

being dated less than three years since the above application was made. The present Judge, Mr. Birch, begins his decision by saying: "The claim must be allowed with costs," but he does not inform us as to what claim must be allowed, and why it must be allowed; then he goes on to say: "I cannot allow this case to go any further," but he says: "As the plea of limitation has been raised by the claimant's pleader, which we may observe was then raised for the first time, as it had not been taken in the claimant's written statement of objections, he holds himself bound to go into the question of limitation." He then states that the original decree was passed in March 1827, more than 43 years ago, that the original decree was for a sum of Rupees 1,945-1-6, and execution had now been taken out for Rupees 11,200-6-5; that in 1830 all that could be found of the judgment-debtor's property was sold, and subsequent to that merely colorable proceedings were taken; that in 1867 the case was before his predecessor, and a claim which was preferred was by him allowed, but no notice was taken of the facts of the case as regards limitation. In this Mr. Birch is clearly wrong; the former Judge did take notice of this plea, and held distinctly that the case was not affected by the statute of limitation. This, no doubt, is an old decree, but it does not follow that, because the decree-holder has failed to find any of his judgment-debtor's property, or has been baffled in his endeavours to satisfy his decree, that his suit must be thrown out in this summary manner.

The judgment-debtors have also raised an objection which would fall under Sections 203 and 211 of the Code. Under Section 203, they had to satisfy the Court that they had duly applied such property of the deceased proved to have come into their possession; and on their failing to do so, the decree might be executed against them to the extent of the property not duly applied by them in the same manner as if the decree had been against them personally. The Judge has not gone into this point at all, and he must now try it.

We, therefore, reverse his decision, and hold that he was not justified in going behind the order of his predecessor which had not been appealed against; and as the case is not barred by limitation, he must try the point raised by the heirs of the original judgment-debtor under Sections 203 and 211, and pass a fresh decision.

The 20th January 1871.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Jurisdiction—Re-arrest of judgment-debtor.

Case No. 415 of 1870

Miscellaneous Appeal from an order passed by the Officiating Judge of Purneah, dated the 8th August 1870, affirming an order of the Subordinate Judge of that District, dated the 8th March 1870.

Shib Ram Mundul (Judgment-debtor),
Appellant,

versus

Ruhmutoolah (Decree-holder). *Respondent.*

Baboo Tarucknath Sein for Appellant.

Mr. C. Gregory for Respondent.

It is not within the competence of a Judge to direct the re-arrest of a judgment-debtor without any petition or motion of the decree-holder to that effect.

Bayley, J.—We think the judgment of the Lower Appellate Court in this case must be reversed. It was not within the competency of the Judge to direct the re-arrest of the judgment-debtor without any petition or motion of the decree-holder to that effect. Possibly the decree-holder might be a loser by this proceeding of the Court taken without his consent. The Judge could, of course, order the judgment-debtor's re-arrest at the motion or application of the decree-holder, but no such application is on the record or shown to us.

The judgment of the Lower Appellate Court is therefore reversed, but without costs, as the decree-holder Ruhmutoolah does not oppose the present appeal, but, on the contrary, has filed a petition praying to be allowed to withdraw from the record.