

ORIGINAL CIVIL.

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Macpherson,
and Mr. Justice Pontifex.

1874
June 26.

COOMBE v. CAW.

*Arrest in Execution of Decree—Discharge—Act VIII of 1859, s. 273—Act
XXIII of 1861, s. 8—Salary.*

The fact that a judgment-debtor, who has been arrested in execution of a money-decree, is in receipt of a salary, is not sufficient cause to show against his discharge under s. 8 of Act XXIII of 1861.

THIS was an application by the defendant under s. 273, Act VIII of 1859, for discharge from arrest in execution of a decree for money obtained by the plaintiff. The petition filed in support of the application stated, that with the exception of certain scheduled property, particulars of which were given in accordance with the terms of s. 273, and of a monthly salary of Rs. 600, the defendant was not possessed of any property: and with regard to the salary the petition further stated that, by an order of Court, Rs. 100 of such salary were directed to be paid monthly in part satisfaction of a previous decree against the defendant.

The application was originally made before Macpherson, J., who expressed an opinion that a person in receipt of a salary does not come within the purview of s. 273, Act VIII of 1859; but on being referred to the case of *Nawab Asdud Dowla Reza Hossein Khan v. Haminsaddowla Abed Khan* (1), and it being stated that the defendant was willing to place his salary at the disposal of the Court, the learned Judge consulted Pontifex, J. The case was subsequently argued before those two Judges who, having regard to the importance of the question involved, suggested a re-argument before themselves and a third Judge. Counsel on both sides assenting, the matter now came on before the Chief Justice and Macpherson and Pontifex, JJ.

(1) 6 B. L. R., 575.

Mr. *Kennedy* and Mr. *Branson* for the defendant.

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Mr. *Lowe* for the plaintiff.

The Court called on Mr. *Lowe* to state the grounds of his opposition to the defendant's application.

Mr. *Lowe* :—Under the circumstances disclosed in his petition, the defendant is not entitled to his discharge under s. 273. Act VIII of 1859 was intended by its framers to apply only to Courts not established by Royal Charter. Cl. 37 of the Letters Patent of 1862 provided that the proceedings in civil suits of every description, brought in the High Court, should be regulated by the Civil Procedure Code and such other enactments of the Governor-General in Council in relation to civil procedure as were then in force; but the Letters Patent of 1865 enacted that all proceedings in civil cases should be regulated by rules to be made by the High Court itself, provided that in making such rules the Court should be guided, as far as possible, by the provisions of Act VIII of 1859 and of any other law which has been made amending or altering the same. The rules framed under that clause adopt generally the provisions of Acts VIII of 1859 and XXIII of 1861 as the procedure of this Court; but the Court cannot by its rules create a jurisdiction which it would not otherwise have; *per* Norman, J., in *Prasanna Mayi Dasi v. Kadambini Dasi* (1). [Couch, C. J.—This is not a question of jurisdiction. If these sections are inapplicable, what power has the High Court to arrest in execution?] There is, it must be admitted, very little doubt that the arrest sections of Act VIII of 1859 do now apply to the High Court on the original side, but under s. 8, Act XXIII of 1861, it is good cause against a debtor's discharge to show that he is in receipt of a salary, and will not set aside any portion of it to pay his debt. [Mr. *Kennedy*.—The defendant has offered to place his salary at the disposal of the Court.] Not in his petition: moreover, if the Court were to order him to pay a certain sum out of his salary and he refused to obey the order, the plaintiff would wholly lose

(1) 3 B. L. R., O. C., 85; see p. 88.

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the benefit of his present execution proceedings, and it is doubtful whether the defendant could be re-arrested; see s. 282. [COUCH, C.J.—The Legislature, while directing an enquiry as to the debtor's future means, appear to have made no provision to secure the application of those means.] The petition shows that the defendant is in insolvent circumstances, and he ought therefore to go to the Insolvent Court, where he could be placed on terms: The plaintiff cannot force him into the Insolvent Court. [COUCH, C.J.—At present we can only consider whether the defendant is entitled to his discharge under the Civil Procedure Code.] Then it is submitted that he has failed to comply with the requirements of the Act as he has not placed, and indeed cannot place, his future means at the disposal of the Court. At all events as the defendant is earning a salary, and has allowed himself to be arrested instead of paying his debts out of that salary, the Court in the exercise of its discretion ought to refuse to discharge him.

Mr. Kennedy for the defendant.—The words “may direct the discharge of the defendant from custody” in s. 8, Act XXIII of 1861, must be read as imperative—*Macdougall v. Paterson* (1), *Anand Chandra Pal v. Panchilal Sarma* (2), and *De Souza v. The Secretary of State* (3). [COUCH, C.J.—The provision as to showing cause gives some discretion to the Court, though the word “may” may not.] Assuming that the Court has a discretion to refuse to discharge the defendant, no sufficient cause against his discharge has been shown in this case. Further, parts of a statute in *pari materia* must be read together. If this application be refused, and the defendant sent to prison, he might at once apply for, and would be entitled to, his discharge under ss. 280 and 281. It would therefore be an idle exercise of the Court's discretion to commit him under s. 274. S. 281 shows the nature of the enquiry directed by s. 8, Act XXIII of 1861; and the cause shown under the latter section must be such as would be an answer to an application under s. 280. Under s. 281 the debtor is entitled to his discharge, unless he

(1) 11 C. B., 755.

(2) 5 B. L. R., 691; see p. 699;

(3) 12 B. L. R., 423:

has committed an act of bad faith for the purpose of obtaining it— *Butler v. Lloyd* (1). It is admitted on the plaintiff's behalf that the defendant would be entitled to be discharged if he were not earning a salary ; the argument therefore comes to this, that an idle man is to be discharged, while the diligent man is to be committed to prison ; or that in order to compel a man to pay his debts, the Court is to deprive him of his only means of doing so.

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The following judgments were delivered :—

COUCH, C.J.—Mr. Lowe, who opposes the application, said that there can be very little doubt that s. 273 of Act VIII of 1859 and the following sections, as well as s. 8 of Act XXIII of 1861, are the law on the original side of the Court, and regulate its practice. He said “very little doubt ;” but there is no doubt that it is the law, and it has been constantly acted upon.

The question we have to decide is what is the meaning of s. 273. Of course, in considering that, we must look also at the sections in Act VIII which follow it. It appears to me that the general design of these provisions is that a man is not to be needlessly and uselessly detained in prison.

Imprisonment is not to be arbitrary and capricious : there must be some object in it,—to oblige the debtor to make a full disclosure of his property, and to prevent him from fraudulently concealing property which might be taken in execution of the decree. S. 273 says that the person who is arrested, when brought up, may apply for his discharge “on the ground that he has no present means of paying the debt, either, wholly or in part ; or if possessed of any property that he is willing to place whatever property he possesses at the disposal of the Court.” And he is to give “a full account of all his property of whatever nature, whether in expectancy or in possession.” And s. 8 of Act XXIII of 1861, which is substituted for s. 274 of Act VIII of 1859, provides that “the Court shall examine the applicant as to his then circumstances, and as to his future means of payment, and shall call upon the plaintiff to show cause

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why he does not proceed against any property of which the defendant is possessed, and why the defendant should not be discharged; and should the plaintiff fail to show such cause, the Court may direct the discharge of the defendant from custody." Allowing that the word "may" is imperative upon the Court, and has, in fact, the same meaning as "shall," the discharge of the defendant from custody is only to be granted when, in the opinion of the Court, the plaintiff shall have failed to show such cause.

The question is whether the plaintiff here can be said to have failed to show cause. The only cause shown is that the defendant is holding an office, for his services in which he is entitled to receive a monthly salary. If he is not discharged and remains in prison, he cannot perform those services, and we may certainly assume that he would not continue to receive the salary; so that, if the cause shown is allowed to be sufficient, the salary will entirely cease. The fact of his being entitled to receive a salary which he can only get by being discharged is given as a reason that he should not be discharged. I cannot see that it is. When we consider what might follow on his not being discharged, and being committed to prison, it would seem that the Court ought not to refuse his discharge. He might, upon being committed to prison, apply under s. 280 for his discharge, and then he must give a full account of all property of whatever nature belonging to him, whether in expectancy or in possession, and of the places where such property is to be found. By s. 281, the Court, on such application being made, is to cause the plaintiff to be furnished with a copy of the account of the defendant's property, and to fix a reasonable period within which the plaintiff may cause the whole or any part of such property to be attached and sold. If the plaintiff does not, within the time specified, prove that the defendant has been guilty of any of the acts there mentioned, he will be discharged. This section shows that the property intended by the former section is property which may be made available for the satisfaction of the debt,—which may be realized and sold. This being the state of things, and the defendant being able, if we were now to send him to prison, to apply for his discharge under s. 280, I think

we ought not to refuse it under s. 273. It is a case in which there is not sufficient cause shown for not discharging him.

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It appears to me that the scope of these provisions does not require that the defendant should be committed to prison for what would not be a legitimate advantage to the plaintiff. The Court would not allow a person to be imprisoned in order to oblige him to obtain money from other persons to pay the debt, and to incur a debt which he would be as little able to pay as the present. It will not aid in forcing other persons to take the risk of loss which is now the creditor's. As we have not the power of giving the plaintiff any lien or charge upon the salary, or to secure to him a part of it in preference to any one who may hereafter attach it, we see no alternative but to declare that the defendant is entitled to be discharged if the other circumstances necessary are proved. Macpherson, J., will now take up the matter, and will also deal with the costs of this application.

MACPHERSON, J.—Having heard the matter fully discussed, I am of the same opinion as the Chief Justice.

PONTIFEX, J.—I am of the same opinion (1).

(1) The defendant was subsequently examined as to his means before Macpherson, J., who, being of opinion that there was nothing in the defendant's conduct to disentitle him to the benefit of s. 8, Act XXIII of 1861 ordered him to be discharged. The learned Judge, however, made no order as to costs.