

## APPELLATE CIVIL.

*Before Mr. Justice Norris and Mr. Justice Gordon.*

1895  
July 26.

RAJENDRO NARAIN ROY (DECREE-HOLDER) v. CHUNDER MOHUN  
MISSER (JUDGMENT-DEBTOR.) \*

*Arrest—Civil Procedure Code (Act XIV of 1882), sections 341, 642—Execution of decree—Arrest of pleader while acting in his professional capacity—Discharge—Re-arrest.*

Under section 341 of the Code of Civil Procedure the immunity of a judgment-debtor from a second arrest depends, not only upon his having been arrested, but upon his having been imprisoned under the arrest.

CHUNDER MOHUN MISSER, a judgment-debtor, was arrested on the 9th November 1894 while acting as a pleader in a Court at Malda, and was brought before the Sub-Judge of Rampore-Baulia under the warrant on the 22nd November. On the 26th January following, having been on bail meanwhile, he was discharged on the ground that he had been arrested while exempt, under section 642 of the Civil Procedure Code, from arrest. Shortly afterwards the decree-holder, Rajendro Narain Roy, applied for the re-arrest of the judgment-debtor. The Sub-Judge ordered that a warrant of arrest should be issued giving the 9th March as the date of its return. Against that decision the judgment-debtor appealed to the Judge of Rajshahye who reversed the decision of the Sub-Judge.

Babu *Kally Kishen Sen* for the appellant.

Babu *Dwarika Nath Chakravarti* and Babu *Horo Chunder Chakravarti* for the respondent.

Babu *Kally Kishen Sen*.—The arrest was made under section 254 of the Code of Civil Procedure. Section 341 says that a judgment-debtor cannot be re-arrested under the decree in execution of which he was imprisoned. Simple arrest does not exempt him from re-arrest; there must be confinement in prison as well as

\* Appeal from Appellate Order No. 136 of 1895, against the order of A. E. Staley, Esq., District Judge of Rajshahye, dated the 19th of March 1895, reversing the order of Babu Bipro Dass Chatterjee, Subordinate Judge of that District, dated the 16th of February 1895.

arrest. The judgment in the case of *Chengalraya Chetti v. Subbiah* (1) says: "The Code expressly preserves a distinction between arrest and imprisonment, and the immunity from further process is only generated by actual confinement." The case of *Subba v. Venkata* (2) is to the same effect, namely, that the discharge of a judgment-debtor before imprisonment is no bar to his being re-arrested. There are two cases of this Court: *The Secretary of State for India in Council v. Judah* (3), and *In the matter of Bolye Chund Dutt* (4), in both of which the judgment-debtor was lawfully arrested and lodged in prison. The only case in which the judgment-debtor could not be re-arrested would be on his obtaining his discharge under section 341.

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Babu *Dwarka Nath Chakravarti* for the respondent.—The contention raised by the appellant cannot be supported. The two decisions of this Court say that there cannot be a second warrant of arrest against the judgment-debtor under one and the same decree. In the case of *The Secretary of State for India in Council v. Judah* (3), Petheram, C.J., says: "I think that this Court having once granted an order for the defendant's arrest, and he having been arrested under that order, it is not open to it to grant another order." That case was followed by Sale, J., who held that the Court, having regard to the section (341) of the Civil Procedure Code, had no power to order the arrest of a judgment-debtor a second time on the same decree. See *In the matter of Bolye Chund Dutt* (4).

The judgment of the High Court (NORRIS and GORDON, JJ.) was as follows:—

We think that this appeal must be allowed. The cases of *The Secretary of State for India in Council v. Judah* (3) and *In the matter of Bolye Chund Dutt* (4) are clearly distinguishable from the facts of the present case. In both those cases the judgment-debtor had been arrested and imprisoned. In this case he had been arrested but not imprisoned, and we think that under section 341 of the Code of Civil Procedure his immunity from a second arrest depends, not only upon his having been arrested, but upon

(1) 6 Mad. H. C., 84.

(2) I. L. R., 8 Mad., 21.

(3) I. L. R., 12 Calc., 652.

(4) I. L. R., 20 Calc., 876.

1895 his having been imprisoned under the arrest. In this view we are supported by the cases of *Chengalraya Chetti v. Subbiah* (1) and *Subba v. Venkata* (2).

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We therefore think that the judgment appealed from must be set aside and a second warrant of arrest allowed to issue. The appellant is entitled to his costs.

F. K. D.

*Appeal allowed.*

*Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.*

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July 23.

AIZUNNISSA KHATOON (DEFENDANT) v. KARIMUNNISSA  
KHATOON (PLAINTIFF.)<sup>c</sup>

*Mahomedan Law—Marriage with living wife's sister—Legitimacy of children of such marriage—Acknowledgment, Effect of, on illegitimate children.*

Under the Mahomedan law marriage with the sister of a wife who is legally married is void. The children of such marriage are illegitimate and cannot inherit. *Shureefoonisa v. Khizuroonisa Khanum* (3) referred to.

The doctrine of acknowledgment is not applicable to a case in which the paternity of the child is known, and it cannot therefore be called in to legitimize a child which is illegitimate by reason of the unlawfulness of the marriage of its parents. *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (4) followed.

THE facts of the case for the purpose of this report are sufficiently stated in the judgment of the High Court.

Moulvie *Mahomed Yusoof* and Babu *Busunt Kumar Bose* for the appellant.

Babu *Lal Mohun Das*, Moulvie *Serajul Islam*, Moulvie *Abdul Jawad*, Moulvie *Mahomed Tahir* and Moulvie *Mustappa Khan* for the respondent.

Moulvie *Mahomed Yusoof* for the appellant.—If in respect of a thing there is a command of the *Shera*, that command shews that the quality of goodness or excellence is to be found in that thing.

A contract is *sahneh*, that is, good and valid, when conformity

<sup>a</sup> Appeal from Original Decree No. 231 of 1892 against the decree of P. N. Banerji, Esq., Subordinate Judge of Backorgunge, dated the 8th of June 1892.

(1) 6 Mad. H. C., 84.

(2) I. L. R., 8 Mad., 21.

(3) 3 S. D. A., Sol. Rep., 210.

(4) I. L. R., 10 All., 289.