

ORIGINAL CIVIL.

*Before Mr. Justice Bayley, Acting Chief Justice, Mr. Justice Scott, and
Mr. Justice Latham.*

GHANASHAMDAS GOORSAMULL, PLAINTIFF, v. JOHARIMULL
KEDARINATH, DEPENDANT.*

1883
August 31.

*Arrest before judgment—Subsequent arrest in execution—Period of imprisonment
—Civil Procedure Code Act XIV of 1882, Secs. 481 and 342.*

The defendant was arrested before judgment, and on the 5th February, 1883, committed to jail under section 48 (1) of the Civil Procedure Code. On the 6th March following a decree in the suit was passed against him. On the 28th July, the defendant being then still in jail under the order of the 5th February, the plaintiff took out a fresh warrant of arrest in execution of the decree, and sought to have the defendant further imprisoned for the full period of six months limited by section 342 (2) of the Code.

Held that the defendant could be re-committed to jail, in execution of the decree, only for such a period as together with the period of imprisonment that had elapsed since the passing of the decree would complete a period of six months, and that, consequently, he would be entitled to be liberated on the 5th September 1883.

Imprisonment under section 481 becomes, after decree, imprisonment in execution of the decree, and the imprisonment suffered after that date must consequently be taken into consideration in calculating the period of six months, which, by section 342 of the Code, is the limit allowed for an imprisonment in execution of a decree.

In this case a warrant of arrest before judgment was issued against the defendant, and he was, in pursuance of it, on the 3rd February, 1883, arrested, and, failing to show cause to the contrary, was on the 5th February committed to jail "until he could give good and sufficient security for any decree that might be

* Suit No. 37 of 1883.

(1) Section 481.—If the defendant fail to comply with any order under section 479 or section 480, the Court may commit him to jail until the decision of the suit, or, if judgment be given against the defendant, until the execution of the decree: provided that no person shall be imprisoned under this section in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees:

Provided that no person shall be detained in prison under this section after he has complied with such order.

(2) Section 342.—No person shall be imprisoned in execution of a decree for a longer period than six months; or for a longer period than six weeks if the decree be for the payment of a sum of money not exceeding fifty rupees.

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passed against him." The order of committal purported to be made under section 481 of the Code. On the 6th March a decree was passed against the defendant. On the 26th of July the plaintiff applied to Mr. Justice Latham in chambers for the arrest of the defendant in execution of the decree, and the defendant was directed to be brought up, in order that he might show cause why he should not be committed for a further period of six months in execution of the decree.

The defendant was, accordingly, brought up on the 28th July, when he contended that, as he would have completed a period of six months' imprisonment on the 5th August then next, he could not be ordered to suffer any further imprisonment after that date.

Mr. Justice Latham was of opinion that the defendant could not be committed to prison for a longer period than down to the 5th September then next, at which date the defendant would have completed a full period of six months' imprisonment, calculated from the date of the decree, from which time Mr. Justice Latham was of opinion that his imprisonment became imprisonment in execution of the decree.

His Lordship, however, deeming the matter one of doubt and importance, directed that it should be argued before a full bench.

August 10.—The matter now came on for argument.

Inverarity, as *amicus curiæ*, argued on behalf of the defendant.—The only object of a committal to jail and an arrest before judgment is to have the person of the defendant within reach to answer the decree when passed. The decree being passed the object has been fulfilled. Imprisonment after that can only be in execution of the decree, and cannot, by section 342, be for more than six months. The defendant was in jail under the decree directly the decree was passed, though committed under section 481. See Broughton's notes to section 481 of the Code of 1877. [BAYLEY, A. C. J., cited *In re Collachand Doss*(1).] That case, too, is in my favour. "Until execution of the decree" in section 481 cannot mean until steps are taken to execute the decree. That construction would put an immense power of op-

(1) 1 Ind. Jur. N. S. 327; also Bourke. 423.

pression into the hands of the judgment-creditor. "Execution" here means possession of the thing sought by the suit: see definition given in Wharton's Law Lexicon and Jacob's Law Lexicon. Therefore, the defendant, I submit, is entitled to be liberated, at the latest, on the 5th September next. But I would contend for more than that—I submit that no second order for his arrest can be made. The first order became, after decree, an order in the execution of the decree, and a man cannot be twice arrested for the same debt. Therefore, the defendant was entitled to his liberty on the 5th August last.

Lang for the plaintiff.—Detention under an order under section 481 is to be only "until execution" of the decree. It is impossible, therefore, to say that detention under such an order can, in any case, be "in execution" of the decree. An attachment before judgment may become an attachment in execution, it is true, but only by the express provisions of section 490. There is no such provision made for the case of arrest; therefore a difference in this respect in the two cases was plainly intended by the Legislature. A comparison of sections 477-481 shows that the only object of the process is to have some security for the execution of the decree when it is passed. Execution itself is not in any way affected by these sections. It may be impolitic in the Legislature to have left a discretion so onerous to a defendant in the hands of a plaintiff, but that circumstance cannot affect the construction of what is in itself clear. It must be remembered that a defendant must be much in default before he can come into this predicament. "Until execution" plainly means until some proceeding is taken, after decree, either in attachment or arrest.

Inverarity in reply.—The presence of section 490 does not show that a difference was intended to be made between the effect, after a decree, of an attachment before judgment, and an arrest before judgment. The sections relating to attachment before judgment are worded altogether differently from those relating to arrest before judgment. There are no words in the former similar to "until execution of the decree" in section 481. The very wording of section 481 makes it unnecessary to have a provision similar to that contained in section 490. There was a special

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reason, moreover, for putting in section 490, because there had been conflicting decisions in the Courts on that very point: see Broughton's notes to Act VIII of 1859, sec. 84, p. 105. There was no such reason for any similar section in the case of arrest before judgment, as the present point arises now for the first time.

Cur. adv. vult.

31st August.—The judgment of the Court was now delivered by

BAYLEY, A.C.J.—Joharimull Kedarinath, a prisoner on the civil side of H. M.'s Common Jail in Bombay, by a petition, dated the 1st August instant, stated that he had been arrested in Suit No. 37 of 1883, brought on the ordinary original civil jurisdiction side of the High Court, under a warrant of arrest before judgment on the 3rd February, 1883, and had been since then undergoing imprisonment on the civil side of the jail; and he submitted that, under the provisions of the Civil Procedure Code, he would become entitled to his release on the 2nd August instant. He stated that he had, however, been served with a warrant of arrest after judgment in the above mentioned suit on the 28th July last (which we find was marked for the levy of Rs. 2,831-2-9), had been produced before the sitting Judge in chambers, and had again been committed to jail from the date of the decree, which was passed on the 6th March, 1883. He then submitted that, under the provisions of the Civil Procedure Code, a man cannot be detained in jail for more than six calendar months, whether he undergoes imprisonment under a warrant of arrest before or after judgment; and he concluded by praying that he might be released from jail.

Mr. Justice Latham, the sitting Judge in chambers, having mentioned the matter to me, and it being desirable that the question raised in the petition, there being no express decision in this Court upon the point, should be settled, so that there might in future be uniformity of practice, and the matter being one involving the liberty of the subject, the case was heard by Mr. Justice Scott, Mr. Justice Latham, and myself, when Mr. Inverarity appeared, as *amicus curiæ*, to argue on behalf of the petitioner, while Mr. Lang represented the plaintiff in the suit.

The question turns upon sections 481 and 342 of the Code of Civil Procedure, Act XIV of 1882. (The learned Judge then referred to the language of those sections ; see note, *ante*, p. 431.)

In the present case the defendant was arrested and taken to jail on Saturday, the 3rd February, 1883, at about 7 P. M., under section 478, which is one of the sections of the chapter headed "Arrest before judgment". On Monday, the 5th February, he was brought before Mr. Justice West, the sitting Judge in chambers, and by an order of that date it was ordered, under section 481 of Act XIV of 1882, that the Sheriff do detain the defendant in his custody until he do give good and sufficient security in himself and two sureties, to the satisfaction of the Prothonotary for any decree that might be passed against him.

Although a form of order for committal under section 481 is expressly given in the fourth schedule to the Act (Form No. 159) such order was not followed in the present case, but the imperfect and inaccurate one was adopted which we have referred to and which was said to have been drawn up in the Sheriff's office according to the form always adopted in such cases. It is desirable that in future the correct form (No. 159) be adhered to.

Section 481 says that, if a defendant fails to comply with any order made under section 479 (the section under which a defendant, failing to show cause, may be ordered either to deposit in Court money or other property sufficient to answer the claim against him, or to give security for his appearance at any time when called upon while the suit is pending and until execution or satisfaction of any decree that may be passed against him in the suit) or section 480 (the section giving the procedure to be followed in case of an application by the surety to be discharged), the Court may commit him to jail "until the decision of the suit, or, if judgment be given against defendant, until the execution of the decree." The order for committal under section 481, being Form No. 159 in the fourth schedule to the Act—the form which ought to have been used in the present case, but was not—adopts the same words. The use of the forms in such schedule is directed by section 644 of the Act. The meaning of the words "until the

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execution of the decree" is somewhat obscure, and counsel on both sides addressed the Court at some length upon the proper construction to be placed upon them. It appears to us, however, that the obscurity is cleared up when this section 481 is read with section 478 and with the form of the warrant of arrest before judgment (No. 158 in the fourth schedule) made under section 478, which is the first step in the process of arrest under this chapter. There the defendant is ordered to be brought before the Court to show cause why he should not furnish security for his personal appearance until the suit shall be fully and finally disposed of, "and until execution or satisfaction of any decree that may be passed." And, as already noticed, under section 479 he may be ordered to deposit money or give security for his appearance "at any time when called upon while the suit is pending, and until execution or satisfaction of any decree that may be passed against him in the suit." Then follows section 481, which is the next step in the same proceeding, and has no independent *raison detre*. It cannot be supposed that the Legislature in those circumstances used the word execution in two different senses. We think it is clear that the words "until the execution of the decree" in the latter section are the same in meaning and intention as the words "until execution or satisfaction" in the Form No. 158 in the fourth schedule and in section 479. Execution used in such a conjunction of terms must mean complete execution. Therefore in this chapter the word has its primary meaning of possession being given to the plaintiff of what is ordered by the decree. Lord Coke defines the word thus :—"Execution, *executio*, and signifieth in law the obtaining of actual possession of any thing acquired by judgment of law"⁽¹⁾. In Wharton's Law Lexicon, p. 278, "execution" is described as the last stage of a suit giving possession of anything recovered at law or in equity.

It is clear, therefore, that an arrest under section 481 becomes, after decree, an arrest until the decree is satisfied or wholly executed. Such imprisonment in no way differs from imprisonment in execution of a decree. The sole object which the

(1) Co. Litt. 154a.

holder of a money decree can legitimately have in view, whether he imprisons his debtor after decree, under section 336, or retains him in prison under section 481, is the payment of the judgment-debt and costs. Any other object would be of a vindictive nature, and the law would not sanction it. We are, therefore, of opinion that an imprisonment under section 481, which is continued after decree, in no way differs from it, and must be taken to be equivalent to it.

If, then, an arrest under section 481 is, after decree, equivalent to an arrest in execution, it becomes subject to the limitation as to time imposed by section 342, which forbids the extension of such an arrest beyond the period of six months. This undoubtedly was the intention of the Legislature; and the Court is bound to give effect to it if the express terms of the Act are not inconsistent with that intention. We think they are not inconsistent with it. As already shown, the imprisonment in question, that is, under section 481, although it has an independent origin, becomes, after decree, in every essential the same as arrest after judgment. The same rule of limitation must, therefore, be applied. If, therefore, as in the present case, the special period of limitation in the chapter on arrest before judgment, *viz.*, six months, which is imposed in section 481, terminates while the defendant is still detained under that section, and he is re-arrested in execution under section 336, the period of imprisonment which has elapsed since the decree must be counted, and when that period *plus* the new period amounts altogether to six months, then section 342 applies, and the defendant must be liberated. The time to be counted is the time of actual imprisonment.

The defendant in the present case was, by the Judge's order of the 28th July last, committed to jail for six months as from the 6th March, 1883, or until further order; and, for the reasons above given, we are of opinion that, under the circumstances of the case, he cannot be detained in custody after he has completed six calendar months' imprisonment from the 6th March last, the date of the decree, and that he will, accordingly, be entitled to be released from jail on the 5th September next.

Attorneys for the plaintiff.—Messrs. *Tobin and Roughton.*

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