Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed; that the decree of the High Court should be reversed with costs, and that of the Subordinate Judge restored.

The respondents will pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants:—*Barrow, Rogers & Nevill.*

Solicitors for the respondents:—*T. L. Wilson & Co.*

J. V. W.

APPELLATE CIVIL.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

SURAJ DIN (JUDGEMENT-DEBTOR) *v.* MAHABIR PRASAD (PURCHASER OF DECREE).*

Civil Procedure Code (1882), *sections* 341 *and* 349—*Execution of decree—Arrest debtor - Discharge pending an insolvency petition—Re-arrest in execution of the same decree—Act No. XV of* 1877 (*Indian Limitation Act*), *schedule II, article* 179—*Application in accordance with law.*

Where a judgement-debtor who has been arrested and sent to jail in execution of a decree obtains an *interim* release under section 349 of the Code of Civil Procedure, 1882, such a release is not a discharge under section 341 of the Code and does not exempt the judgement-debtor from liability to be re-arrested in execution of the same decree. An application, therefore, in such circumstances, for execution of the decree by re-arrest of the judgement-debtor is one in accordance with law and saves limitation. *Shamji Deokaran* v. *Poonja Jairam* (1) followed. *Secretary of State for India* v. *Judah* (2) dissented from.

THIS was an appeal under section 10 of the Letters Patent from a judgement of KARAMAT HUSAIN J. The facts of the case appear from the judgement under appeal, which was as follows:—

"The decree-holder in this case obtained the decree on the 19th November, 1904. The first application was made on the 6th February, 1905. The prayer was to have the judgement-debtor arrested, but that application was struck off for default. The second application for execution was made on the 2nd July, 1905, and the judgement-debtor was arrested on the 3rd of July and sent to jail. The judgement-debtor applied to be declared an insolvent, and by the order of the District Judge of the 28th July, 1905, an interim order was passed by the District Judge for the release of the judgement-debtor. The application of the judgement-debtor for a declaration that he was an insolvent

* Appeal No. 34 of 1910 under section 10 of the Letters Patent.

(1) (1902) I. L. R., 26 Bom., 652. (2) (1886) I. L. R., 12 Calc., 652.

1910

SURAJ DIN v. MAHABIR PRASAD.

was rejected. Notice of this was given to the court executing the decree. That court, on the 30th August, 1905, gave notice to the decree-holder to proceed, and on the 6th September, 1905, the court struck off the decree-holder's application for default. On the 10th August, 1907, the decree-holder made a third application which was struck off for default on the 24th August, 1907. That application was also for the arrest of the judgement-debtor. The fourth application was made on the 3rd September, 1908, praying for the attachment of certain property of the judgement-debtor.

"The objection taken by the judgement-debtor is that this fourth application is time-barred for the following reason. The judgement-debtor, who was arrested under the second application, was released, and, as he could not be arrested for a second time, the third application of the 10th August, 1907, which was also for his arrest, could not have been made and therefore could not be regarded as a step in aid of execution of the decree.

"The court of first instance came to the conclusion that the application of the 10th August was an application in accordance with law and that therefore the execution of the decree was not barred by limitation. The judgement-debtor appealed and his appeal was rejected by the District Judge of Allahabad. He in his judgement says:—'The judgement-debtor was released under an order of the Court of Insolvency, but his application in insolvency was ultimately rejected by the court and he was liable to be sent to jail. Therefore, as held in I. L. R., 26 Bom., 652, the judgement-debtor who was arrested and imprisoned in execution of a decree and had obtained an interim protection under the Insolvency Act was liable to be arrested in execution of the same decree. Therefore the order of the court below is correct.'

"The judgement-debtor comes here in second appeal, and it is argued by his learned advocate that if a judgement-debtor is released once, no matter how he is released, the decree holder cannot apply for his arrest a second time. In support of his contention he relies on I. L. R. 12 Calc., 652.; I. L. R., 20 Calc., 874 and 72 L. J., p. 46.

"The authorities relied on by the learned advocate have no application to the facts of this case. Section 341 of the old Code of Civil Procedure, Act No. XIV of 1882, enacts that 'a judgement-debtor discharged under this section is not thereby discharged from his debt; but he cannot be re-arrested under the decree in execution of which he was arrested.'

"In the case before me the judgement-debtor was not discharged under section 341, and therefore the application for execution of the 10th of August, 1907, was an application in accordance with law. This view is supported by the ruling in *Shamji Deokaran* v. *Poonja Jairam* (1).

"The result is that I dismiss the appeal with costs."

The judgement-debtor appealed.

Mr. *A. P. Dube*, for the appellant:—

The case of *Shamji Deokaran* v. *Poonja Jairam* (1) does not govern this case. That was under the Insolvency Act (11

(1) (1902) I. L. R., 26 Bom., 652.

and 12 Vict., C. 21), which makes special provision for the re-arrest of persons released by an interim order. That Act only applies to Presidency towns. I rely on *Secretary of State for India in Council* v. *Judah* (1) and *Church's Trustees* v. *Hibbard* (2). If the time intervening between release and application for a second writ of arrest was greater than the original period for which imprisonment was ordered the judgement-debtor could not be re-arrested. The debtor ought to have been re-arrested immediately after his application was rejected.

Maulvi *Shafi-uz-zaman*, for the respondent, was not called upon.

STANLEY, C. J., and BANERJI, J.—The question for determination in this appeal is whether or not an application of the 10th of August, 1907, made by the judgement-creditor respondent, was an application in execution of his decree made in accordance with law. The respondent obtained a decree against the appellant on the 19th of November, 1904, and on an application for execution made on the 7th of July, 1905, the judgement-debtor was arrested and sent to jail. He then applied to be declared an insolvent, and by the order of the District Judge of the 28th of July, 1905, an interim order was passed for his release from imprisonment. Subsequently the application of the appellant for declaration of insolvency was rejected. An application was then made by the judgement-creditor on the 10th of August, 1907, for the arrest of the judgement-debtor. An objection was raised to this application that it does not save the operation of the Statute of limitation by giving a fresh start for limitation, it being contended that it was not made in accordance with law. An application was made on the 3rd of September, 1908, praying for the attachment of certain property of the judgement-debtor, and to this application the plea of limitation was set up. The court of first instance came to the conclusion that the application of the 10th of August, 1907, was an application in accordance with law, and that therefore the execution of the decree was not barred by limitation. The judgement-debtor appealed, with the result that his appeal was dismissed. He then filed

(1) (1886) I. L. R., 12 Calc., 652. (2) (1902) L. R., 2 Ch., 784.

1910

SURAJ DIN v. MAHABIR PRASAD.

a second appeal, which was also dismissed, and now he comes before us in appeal under the Letters Patent.

The learned Judge of this Court, after a review of the authorities, came to the conclusion that the application of the 10th of August, 1907, was in accordance with law, and that application saved the operation of limitation. We think in this view our learned brother was correct.

The present appeal has been ably argued by Mr. *Dube*. His argument was based largely upon a ruling in the case of *The Secretary of State for India* v. *Judah* (1). In that case the learned Chief Justice, Sir COMER PETHERAM, undoubtedly laid down that, under circumstances similar to those in the present case, a re-arrest of a judgement-debtor was not in accordance with law. He was clearly of opinion that "the Code only contemplates one arrest, and that if the defendant is to be remitted to jail, or if he is in custody now, he is in custody under the original arrest, and can be in custody under no other." It seems to us, with all deference, that the learned Chief Justice did not give a true interpretation to the language of section 341 of the Code of Civil Procedure of 1882. That section provides that a judgement-debtor shall be discharged from jail in certain events, and amongst others, on the decree being satisfied, or at the request of the judgement-creditor, or on the judgement-creditor omitting to pay the allowance directed to be paid for diet, *et cetera*. It further prescribes that a judgement-debtor *discharged under the section* is not thereby discharged from his debt, but that he cannot be re-arrested under the decree in execution of which he was imprisoned.

In the present case the judgement-debtor was not discharged under that section. He obtained an interim discharge by the Court in the insolvency matter under section 349. It seems to us that the discharge so obtained by him cannot be deemed to be a discharge within the meaning of section 341 of the Code of 1882, as the learned Chief Justice seemed to think.

The case of *The Secretary of State* v. *Judah*, was the subject of consideration by a Bench of the Bombay High Court in the case of *Shamji Deokaran* v. *Poonja Jairam* (2). In that case

(1) (1886) I. L. R., 12 Calc., 652. (2) (1902) I. L. R., 26 Bom., 652.

1910

SURAJ DIN v. MAHABIR PRASAD.

it was held by the learned Chief Justice, Sir LAWRENCE JENKINS and CROWE, J., that a judgement-debtor who has been arrested and imprisoned in execution of a decree and has obtained an interim protection order under section 13 of the Indian Insolvency Act, is liable to be re-arrested in execution of the same decree. In this case there was an appeal from a decision of STARLING, J., and the appeal came before JENKINS, C. J., and CROWE, J. In his judgement the learned Chief Justice reviewed the authorities and criticised at length the judgement of PETHERAM, C. J., to which we have referred. The learned Chief Justice observed:—"I confess I do not follow the train of reasoning which led Sir COMER PETHERAM to the conclusion that the Code only contemplates one arrest, if by that is meant that there is anything in the Code, which forbids a second arrest apart from the express prohibition it contains. If the Chief Justice's proposition is correct, then it is difficult to see why a special prohibition was inserted in section 341. The mere fact that a general power of retaking the person is not expressly given by the Code cannot be a prohibition, for were it so, then a retaking of property in attachment would equally and by parity of reasoning be illegal; but that no one suggests." We entirely agree in the view thus expressed and in the conclusion arrived at by our learned brother against whose decision this appeal has been preferred. We therefore dismiss the appeal with costs.

Appeal dismissed.

1910

November 26.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

CHUTTAN LAL (PLAINTIFF) *v.* KALLU AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Alienation of family property—Right of subsequently born member of family to object to alienation.

Held that a member of a joint Hindu family who was born after the alienation of the family property by another member of that family cannot question the validity of that alienation. *Chattarpal Singh* v. *Natha* (1) followed. *Hurodoot Narain Singh* v. *Beer Narain Singh* (2) and *Bunwari Lal* v. *Daya Shunker* (3) distinguished.

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*Appeal No. 54 of 1910 under section 10 of the Letters Patent.

(1) Weekly Notes, 1906, p. 26. (2) (1869) 11 W. R., 480.
(3) (1900) 13 C. W. N., 815 (822).