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allow *interim* release of the debtor when he has been put into jail, except as provided by s. 341. *Hastie's case* (1) has put a wrong interpretation on the terms "arrest" and "imprisonment," and the interpretation of this Court should be upheld. Section 345 says that in the application the debtor shall state whether he is "arrested" or imprisoned": so this shows that the intention of the Legislature was that the two terms should be distinguishable, and the right, which the debtor has to apply upon arrest, is lost when he is imprisoned. See also *In re Quarme* (2).

JUDGMENT.

SARGENT, C.J.—The circumstance that throughout the Code the terms "arrest" and "imprisonment" are employed as denoting different things, and, further, that in ss. 344 and 345 both "arrest" and "imprisonment" are mentioned where the [48] provisions of the sections are intended to apply in either case, precludes, we think, the larger construction that has been placed by the Calcutta High Court, *In the matter of William Hastie* (1), upon term "arrest" in s. 349.

Had the Legislature intended to give the Judge the power of releasing the judgment-debtor when in jail, we should have expected to find "imprisonment" mentioned as well as "arrest," as is done in the above sections. The decision *In re Quarme* (2) supports the construction of the section. The question referred to us is answered in that sense.

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12 B. 48.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

KRISHNAJI JANARDAN (*Original Plaintiff*), *Appellant v.* MURRARRAV AND NARSINGRAV (*Original Defendants*), *Respondents.** [7th July, 1887.]

Limitation - Joint family—Death of judgment-debtor—Execution against one of several representatives of a sole debtor—Death of such representative—Subsequent application for execution against other representatives—Practice.

An application for execution against one of the representatives of a sole judgment-debtor saves limitation against another representative.

Accordingly where the plaintiff, on the death of his sole debtor, sued out execution on the 18th June, 1881, under a *darkhast* No. 718 of 1878, against V., one of the three sons of the debtor, and the execution proceedings continued till the death of V. in March, 1884, whereupon the plaintiff applied on the 28th May, 1884, to put M. and N., the brothers of V., on the record as his representatives,

Held, that the application was not too late against M. and N. regarded as joint representatives with their brother V. of their father, the original judgment-debtor.

[F., 13 Ind. Cas. 313=22 M L.J. 169=11 M.L T. 19=(1912) M.W.N. 9.]

THIS was a second appeal from a decision of A. C. Watt, Acting District Judge of Poona.

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* Appeal, No. 691 of 1885.

(1) 11 C. 451 (457). (2) 8 M. 503.

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The appellant, Krishnaji, obtained a decree against one Yashvantrav, who died leaving three sons, *viz.*, Vithalrav and the respondents Murrarrav and Narsingrav, who after his death continued [49] to live as members of an undivided family. On the 18th June, 1881, Krishnaji presented *darkhast* No. 718 of 1878, and obtained an order for execution of his decree against Vithalrav alone, and the execution proceedings continued until Vithalrav's death in March, 1884. On the 28th May, 1884, the appellant applied to put Murrarrav and Narsingrav on the record as representatives of their deceased brother, Vithalrav. Notice having been served upon them under s. 248 of the Civil Procedure Code (Act XIV) of 1882, they denied their liability as representatives of their brother, and contended that they were full owners of the property.

The Joint Subordinate Judge of Poona rejected the appellant's application.

The appellant appealed to the District Judge, who confirmed the lower Court's order, with the following remarks :—

"* * * I certainly think they (Murrarrav and Narsingrav) were not heirs of Vithalrav. As brothers, they were joint co-parceners, and if the plaintiff wished in execution to get any order binding on them, he most certainly should have made them parties on the record. They were as necessary parties to the *darkhast* of 1878 as Vithalrav was, and no order passed in any proceeding to which they were not parties is binding on them * * * * *."

The appellant preferred a second appeal to the High Court.

Shantaram Narayan, for the appellant—Vithalrav was the eldest son of the original debtor, and execution having been issued out against him it should be considered as issued against his brothers. Execution against one representative is execution against the other: see *Ram Anuj Sewak Singh* v. *Hingu Lal* (1).

Rav Saheb *Vasudev Jagannath Kirtikar*, for the respondents.—The respondents ought to have been made parties to the proceedings taken against their brother, Vithalrav. They are not Vithalrav's representatives. They are now the sole owners of the property.

JUDGMENT.

July 7th. SARGENT, C.J.—The Acting Judge would appear to have treated the application as one to place Murrarrav and Narsingrav [50] on the record for the purpose of executing the decree against them. In holding that they were not the heirs or representatives of Vithalrav he was clearly right, but he proceeds to consider whether they could now be placed on the record as heirs of Yashvantrav, or otherwise we do not understand how the question of limitation could arise. He says, and rightly, that they were every bit as much as Vithalrav necessary parties to the *darkhast* of 1878, and concludes that not having been made parties it is now too late to proceed against them. We agree, however, with the ruling in *Ram Anuj Sewak Singh* v. *Hingu Lal* (1) that the application for execution against one of the representatives of a sole judgment-debtor saves limitation against another representative. The application would not, therefore, be too late as against Murrarrav and Narsingrav regarded as joint representatives with Vithalrav of the original judgment-debtor, Yashvantrav.

(1) 3 A. 517.

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We must, therefore, discharge the order, and send back the case for a fresh decision, having regard to the third issue, which is to be understood as including the question whether the mortgage was valid beyond Yashvantrav's lifetime, and, if so, whether it was for a legitimate purpose so as to bind his sons. Costs to abide the result.

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12 B. 50.

ORIGINAL CIVIL.

Before Mr. Justice Farran.

THE BOMBAY UNITED MERCHANTS' COMPANY, LIMITED (*Plaintiffs*) *v.* DOOLUBRAM SAKULCHAND AND PURSHOTAM JAVER (*Defendants*).* [23rd August, 1887.]

Contract—Sale of goods—Non-acceptance of goods—Contract for goods to be ordered from Europe—Such contract not fulfilled by offer of goods of same description not ordered out for purchasers, but bought by vendors in Bombay.

On the 7th August the defendants commissioned the plaintiffs to order out from Europe 500 cwts. copper braziers, September shipment, assorted in the manner set out in the indent signed by the defendants, "free on board, Bombay harbour," at the rate of £ 53-5 *per* ton. On the same day the plaintiffs sent a reply to the defendants' order in their usual form, partly lithographed and partly written, as [51] follows :—"We have the pleasure to inform you that we have received a telegram from our Manchester friends, and so far as the cyphers therein used, we learn that they advise the following purchases, which will be invoiced to you at your limit, subject to confirmation by letter as usual. Order this day 100 bundles of copper braziers, at £ 53-5 *per* ton, free on board, Bombay." As a fact, however, no telegram had been received from the plaintiffs' Manchester friends, and the plaintiffs had not learned that they had advised the purchases referred to in their reply. The acceptance of the plaintiffs' offer was really based on the plaintiffs' view of the probabilities of the copper market. The agents in England were unable to carry out the order, and it remained unexecuted. On the 26th October the plaintiffs having negotiated with one Naga Ducha to take over from him a September shipment of copper by the S. S. *Merton Hall*, answering to the defendants' order, and for the purpose of fulfilling it, wrote to the defendants as follows :—"We beg to inform you of the arrival of the S. S. *Merton Hall* with 100 packages of goods sold to you as *per* agreement No. 213 ; and have therefore to request payment of the cash for those goods, according to the terms of the agreement." The plaintiffs' negotiation, however, with Naga Ducha fell through, and they were unable to supply the defendants with the goods from the *Merton Hall*. The defendants, on the 30th October, wrote through their solicitors to the plaintiffs, stating that they believed the goods never came to Bombay, and that they considered the contract at an end. The plaintiffs, however, on the 29th October had succeeded in purchasing a September shipment of goods from one Beg Mahomed, corresponding to tho ordered by the defendants. They then on the 31st October wrote to the defendan ts, informing them that it was a mistake of their clerk to advise the arrival of the defendants' goods *per Merton Hall*, and handing the defendants invoice of 100 bundles arrived *ex Tuban Head.* The defendants discovered that the plaintiffs had not ordered out these goods, but had purchased them in Bombay, and on that ground they refused to accept them. The price of copper had then fallen. The plaintiffs sold the goods by auction, and brought this suit against the defendants, to recover the difference between the price realized by the sale and the price which by their contract the defendants had agreed to pay. It was admitted by the plaintiffs', witnesses that it was intended, at the time the defendants gave their order, that the goods should be ordered out from England by the plaintiffs ; and that this was the invariable course of business of the plaintiffs' firm—the present case forming the only instance to the contrary.

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* Small Cause Court Suit No. 3819 of 1887.