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SHEO  
NARAIN  
†  
NUR  
MUHAMMAD.

notified as subject to incumbrance, which is not the case here. The last plea is that such a suit as this is not maintainable. In my opinion there is no force in this plea. The suit is one of the suits described in article 138, schedule II, of the Limitation Act. The mere fact that the auction purchasers or their representatives failed to apply within time to be put in possession under section 318 of the Code of Civil Procedure does not deprive them of their right to bring a regular suit, *vide Seru Mohun Bania v. Bhagoban Din Pandey* (1), *Kishori Mohun Roy Chowdhry v. Chunder Nath Pal* (2). I have not been referred to any case in which an opposite view has been taken. For the above reasons I am of opinion that the appeal fails, and it is dismissed with costs.

*Appeal dismissed.*

## REVISIONAL CIVIL.

*Before Mr. Justice Richards.*

ASHIQ ALI (PETITIONER) v. MOTI LAL (OPPOSITE PARTY). \*

*Civil Procedure Code, section 336—Insolvency—Security for filing application by judgment-debtor to be declared insolvent.*

The petitioner gave security for one Aziz, who had been arrested in execution of a decree. He deposited a sum of money in Court on condition if an application which was to be made by Aziz within a time specified to be declared insolvent was rejected on any ground whatever, the amount deposited would be paid to the decree-holder. The judgment-debtor duly presented his application for a declaration of insolvency, but before any order could be passed on it he died. *Held* that the condition of the security was not fulfilled, and the decree-holder was not entitled to the money deposited by the surety. *Krishnan Nayar v. Ubban Nayar* (3) referred to.

ONE Aziz having been arrested in execution of a Civil Court decree, one Syed Ashiq Ali deposited a sum of money for him in Court as security. The terms of the security were that if an application which was to be made by Aziz within a time specified to be declared insolvent was rejected on any ground whatever, the amount deposited would be paid to the decree-holder. Aziz duly made his application to be declared insolvent; but before any

\* Civil Revision No. 64 of 1906.

(1) (1883) I. L. R., 9 Cal., 602. (2) (1887) I. L. R., 14 Cal., 644.  
(3) (1901) I. L. R. 24 Mad., 637.

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order could be made on it he died, on the 16th April 1906. On the 19th April 1906, the decree-holder applied for the payment to him of the money deposited by Syed Ashiq Ali. The Court, however, refused this application, but subsequently, on a fresh application, made to it, directed that the money should be paid. Against this order Syed Ashiq Ali applied in revision to the High Court.

Munshi Gokul Prasad, for the applicant.

Dr. Satish Chandra Banerji, for the opposite party.

RICHARDS, J.—A decree was obtained against one Aziz. In execution of that decree Aziz, the judgment-debtor, was arrested. After some time Syed Ashiq Ali deposited a sum of money as security in Court. The terms of security were that if an application which was to be made by Aziz within a time specified to be declared insolvent was rejected on any ground whatever, the amount deposited would be paid to the decree-holder. Aziz duly made his application to be declared insolvent. Before any order could be made Aziz, the judgment-debtor, died on the 16th of April 1906. On the 19th of April the decree-holder applied to the Court that the money deposited by Syed Ashiq Ali should be paid to him. The Court made an order on the 21st of April refusing this application on the ground that the security was only given to secure the appearance of the judgment-debtor. The learned Judge had evidently in his mind the provisions of section 336 of the Code of Civil Procedure, which provides that when a judgment-debtor is arrested the Court is to release him if he furnishes security *that he will appear when called upon and will within one month apply to be declared insolvent*. On the 24th of April the decree-holder made a fresh application that the money should be paid to him and on the 24th of May 1906, notwithstanding the order of the 21st April 1906, the Court ordered that the amount deposited by Syed Ashiq Ali be paid over to the decree-holder. This is the order which the applicant now asks to set aside in revision. The security which was furnished was not in strict accordance with the provisions of section 336. The security went so far as to undertake that if the application of the judgment-debtor to be declared insolvent was rejected, on any ground whatever, the money should be paid to the decree-holder. It seems to me that

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on the merits the decree-holder was not entitled to get this money. The application of the judgment-debtor was never rejected. His death rendered an order under section 351 of the Code of Civil Procedure impossible, and even assuming that the security was bound to the full extent of his undertaking when he deposited the money, in my judgment, the Court ought to have given back to him the money deposited after the death of the judgment-debtor. The decree-holder contends that, even assuming that the decision complained of is wrong, this Court ought not to interfere in revision. This contention is met by the applicant by pointing out that so long as the order of the 21st of April stands, the lower Court had no jurisdiction whatever to make the order of the 24th of May 1906. Under all the circumstances I think that this is a case which I should entertain in revision. As I do entertain it, I think on the general merits Syed Ashiq Ali is entitled to the money deposited in Court. In an exactly similar case—*Krishnan Nayar v. Itinan Nayar* (1) it was held that where the judgment-debtor died before the expiration of the time granted for making an application for insolvency, the security was released. I allow the application and set aside the order of the 24th of May 1906. I make no order as to costs.

*Application allowed.*

*Before Mr. Justice Richards.*

J. G. WILLIS AND OTHERS (APPLICANTS) v. JAWAD HUSAIN AND OTHERS  
(OPPOSITE PARTIES)\*

*Civil Procedure Code, sections 622, 623, 626 and 629—Review of judgment—Application for review rejected—Revision—Small Cause Court suit.*

An application for review of judgment in a Small Cause Court suit was rejected, wrongly, on the ground of a supposed deficiency in the court fee paid upon the application. *Held* that this order was open to revision. *Ram Lal v. Ratan Lal* (2) distinguished.

THIS was an application in revision arising out of a suit in a Small Cause Court in which the plaintiffs claimed a sum of 60 or 65 rupees alleged to be due by the representative of a deceased pleader to them as executors of the Will of one T. A. Martin. The defendants contested the suit and claimed a set-off amounting

\* Civil Revision No. 48 of 1906.

(1) (1901) I. L. R., 24 Mad., 637. (2) (1904) I. L. R., 26 All., 572.