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interest of incapable proprietors under its ward, and (iv) that no case to the contrary has been cited, we are prepared to hold that the Courts below were right when they held Chaudhri Fateh Bahadur Singh incapable of entering into a contract in respect of the subject-matter of this suit; and further that the order under Act XVII of 1876 laid down that Chaudhri Fateh Bahadur Singh was not capable to contract, which incapacity would follow him, and affect the so-called contracts entered into by him outside the local limits of that Act.

There remains the third plea to the effect that the house in suit was never placed under the superintendence of the Court of Wards. We are fully prepared to agree with the lower appellate Court that the whole of the property of a ward vests in the Court of Wards when it takes up the management of a ward's estate, especially when it is not shown, as in this case, that any property was specially reserved either by Chaudhri Fateh Bahadur Singh or the Court of Wards from the control of the latter. This view is, in our opinion, consonant and in harmony with the provisions of the Act. Whether Chaudhri Fateh Bahadur Singh at the time that he entered into this contract did or did not know of the existence of the house at Cawnpore, it is found that it at that time formed part of this property. As such, we hold that it came under the superintendence of the Court of Wards by virtue of the order of the Government. Chaudhri Fateh Bahadur Singh could not therefore create any charge upon or interest in it. The result is that this appeal must be and is dismissed with costs.

Appeal dismissed.

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Before Mr. Justice Burditt and Mr. Justice Aikman.

JUMAI (OBJECTOR) v. MUHAMMAD KAZIM ALI (APPLICANT)*

Civil Procedure Code, section 344—Insolvency—Who may apply for declaration of insolvency—Judgment-debtor arrested or imprisoned.

Held that section 344 of the Code of Civil Procedure does not apply to the case of a judgment-debtor who had indeed been arrested in execution of a decree for money, but who had been released after a few hours' detention owing to the creditor's failure to pay subsistence money, and some twenty days

* First Appeal No. 91 of 1902, from an order of E. O. E. Leggatt, Esq., District Judge of Mirzapur, dated the 17th May 1902.

after his release applied to the Court to be declared insolvent. It is only a person against whom proceedings under section 344 are actually pending who is entitled to make the application permitted by that section.

THE respondent to this appeal applied in the Court of the District Judge of Mirzapur under the provisions of section 344 of the Code of Civil Procedure to be declared an insolvent. His application was opposed by some of the creditors, including one Jumai, and amongst other grounds it was pleaded that the applicant had not right to be declared an insolvent, inasmuch as he had not been arrested nor imprisoned, nor had any order for attachment of his property been issued. In fact the applicant had been arrested in execution of a decree held against him by the objector Jumai himself, but he was released after a few hours' detention owing to the objector's failure to pay subsistence money. The District Judge made the order prayed for. Jumai appealed against that order to the High Court, raising again the question whether such an arrest as that which took place in this case was sufficient within the meaning of section 344 of the Code of Civil Procedure to warrant the Court in making an order declaring the applicant an insolvent.

Mr. *M. L. Agarwala*, for the appellant.

The respondent was not represented.

BURKITT and AIKMAN, JJ. — In this case the respondent, one Muhammad Kazim Ali, has been declared by the District Judge of Mirzapur, under section 351 of the Code of Civil Procedure, to be an insolvent. Against this order the present appeal has been instituted by one Jumai, who holds a decree against the respondent. The facts of the case appear to be that the respondent Kazim Ali was arrested in execution of the appellant's decree, but was released after few hours' detention owing to the appellant's failure to pay subsistence money. Some twenty days afterwards the respondent put in an application to the Court under section 344 of the Code of Civil Procedure, asking the Court to declare him an insolvent. That application has been granted. The question we have to decide is, whether the Court below was justified in its order. In our opinion it was not. The facts clearly show that at the time the respondent put in his application, he was not suffering under any duress of Court, nor had any order of attachment issued against his

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property. The proceedings taken against him by way of arrest had dropped. We cannot believe that it was the intention of the Legislature that any judgment-debtor, who had once been arrested, or against whose property an order of attachment had once been made, could some years afterwards come into Court, and apply to it to declare him insolvent on the strength of a long-dropped proceeding by arrest or attachment. We think it is only a person against whom proceedings under section 344 are actually pending who is entitled to make the application permitted by that section. We must therefore allow the appeal. We set aside the order of the District Judge declaring the respondent to be insolvent. The appellant is entitled to his costs of this appeal. We may add that the respondent was not represented at the hearing of the appeal. The above order therefore is *ex parte*.

Appeal decreed.

Before Mr. Justice Burkitt and Mr. Justice Aikman.

MEHDI HUSAIN (PLAINTIFF) v. SUGHRA BEGAM AND OTHERS
(DEFENDANTS).*

Civil Procedure Code, sections 368, 588(18) — Death of one of several defendants—Order declaring suit to have abated—Appeal.

Held that an order made under the penultimate clause of section 368 of the Code of Civil Procedure declaring a suit to have abated is appealable, not as a decree, but as an order under section 588(18) of the Code.

Where a defendant to a suit for the recovery of a mortgage debt, who was on the record as a surety personally for the payment of the mortgage money, died, and the plaintiff declined to place on the record such defendant's legal representative, it was *held* that this only amounted to a waiver of the plaintiff's rights as against the surety, and did not preclude him from continuing the suit against the mortgagor. The suit did not abate.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Satya Chandra Mukerji, for the appellant.

Mr. Abdul Raoof, Babu Jogindro Nath Chaudhri, Pandit Moti Lal Nehru and Babu Sital Prasad Ghosh, for the respondents.

AIKMAN, J. (BURKITT, J., concurring).—This is an appeal under clause (18) of section 588 of the Code of Civil Procedure

* First Appeal No. 96 of 1902, from an order of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Benares, dated the 14th July, 1902.

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