot have both at the same time, but if one fails, he can have the other—*Davis* v. *Middleton* (1). The Court is to issue execution according to the nature of the application—see section 212, Act VIII of 1859, and section 15 of Act XXIII of 1861. The *onus* is on the debtor to show that he has no other property, and not on the creditor to show, that he has—see section 273. Under that section the creditor is entitled to the oath of the defendant, that he has no property whatever, not only that he has none that can be taken in execution. The creditor here may be entitled to keep the debtor in prison on other grounds—see section 281. If the judgment appealed from is correct, execution against the person would never be obtainable after execution had once been had against the property—see section 280. [COUCH, C. J.—What is the practice of the Bombay and Agra High Courts alluded to by Mr. Justice Phear?] I have been unable to find any such practice in reported cases. The cases of *Byjnath Pundit* v. *Kunhya Lall Pundit* (2), and *Nittai Chandra Pal* v. *Thakur Das Biswas* (3) were also referred to.

(1) 8 W. R., 282.

(2) 9 W. R., 527.

(3) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Macpherson.*

The 5th August 1869.

NITTAI CHANDRA PAL (PLAINTIFF) *v.* THAKOORDAS BISWAS AND OTHERS (DEFENDANTS).

THIS was an appeal from an order of Mr. Justice Phear, refusing an application for the attachment of the person of a judgment-debtor in execution of a decree.

The facts are sufficiently stated in the judgments on appeal.

PEACOCK, C.J.—It appears to me that in this case a writ ought to be issued. The first writ was issued on the 19th June 1867, and the Sheriff was commanded to execute it on or before the 19th July. The Sheriff returned that writ on the 11th September, stating that he had made diligent search after Thakurdas Biswas, Nakur Chandra Mitter, and Ramlal Kundu, but that they were not nor was any or either of them, found within the town of Calcutta. Another writ was issued on the 18th June 1868, returnable on the 18th July 1868, and that writ was returned by the Sheriff in the same manner, stating that he had made diligent search after Thakurdas Biswas; but that he was not found within the town of Calcutta.

I don't know why the second writ was issued only against one of the defendants and not against the whole of them. It would have been more regular if the writ had been issued against all. The plaintiff swears that on the 8th January 1867, a decree was obtained by him against the defendants, under the provisions of the Bills of Exchange Act. He then says:—"The defendants have not "nor hath any of them property within "the local jurisdiction of this Hon'ble "Court, whereupon the said decree could "be satisfied during the respective period