

**(1868) 08 CAL CK 0007**

**Calcutta High Court**

**Case No:** Misc. Appeal No. 272 of 1868

In Re: Gajadhar Prasad Narayan  
Sing

APPELLANT

Vs

RESPONDENT

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**Date of Decision:** Aug. 6, 1868

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### **Judgement**

Phear, J.

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 1869 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 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 & 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.

2. 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 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 "moveable and immoveable 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."

3. 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 Motion. 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.

4. 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, 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.

5. 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 Station 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.

6. 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 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 moveable and immoveable 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.

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<sup>1</sup>[Sec. 159:--If the summons for the attendance of any person, either to give evidence or to produce a document) cannot be served in either of the ways herein-before specified, the Court, on being certified thereof by the return of the serving Officer, and upon proof that the evidence of such witness or the production of the

document is material, and that the witness or other person absconds or keeps out of the way for the purpose of avoiding the service of the summons, may cause a proclamation requiring the attendance of such person to give evidence, or produce the document, at a time and place to be named therein, to be affixed in some conspicuous place upon his house or place of abode; 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 moveable and immoveable 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.]

When a witness absconds, his property may be attached.

<sup>2</sup>[Sec. 160:--If, on the attachment of the property, such witness or other person shall appear and satisfy the Court that he did not abscond or keep out of the way to avoid service of the summons, and that he had not notice of the proclamation in time to attend at the time and place named therein, the Court shall direct that the property be released from attachment, and shall make such order in regard to the costs of the attachment as it shall deem fit 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 the 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 the service of a summons, If the witness or other person shall pay into Court the costs and fine as aforesaid, the Court shall order the property to be released from attachment.]

How the Court is to proceed with the witness on his appearance.

<sup>3</sup>[Sec. 365:--All orders as to fines or to levying thereof or as to imprisonment under this Act (except when the imprisonment is in execution of a decree) shall be subject to appeal.]

Appeal from orders as to fines or imprisonment.

<sup>4</sup>[Sec. 28:--Clause 1. The cost of the attachment shall be borne in the first instance by the party applying for it, and the Court issuing the summons and attachment shall not proceed to sale of the property, but shall order the same to be released from attachment if the witness shall appear and satisfy the Court that he did not abscond or keep out of the way to avoid service of a summons, and that he had not notice of the proclamation in time to attend at the time and place named therein. Upon the appearance of such witness, the Court shall make such order in regard to the costs

of the attachment as it shall deem fit. If the witness appearing shall fail to satisfy the Court that he did not abscond or keep out of the way to avoid service of a summons, and that he had not such notice of the proclamation as aforesaid, it shall be in the discretion of the Court to order the property attached, or any part thereof, to be forfeited and sold for the purpose of satisfying all costs incurred in consequence of such default, absconding or keeping out of the way, and such fine not exceeding the amount in dispute in the suit as the Court may deem fit to impose upon the witness, having regard to all the circumstances of the case, and the condition of life of the witness, or the Court may order the property to be released from attachment upon payment of such costs and fine as aforesaid.

Clause 2. An order made in pursuance of this section shall be subject to appeal in the same manner and within the same period, as an appeal against an order for attachment and sale under the last preceding section of this Act.]

<sup>5</sup>[Sec. 168:--If any person, on whom any summons to give evidence or produce a document shall have been served in either of the ways specified in Section 156, shall, without lawful excuse, fail to comply with the summons, the Court may order such person to be apprehended and brought before the Court. If such person absconds or keeps out of the way, so that he cannot be apprehended or brought before the Court, his property shall be liable to attachment and sale in the manner and subject to the rules provided in Sections 159 and 160 with respect to a witness or other person on whom the service of a summons cannot be effected.]

Consequences of non-attendance by a witness.