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CHANDRA-KANT BHAT-TACHARJI v. JADUPATI CHATTERJ

the suit No. 140 of 1865, and the property which is the subject of that suit, are not affected by the sale, which was held in execution of the decree passed by the Deputy Collector. The appellant must have his costs in this Court and in the lower Appellate Court.

Before Mr. Justice Phear and Mr. Justice Hobhouse.

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IN RE GAJADHAR PRASAD NARAYAN SING.*

Jurisdiction—Right of Appeal—Fine for avoiding Service of Summons—Act VIII. of 1859, *ss.* 159, 160, *and* 365.

Section 28 of Act XIX. of 1853 having been repealed by Act X. of 1861, a Judge has no jurisdiction under Act VIII. of 1859 to inflict a fine for the purpose of punishing a witness who absconds, or keeps out of the way, to avoid service of summons.

By the words of section 365 of Act VIII. of 1859, the Legislature must have intended to give the person aggrieved by any order of a Civil Court, imposing a fine on him as a punishment for keeping out of the way in order to avoid service of summons to attend as a witness, the right of appeal to the High Court, whether the order be strictly referable to section 160. of that Act or not.

THIS was an appeal from an order passed by the Judge of Sarun, rejecting a petition of Gajadhar Prasad Narayan Sing, who was cited as a witness by one of the parties to a suit pending in the Judge's Court. It appeared that service of summons could not be effected on this witness; and, consequently, the judge ordered certain properties belonging to him to be attached, and also imposed a fine of Rs. 3,000. What took place afterwards will appear from the Judge's decision rejecting the petitioner's prayer to have the fine remitted —

"The vakeels for petitioner applied by petition for the sale "of the property to be postponed. The order passed was, that "the sale could not be stayed, unless the fine and costs were "paid into Court The amount was paid in, and the sale "did not take place. The vakeels now verbally ask that the "fine may be remitted, and they produce certain witnesses who "depose that their master had gone to Jagannath, and was "not at Muksudpore when the summons and proclamation

* Miscellaneous Appeal, No. 272 of 1868, from an order of the Judge of Sarun

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"were issued. Besides such evidence being wholly insufficient "to prove the fact, the verbal applications of vakeels on such "a matter cannot be received. Under section 168, Act VIII. "of 1859, the witness must appear in person and satisfy the "Court that he did not abscond or keep out of the way to avoid "service of summons, &c. Here the application is made on "the strength of a general power of attorney, and it is mani-"festly quite inadmissible. The application is, consequently, "rejected."

Against this order of the Judge, the petitioner appealed to the High Court.

Baboo *Krishna Sakha Mookerjee* for appellant.

PHEAR, J.—(After stating the facts.) I had at first some little doubt in my mind, whether, or not, proceeding by way of appeal was the proper mode of seeking relief from this Court. Section 365 of Act VIII. of 1859 says, that "all orders as to fines, or the levying thereof under this section, shall be subject to appeal," but there are no provisions in the Act, singularly enough, which in themselves give authority to Civil Courts to impose fines. However, sections 159 and 160 apply to the case of absconding witnesses, and prescribe the mode in which their attendance is to be compelled, if possible; and the first of these sections does speak of levying any fine to which the person may be liable under the provisions of the following section. Then the following section, that is section 160, says, that the Court may defray, out of the proceeds of the sale of the property which has been attached, the fine which it has the power by any existing law to impose. So that, although, strictly speaking, section 160 does not give a liability to fine, notwithstanding that the last words of the previous section speak as if it did so, still, under all the circumstances, it seems to me not unreasonable, inasmuch as there is no other way of giving full application to the words of section 365, to treat section 160 as if it provided for the making of orders as to fines, as it certainly does provide for the levying of fines. In this way it appears to me, on the whole, that the Legislature must

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have intended, by the words of section 365, to give the person aggrieved by any order of a Civil Court imposing a fine on him as a punishment for keeping out of the way in order to avoid service of a summons to attend as a witness, whether the order be strictly referable to section 160 or not, the right of appeal to this Court.

The grounds of appeal in this instance are substantially two *first*, that the Judge had no power to impose a fine upon the witness at all; and the other, that he was wrong in insisting upon the personal presence of the witness before he would be satisfied as to the cause of his absence. I may as well say at once that it seems to me that this second objection, provided the first is not fatal to the proceedings of the Judge altogether, is without any real force. If the matter which is to be cleared up to the satisfaction of the Judge is the non-attendance according to order of a certain person, I think that the Judge may very well refuse to be satisfied as to the sufficiency of the reasons for the non-attendance of that person, merely by the explanation of a vakeel retained to appear as that person's advocate. The Judge is perfectly entitled to insist upon having proper evidence of the facts which led to the non-attendance of the witness, and that evidence could hardly be furnished by the vakeel alone; and in most cases, probably, it might be correctly said that the best evidence could only be afforded by the person whose non-attendance was complained of. However, after the best consideration which I have been able to give to the sections of Act VIII. which bear upon this case, I have come to the conclusion that the first objection must prevail. Sections 159 and 160, as I believe, constitute the only enactments which apply to the case. They are both of them taken, verbally I may say, from the corresponding sections of Act XIX. of 1853, only that certain portions of the original section have been omitted in these sections, and a slight addition has been made in place of the omission, but the result of this conversion is not altogether happy.

Section 159 provides that if the witness or other person whose attendance is required "absconds or keeps out of the way for "the purpose of avoiding the service of the summons, the Court

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"may cause a proclamation requiring the attendance of such "person to give evidence or produce the document," and so on; and "if such person shall not attend at the time and place named "in such proclamation, the Court may, at the instance of the "party on whose application the summons was issued, make an "order for the attachment of the movable and immovable "property of such person, to such amount as the Court shall "deem reasonable, not being in excess of the amount of the "costs of attachment, and of any fine to which the person "may be liable under the provisions of the following section."

I may remark, by the way, that the original section in Act XIX. of 1853, namely section 27, from which this is copied, stops at the word "reasonable" at the end of the sentence "to such amount as the Court shall deem reasonable." In this section, a limitation is put to the amount of the property which is to be attached, by prescribing that it shall not be more than sufficient to cover the costs of attachment and any fine to which the witness may be liable under the following section. Then the following section (160) enacts, that "If such witness "or other person shall not appear, or appearing shall fail to "satisfy the Court that he did not abscond or keep out of the "way to avoid service of summons, and that he had not such a "notice of the proclamation as aforesaid, it shall be lawful for "the Court to order the property attached or any part thereof, "to be sold for the purpose of satisfying all costs incurred in "consequence of such attachment, together with the amount of "any fine which the Court may impose upon such witness or "other person under the provisions of any law for the time "being in force, for the punishment of a witness who may "abscond, or keep out of the way in order to avoid service of "summons." Therefore, when the property is attached, and yet the person fails to come in as required by the Court, the property may be sold for the double purpose of meeting the costs of attachment, and the amount of the fine which has been legally imposed.

The original section, namely section 28, Act XIX. of 1853, which corresponds to section 160, gave a very much larger purpose to the attachment. All that has been omitted in this section,

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with the exception of discharging the amount of the fine, and, in substitution for that which has been omitted, has been inserted the costs of the attachment. According to the original enactment of 1853, as I understand it, the attachment was the principal object in view of the Legislature. It was to be the machinery by which the attendance of the person should be insured, by causing him in the alternative, through distraint and sale of his property, to pay very considerable charges, and to make good any loss which the party desiring his presence might incur by reason of his non-attendance. The meeting the amount of the fine, was, as I think, subordinate to the other purposes of the attachment. But here, by reason of the alterations which has been effected in the wording of the sections, it seems to me that the only real purpose of the attachment is the providing of funds for discharging the fine; because it appears to me obvious that the costs of the attachment, if it is the cost alone of the attachment for which the attachment is made, is really a very trivial matter. Indeed I can hardly think that it occurred to the Legislature when it enacted the provisions of this section that it thereby enabled the Court to attach just so much property as would meet the costs of that attachment, and nothing else, if the Court so thought fit, with no other purpose in view. At the time that Act VIII of 1859 was passed, there was a law which enabled the Court to impose a fine upon a witness who might abscond or keep out of the way, in order to avoid service of summons, and that was the Act to which I have already referred, namely Act XIX. of 1853, section 28. A portion of section 28, which was omitted when section 160 was framed from it, gave the power to the Court to impose a fine for the punishment of a witness who might abscond or keep out of the way, but that section has been repealed by Act X. of 1861, and the consequence is that the Civil Court has now no power of imposing a fine for the purpose of punishing a witness who might abscond or keep out of the way in order to avoid service of summons. This being so, it seems to me that the whole of the purpose of section 159 of Act VIII. is gone, for at the most the only end which that attachment can now be directed to, is the sale of just so much property as will be sufficient to cover the costs of the attachment itself.

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The words of section 160 do not enable the Court to levy any other fine out of the proceeds of the sale of the property attached, than the fine for the punishment of a witness who might abscond, or keep out of the way in order to avoid service of the summons; and, therefore, although, as is probably the case, every Civil Court of competent jurisdiction has power to punish for contempt of its authority, and, perhaps, to inflict punishment in the shape of a fine, still a fine inflicted in exercise of such a jurisdiction, and for such a purpose, is obviously not a fine within the meaning of the words of section 160 of Act VIII. It seems to me that a person who has successfully kept out of the way of all orders of Court and all service of process can scarcely be said to have committed a contempt of Court, for which he could, within the ordinary powers of the Court, be punished by fine or otherwise. Indeed, it was for the purpose of reaching such a case as that, and because the Court could not otherwise do it, that the complicated machinery of sections 159 and 160 was, as I supposed, first devised. With these views, I think that the Judge had no jurisdiction to inflict the fine in this case, and that, consequently, the fine must be remitted and paid back to the applicant.

I have gone, perhaps, somewhat further into the enquiry as to the operations of these sections than the case calls for, or than I at first intended; and I have said that the conclusion which I draw from them is that a Judge of a Civil Court has now no longer any authority even to attach; but I desire that this expression of opinion should not be taken as a part of my present decision. The application which, according to the grounds of appeal, is before us (and it was the same in the Court below) is simply that the fine be remitted; and, therefore, it is enough for the judicial determination of the case for me to say, that I think this appeal must be decreed on the ground that this fine in question was imposed without jurisdiction, and consequently the Judge must be ordered to cause it to be repaid to the petitioner.

HOBHOUSE, J.—I do not go so far as Mr. Justice Phear in reading the provisions of sections 159 and 160 of Act VIII. of 1859 as to say, and this I understand him to say, that in fact

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the whole of the provisions of these sections have become a nullity. The question is not before us, and, therefore, I do not think I am compelled to give my opinion as to whether or not the Judge had the power to make an order for the attachment of movable and immovable property of the appellant in this case to such an amount as he should deem reasonable, not being in excess of the amount of the costs of attachment. But I entirely go with Mr. Justice Phear, that the Judge had not the power, as that law at present stands, to go further and to inflict a fine. That fine could only have been inflicted under the provisions of section 28, Act XIX. of 1853, and the provisions of that section have been repealed, as to proceedings under Act VIII. of 1859, by Act X. of 1861. It follows, therefore, that as the Judge had no power to inflict the fine, we must direct that that fine be remitted.

Before Mr. Justice Kemp and Mr. Justice E. Jackson.

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GOPAL PRASAD *v.* NANDARANI.*

Registration—Act XVI. of 1864, *s.* 13—*Deed of Mortgage—Evidence.*

A. executed an instrument in favor of B., thereby covenanting to repay B. the amount of a loan together with interest, and mortgaging certain immovable property as security for repayment of the same. B. sued A. for the debt. *Held*, that the instrument did not directly create, declare, transfer, or extinguish any right or title in immovable property; the land was mentioned as a collateral security, and, therefore, the instrument was not inadmissible in evidence under section 13 of Act XVI. of 1864.

THIS was a suit to recover Rs. 989-12-3, being the amount of principal and interest due on a bond, dated 29th Magh 1272, (11th March 1865), executed by the defendant, Nandarani, in favor of the plaintiff. The plaintiff prayed for a decree for the amount of the principal and interest.

The following is a translation of the bond (*Tamassuk*):

"I, Mussamat Nandarani Kunwar, inhabitant of, and shareholder in Mouza Bariarpore Bandh, and shareholder in Bagi Gopalpore Gopinath, in Chakla Garjol, Pergunna Bisara. Whereas

* Special Appeal, No. 880 of 1868, from a decree passed by the Additional Judge of Tirhoot, reversing a decree of the Sudder Ameen of that district.