

In Re: Omritolall Dey

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Court : Kolkata

Decided On : Sep-09-1875

Reported in : (1876)ILR1Cal79

Judge : Phear, J.

Appellant : In Re: Omritolall Dey

Judgement :

Phear, J.

1. The prisoner Omritolall Dey has been brought before this Court in obedience to a writ of habeas corpus ad subjiciendum. The return to the writ is that Omritolall Dey was received into the custody of the Superintendent of the Presidency Jail under and by virtue of a warrant of commitment to the following effect (reads warrant of commitment, ante, p. 79), and that he is detained under the authority of this commitment, and for no other cause.

2. The affidavits which have been filed on behalf of Omritolall Dey disclose facts which, if they are true, show that when Omritolall was taken by the bailiff he was privileged from arrest, and that therefore the commitment was illegal. It follows that as the jailor shows no other cause for detaining his prisoner the detention is illegal and he ought to be discharged. The commitment, however, purports to be a commitment made by the Court of Small Causes by way of execution of its own judgment in a civil suit, and therefore a commitment such as that Court had power

to make.

3. The first question then is,--Can the validity of the commitment made by the Small Cause Court, which is good on the face of it, be inquired into by this Court, and the facts investigated which, so to speak, lie behind it, and seem to render it illegal. The answer must be in the negative if the Small Cause Court is a Court of co-ordinate authority with this Court, or if it is altogether independent of this Court's jurisdiction. Each of the superior Courts at Westminster refrains from inquiring into the legality of imprisonment imposed under color of process issuing out of any other of those Courts; for the simple reason, as I apprehend, that the latter Court, that is, the Court from which process issued, has equal power and authority with itself to finally judge of and determine upon the right and justice of the matter, and therefore is the Court to which the person aggrieved ought to go, and by whose decision he will be bound. It will be otherwise, however, if the Small Cause Court is an inferior Court and subordinate to the control and authority of this Court.

4. Now I apprehend that the Small Cause Court does not stand in any superior position, relative to this Court, to that in which the former Court of Bequests stood towards the late Supreme Court. It certainly does not occupy a position of greater independence than the Court of Bequests did; and is more nearly associated with this Court than was the case between the Court of Bequests and the Supreme Court. The Charter of the late Supreme Court (Section 21) runs thus: 'And to the end that the said Court of Bequests erected and established at Fort William in Bengal by the said Charter of our said Royal grandfather made in the 26th year of his reign, and the Justices, Sheriffs and other Magistrates thereby appointed for the said districts, may better answer the ends of their respective institutions and act more conformably to law and justice, it is our further will and pleasure, and we do hereby further grant, ordain and establish that all and every (sic) the said Courts and Magistrates shall be subject to the order and control of the said Supreme Court of Judicature at Port William in Bengal in such sort, manner and form as the inferior Courts and Magistrates of and in that part of Great Britain called England are by law subject to the order and control of our Court of King's Bench: to which end the said Supreme Court of Judicature at Fort William in Bengal is hereby empowered and authorized to award and issue a writ or writs of

mandamus, certiorari, procedendo, or error, to be prepared in manner above mentioned, and directed to such Courts or Magistrates as the case may require, and to punish any contempt of a wilful disobedience thereunto by fine and imprisonment.'

5. I need hardly say that the powers thus given were constantly exercised by the Supreme Court during the period of the existence of the Court of Requests. In 1850, by Act IX of that year, the Court of Bequests was developed and converted into the present Court of Small Causes. Its constitution was amended, its jurisdiction in certain respects extended, its practice was regulated, and its name was changed, but it still remained an inferior Court, and the Supreme Court frequently, when occasion required, controlled its orders and directed its discretion by means of writs of mandamus, certiorari, prohibition, and so on, in precisely the same way as it had when the Court was called the Court of Requests. Mr. Allen, in his very clear argument on behalf of the prisoner, well pointed out that Act IX of 1850 was moulded on the English County Courts Act 9 & 10 Vict., c. 95, and its effect was to place the Courts of Small Causes much in the same situation in relation to the Supreme Court as the County Courts stand to the superior Courts at Westminster. There are differences no doubt in the two cases, but they do not, as it appears to me, tend to give the Small Cause Court any greater independence. Act XXVI of 1864, which extended the jurisdiction of the Small Cause Court, also expressly placed the High Court in the same position with regard to it as the Supreme Court had previously occupied; and lastly, Section 9 of the Charter Act--I need not read it at length--continues to the High Court all the powers and authority of the Supreme Court, subject only to such limits thereto, if any, as might be put by the Queen's Letters Patent to be issued under that Act, or by legislative enactment on the part of the Indian Government. Neither of these authorities has, as I understand, prescribed any such limits of authority by the High Court over the Court of Small Causes.

6. I think, then, that this Court has power to examine into and determine on the validity of orders of the Small Cause Court which are brought before it regularly for that purpose. And I may add that if this Court could not on a return to a habeas corpus like that which is now made go behind the commitment of the Small Cause

Court the result would be most anomalous: the very purpose, namely, the protection of the liberty of the subject, for which this Court, as the Court of ultimate authority and resort, exercises the power of causing any one who is in confinement within the limits of its original jurisdiction to be brought before it, would be defeated. I will venture to put a case--a somewhat extreme case I admit, but still a case which was apparently within the anticipation of the framers of Act IX of 1850. Section 35 of that Act says--'The Governor-General and Members of the Supreme Council of India, the Governors and Members of Council of the Presidencies of Fort William in Bengal, Port St. George, and Bombay, respectively, and the Chief Justices and Judges of the several Supreme Courts established therein by Royal Charter shall not be liable to arrest or imprisonment by process issuing out of any Court holden under this Act, and no writ or process shall be (sic) sued out of the said Court against any of the persons privileged by Act I of 1844, or Act XVIII of 1848, without the consent of the Governor in Council.' Suppose a gentleman, newly made a member of the Supreme Council, had the misfortune to have a judgment of the Court of Small Causes passed against him, and to be arrested by his judgment-creditor, and suppose the Fifth Judge of the Small Cause Court, on his being brought before him for commitment, altogether disbelieved the assertion made by him as to his rank and privilege, and forthwith committed him to prison. Would this Court, on his claiming his discharge, and being brought here on habeas corpus, be obliged to say--'It is true we have issued this writ by virtue of the authority which enables us, as the Court of highest jurisdiction in this country, to take care that no one is illegally confined within the limits of the original jurisdiction of this Court, and it is true we have conclusive evidence before us that you are illegally imprisoned by reason of the privilege from arrest conferred on you for purposes of public expediency; 'but the Fifth Judge of the Small Cause Court has thought fit to commit you to prison, and we cannot release you?' I think that it can hardly be considered a right state of things that the superior authority of this Court should be thus fettered and rendered vain in the matter of personal liberty.

7. We have, moreover, the precedent set by the Court of Common Pleas in a very analogous case to the present--*Ex parte Dakins* 1 Jur. N.S. 378. In that case the prisoner 'having been brought up by a habeas corpus ad subjiciendum directed to

the keeper of the county jail of Derbyshire, it appeared on the return made to the writ that a judgment had been obtained against him as defendant in an action for debt in the County Court of Derbyshire, and that having been afterwards summoned before the said County Court touching the non-payment of the said judgment-debt, and not having appeared in obedience to such summons, he had been committed by the Judge for such default to the said prison for forty days, or until he should be discharged out of custody by leave of the Judge. Serjeant' (afterwards Mr. Justice) 'Byles moved that the prisoner should be discharged out of custody on the ground of his being privileged from arrest as one of the Queen's priests in ordinary.' In the course of the argument Jeevis, C.J., said--'The return shows on the face of it a good cause of detainer; there is then no privilege, and the application should be to the inferior Court.' But Serjeant Byles answered: 'The privilege appears in the affidavits on which I move, and they may be used to explain the return: *Ex parte Eggington* 18 Jur. 224. In that case Lord Campbell, C.J., says--'Although the return is good on its face, it is competent to show by affidavit the fact that the arrest took place on a Sunday. If such a course were not allowed, that or any other privilege from arrest would be wholly unavailing, as the fact upon which it rests would not appear in the return.'

8. In giving judgment, Jekvis, C.J., said--'Although I have had considerable doubts during the argument, yet on the whole I am now of opinion that the applicant is entitled to his discharge.' Again, after discussing an objection which had been raised, that the privilege did not extend to the commitment made in that case, as it was one in the nature of a punishment, and not in the nature of an execution, the Chief Justice deciding that it was in the nature of an execution said--'This seems therefore to me not to be a case in which the privilege is taken away, but that the case is the same as if the application were made to one of the superior Courts for a discharge from an imprisonment under the process of that Court. But then it is said that if that is so, still the application to discharge the defendant ought to be made to the County Court, which Court alone has power to discharge him that the defendant has mistaken his remedy and should apply for relief to the Court out of which the process under which he is detained was issued, and that he would then be discharged either on summary application to the County Court, or he can sue out his writ of privilege, but no summary application can be made to the County

Court. Then the defendant is being illegally detained, What is his remedy'? The ordinary one by habeas corpus disclosing on the return the reason of his detainer, and assisted by affidavits, if necessary, to show why the detainer is illegal, as was held in *Ex parte Eggington* 18 Jur. 224. And then we have the authority of the case before Patteson, J., in which a servant of the Queen, in custody under a similar commitment, was discharged by this mode on the express ground of privilege.' Cresswell, J., said--'I am of the same opinion,' and, after referring to the argument, 'this therefore shows that this is a commitment in execution for non-payment of the debt, and not as a punishment on contempt. Then as to the mode in which this privilege is to be enforced, it is suggested that the defendant ought first to go to the County Court before we can interfere; but the decision of Patteson, J., is sufficient authority to my mind for granting the present application.' The other Judges, Williams, J., and Crowder, J., took precisely the same view.

9. I may remark that in the present instance the preliminary objection cannot be made, for the prisoner has applied to the Small Cause Court, but has not there succeeded in obtaining his discharge. The cause of his failure does not appear. It may be that the Court thought it was *functus officio*, 'and had no power at the stage which the matter had then reached to order his discharge. However this may be, there seems to be no reason why he should not now have recourse to the ultimate authority of this Court, if the facts are such as to justify this Court in interfering.

10. The affidavit of the prisoner himself states reads affidavit.

11. A similar question of privilege was raised before me in the late case of *Wooma Chum Dole v. Tail* 14 B.L.R. App. 13. I there was of opinion on the facts that the prisoner was not entitled to the privilege he claimed, and that the whole case showed an obvious device contrived for the purpose of protecting the prisoner daily for a considerable period on his way to and from his place of residence out of Calcutta and his place of business in Calcutta. The case in which he was subpoenaed was not at the time on the board of this Court for trial, and Mr. Teil had no cause to think either that it was or that it would soon be so; on the contrary he had every cause to know that it certainly would not come on for trial on the day

when he was arrested. It seems to me that the facts disclosed in the affidavits in the present case differ altogether from the facts of that case. Here there was a suit actually fixed and pending for trial in the Small Cause Court on the 2nd July, in which Omritolall Dey was subpoenaed to appear as a witness, and in which his appearance seems to have been necessary. He had on the former occasion, when the same case was adjourned to the 2nd, acted for his father in that suit, and had taken part in the proceedings to the knowledge and with the permission of the Third Judge. This case was not only pending, as I have said, but was in fact heard and determined as an ex parte case on that very day, only, so far as I can see, two or three hours at the utmost before Omritolall Dey was arrested. It seems to me on the affidavits to be beyond the possibility of contest that the prisoner was attending the Court of Small Causes on that day for the purposes of that suit, and that it was right he should be there. It may be open to question whether he stayed longer in Court after he learnt that the case was over than was absolutely necessary. According to his own account he did not. But even supposing he did, then, on the authority of numerous, English decisions, that fact alone did not take away his privilege from arrest. Even if he had delayed to some extent in going from the Court to his house, he might well enough, within the decided cases, have nevertheless not lost his privilege. But this did not happen; he was arrested almost as he stepped over the outer threshold of the Court. I take these facts as they are placed before the Court on the prisoner's affidavits, because on the authority of Ex-parte Dakins 1 Jur. N.S. 378, as I have already mentioned, it is not only justifiable but absolutely necessary in a case of this kind that the Court should look at affidavits to ascertain all the necessary facts not disclosed by the commitment itself. The ruling of the Court of Common Pleas in Ex-parte Dakins 1 Jur. N.S. 378, which is directly applicable, relieves me from the necessity of examining the long list of cases from The Queen v. Bolton 1 Q.B. 66, 72, downwards, which illustrate the principle which must govern the superior Court on this point. I may mention however Bailey's case 3 R. & B. 607, 618 as a very strong authority the same way. The judgment-creditor and also the Judge of the Small Cause Court have had notice of this application, and of the grounds on which it is made; but no affidavits have been filed, nor any statement of facts presented to this Court in opposition to the affidavits filed on behalf of the prisoner. I must therefore take the facts

disclosed in these affidavits as being substantially the facts of the case. One of these affidavits, made by Mr. Gasper, a disinterested person, entirely confirms the account of the prisoner as to the time of the day when the occurrence took place.

12. On these facts, then, it appears to me that the prisoner was privileged from arrest when he was taken by the bailiff; that he was therefore wrongly committed to prison by the Small Cause Court, and that the return to the habeas corpus made to the High Court in this case, when inquired into, does not justify his detainer.

13. There still remains a point to be considered. On a comparison of dates, it appears that the arrest and commitment took place two months ago, and unless this interval had been accounted for this Court would not interfere on habeas corpus. It is incumbent on the applicant in a case of this kind to come at once to the Court without delay. But I find in that part of the affidavit of the prisoner which I have not read out that this time was consumed by fruitless applications to the Small Cause Court for release. I am therefore of opinion that the delay does not serve to disentitle the applicant to his discharge. There is, however, one condition I must impose on him. The privilege he sets up is for the benefit of the public, and not for his own personal advantage; and I think I ought therefore to require of him that he bring no action for damages for illegal arrest or false imprisonment against the Judges of the Small Cause Court, the bailiff, the jailor, or the judgment-creditor. (As to the right to bring an action in the case of an arrest in breach of the privilege arising from attendance at Court, see *Cameron v. Lightfoot* 2 W. Black 1190 and *Stokes v. White* 1 C.M. & R. 223.

14. Mr. Allen on behalf of the prisoner states that he is instructed by the prisoner to give that undertaking.

Phear, J.

15. Let the prisoner be discharged.