

CALCUTTA HIGH COURT

Mono Mohan

Vs

Upendra Mohan Pal

(Mitter,J.)

27.06.1934

JUDGMENT

Mitter,J.

1. This is an appeal by one Mono Mohan alias Panchkari Chowdhury, a judgment-debtor in a decree for money which was obtained against him by the decree-holders, Upendra Mohan Pal and others who are the respondents in this appeal. The facts necessary to be stated are the following: The suit decree was for a sum of Rs. 6,192 and the decree was passed in June 1931. The first application for execution was dismissed for default on 25th August 1931 under circumstances which do not appear in the papers before us. It appears however that on the same day, that is to say on 25th August 1931, a fresh application for execution was made on behalf of the decree-holders.

2. In the course of the proceedings started on this second application some properties belonging to the judgment-debtor were put up for sale and it also appears that the decree-holders obtained the permission of the Court to bid at the proposed sale. For reasons which do not appear in any of the papers before us the second application for execution was also allowed to be dismissed for default on 28th May 1932. Two days after, that is to say, on 30th May 1932, a third application for execution was made and the orders that were subsequently passed in the proceedings that followed are the orders which form the subject-matter of this appeal. The prayer that was made on behalf of the decree-holders in the third application for execution was that the decretal amount might be realised by the arrest and detention of the judgment-debtor in civil prison. On this application a notice was issued upon the judgment-debtor and he, on 20th June 1932, put in an objection purporting to be one under Section 47 and Order 21, Rule 40 of the Code. Amongst other matters that were stated in the said petition of objection, there was a statement to the effect that properties of the value of a lac of rupees belonging to the judgment-debtor were held in mortgage by the decree-holders for a small sum of money and it was further stated that there was a prayer for the sale of the said properties in a certain execution case started at the instance of some other parties for realization of a sum of Rs. 16,000 and it was also stated that the decree-holders could very well attach those properties and apply for rateable distribution in order to have their claim satisfied.

3. It was further clearly stated in the said petition that the properties having been attached as

aforesaid, he was unable to raise money by selling the same and he accordingly prayed that he might be released from the liability of being arrested. The matter remained pending for several months till on 12th November 1932 a further petition was filed on behalf of the judgment-debtor in which it was repeated that the judgment-debtors' property worth more than a lac of rupees was under mortgage to the decree-holder for a sum of Rs. 7,500 only and it was further asserted that at the instance of a certain creditor an insolvency proceeding had been started against the judgment-debtor in the Court of the District Judge of Chittagong and that on account of those proceedings he was entitled to protection under Section 55, Civil P.C. On 12th November 1932, on which date, as aforesaid, the latter petition was filed, the case was taken up by the Subordinate Judge, who, after dealing with another objection arising out of the fact that one of the decree-Holders was dead, an objection with which we are not concerned at the present stage, proceeded to dispose of the judgment-debtor's objection as to his arrest and detention in these words: I see no reason to stay execution proceedings for the reasons stated in the judgment-debtor's petition. The latter has not yet applied for insolvency. The objections raised by the judgment-debtor are therefore disallowed

4. Were it not for the fact that subsequent to the passing of the aforesaid order, the judgment-debtor himself objected to the adjudication order being passed against him on the petition of the creditor to which reference has been made above, it would have been necessary for us to consider whether the reason which the learned Subordinate Judge gave for refusing to accede to the judgment-debtor's request for exemption on the ground of Section 55, Provincial Insolvency Act, was valid or not. The only fact that need be mentioned at the present stage is that none of the other objections, taken in either of the aforesaid two petitions of objections put in on behalf of the judgment-debtor, were dealt with by the learned Subordinate Judge. One of those objection, as has been already stated, was to the effect that by reason of the fact that properties worth a lac of rupees were under mortgage to the decree-holder for a small sum of Rupees 7,500 it was not possible for the judgment-debtor to pay off the debt due under the present decree. We find then that on 12th November 1932, after disposing of the objection in the manner stated above, the learned Judge issued a warrant of arrest of the judgment-debtor fixing 12th December 1932 for necessary orders. On 15th November 1932 a further petition was filed on behalf of the judgment-debtor purporting to be under Section 47 and under Order 21, Rule 40, Civil P.C.

5. In this petition mention was made of the fact that the properties of the judgment-debtor worth a lac of rupees were mortgaged to the decree-holders for a sum of Rs. 7,500 and that the decree-holders had instituted a suit for the said amount on the basis of the said mortgage and that the said suit was pending. Reference was also made in this petition to the insolvency proceedings and to certain other facts which need not be specifically referred to. This petition was disposed of by the learned Subordinate Judge by an order passed on the same date in which he said that the judgment-debtor files a petition under Section 47 of the Code and under Order 21, Rule 40 of the Code for stay of issue of warrant of arrest on the ground mentioned in the petition. The warrant arrest cannot be stayed. The application is rejected.

6. So far then we have the fact that the objection which the judgment-debtor has taken to the issue of warrant of arrest against him, an objection based on the ground that his properties were the subject-matter of a mortgage suit in which the plaintiffs were decree-holders, that those properties were valued at a lac of rupees and that the mortgage debt amounted to only Rs. 7,500 and that on account of this fact he was not in a position to pay off the decretal amount, is an

objection which had not received any consideration from the learned Subordinate Judge. We may state here that subsequent to the orders which are complained of in the present appeal a mortgage decree has been obtained by the decree-holders in the said suit on 16th February 1933. It may be stated here that there was afterwards a proceeding in the nature of review under Order 47, Rule 1 of the Code at the instance of the judgment-debtor in which he had complained that his objection had not been properly considered and upon that evidence being taken on behalf of the parties a further order was made disallowing the review and refusing to withdraw the warrant of arrest.

7. On behalf of the judgment-debtor who is the appellant in this appeal, it has been contended that upon the facts and circumstances of the case which were recited in the petition of objection filed before the Court on behalf of the judgment-debtor a sufficient case was made out why the decree-holders should not have been allowed to proceed against the person of the judgment-debtor but should have been directed to take other steps which under the law they were competent to take in execution in order to realise the decree which they had obtained as against the judgment-debtor. It has been further stated on behalf of the appellant that the decree-holders themselves, in their evidence in the mortgage suit, had stated that the value of the mortgaged properties would be Rs. 75,000 or so and that the statement which they had subsequently made, to the effect that their value would be only Rs. 30,000, should not be accepted as Correct.

8. On behalf of the decree-holders the position taken up in the first place is that it is entirely at the option of the decree-holders to select the means which they should adopt for the purpose of executing their decree and that it is not open to the Court in any case to refuse the decree-holder permission to proceed against the person of the judgment-debtor if the decree be such as would entitle him under the law to adopt that course. In support of this position, reliance has been placed on the decision of the Lahore High Court in Hargobind Kishan Chand v. Hakim Singh 1926 Lah 110. In that case the learned Judges held that the law confers upon the decree-holder the right to decide whether he should execute the decree for the payment of money by the arrest of the judgment-debtor or by the attachment and sale of the property, or by both, and that while the Court has discretion (which should be exercised in a judicial manner) to refuse execution against the person and property simultaneously, it has not authority to refuse execution against the person of the judgment-debtor on the ground that the decree-holder must in the first instance proceed against the property of the judgment-debtor.

9. This decision has been placed before us as supporting the proposition that it is not open to the Court in any circumstances to refuse the application of a person who holds a decree for money to proceed against the person of the judgment-debtor. We are of opinion that if that is what was intended to be laid down in that decision, the decision must be taken as having taken too narrow a view of the law. It is quite true that in Section 51 of the Code the remedies open to a judgment-creditor are detailed in the five clauses (a) to (e) to that section and it is also true that where the holder of a decree for money comes before the Court and wants process against the person of a judgment-debtor for his arrest, and if there are no special circumstances present, it is not open to the Court to say that the decree-holder must proceed against the properties of the judgment-debtor before applying for warrant of arrest against him. To that extent we are entirely in accord with what the learned Judges of the Lahore High Court have said in the case to which we have just referred. But we are clearly of opinion that there may be circumstances present in a case which would not only justify a refusal to allow the decree-holder to have process for the arrest and detention of the judgment-debtor, but, we are prepared to go further and say that there may

be circumstances which would demand such a refusal. It is not necessary for us, nor indeed is it possible, to lay down what exactly those circumstances may be, but we are clearly of opinion that in a case in which it is established that by reason of the fact that properties are under attachment at the instance of a decree-holder or that properties form the subject-matter of a decree for mortgage at the instance of a decree-holder, the consequence of which is that although there may be a large amount of surplus left if the properties are put up to sale in execution of the decree obtained on the mortgage, the judgment-debtor is precluded from raising money on those properties in order to pay off the decree by reason of the action of the decree-holder, a refusal of such a prayer may be justifiable. Whether in this particular case those circumstances are present or not is a matter which has not been seriously taken into consideration by the learned Subordinate Judge at any stage of the proceedings. From the orders to which we have referred it is perfectly clear that the learned Judge never applied his mind to this particular objection which was taken by the judgment-debtor.

10. We are therefore of opinion that the orders which form the subject-matter of this appeal should be set aside and that the case should be sent back to the Court of the learned Subordinate Judge in order that he may issue notice Upon the judgment-debtor to appear before him to show cause why warrant of arrest should not issue against him, and on dealing with such objections as the judgment-debtor may prefer to the issuing of a warrant and specially to the objection to which we have just referred he will pass the necessary orders. The result is that the appeal is allowed and the case is sent back to the Court of the Subordinate Judge to be dealt with in accordance with the observations made above. There will be no order for costs in this appeal.

11. The orders complained of in the appeal having been set aside, it is not necessary to deal with the application which relates to subsequent orders passed by the Subordinate Judge. Let the papers filed along with the application be returned to the learned advocate for the appellan