

## APPELLATE CIVIL.

*Before Mukerji and Guha JJ.*

SHAILENDRANATH GHOSH

v.

SURENDRANATH DE.\*

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Dec. 3.

*Execution of decree—Transfer of decree for execution to another court—Death of decree-holder after transfer—Substitution of heirs by executing court, if an irregularity curable by acquiescence—Code of Civil Procedure (Act V of 1908), O. XXII, r. 12 ; O. XXI, r. 16.*

A money decree was passed by the Original Side of the High Court and transferred to the district court for execution. After the transfer, the decree-holder died and his legal representatives applied for substitution in the district court. The judgment-debtor objected to such substitution, but the executing court allowed substitution to be made. The present respondent No 1, who purchased the interests of the judgment-debtor sometime before the order for substitution was made, but did not appeal against such order, put forward the same objection, contending that, under the law, heirs cannot continue the old execution but must make a fresh application.

*Held* that order for substitution should have been made by the court that passed the decree, and not by the executing court ; but this is an irregularity which can be waived by acquiescence.

*Held*, also, that the objectors, not having appealed against the order for substitution, must be taken to have waived the irregularity.

*Jang Bahadur v. Bank of Upper India, Limited* (1) followed.

## APPEAL by decree-holder's heirs.

The facts will sufficiently appear from the judgment of Mr. Justice Mukerji. The appeal was originally filed by Lakshmimani Dasi, who was not personally interested in the decree, but was only the guardian of her sons\* in the proceedings, on her own behalf. This was due to a *bonâ fide* mistake on the part of her legal adviser. That appeal was dismissed as incompetent, but, in view of the exceptional circumstances of the case, their Lordships allowed the

\*Appeal from Order, No. 345 of 1928, against the order of E. Milsom, Additional District Judge, Howrah, dated May 3, 1928.

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heirs of the decree-holder to file a proper appeal, wherein all the parties being represented were heard.

*Mr. Bijaykumar Bhattacharya* (with him *Mr. Debendranath Bhattacharya*), for the appellants. The learned District Judge is wrong in his view as regards the effect of Order XXII, rule 12. That rule does not take away any privilege, which the heirs of parties to execution-proceedings could otherwise have. It simply relieves the decree-holder's heirs of the duty of getting themselves substituted according to the procedure laid down in Order XXII, and the result is, the decree-holder's heirs are entitled to continue the proceedings from the point at which they were left by the deceased decree-holder. See *Manmotha Nath Mitter v. Rakhal Chandra Tewary* (1), *Kedarnath Goenka v. Anant Prasad Singh* (2) and *Akhoy Kumar Talukdar v. Surendra Lal Pal* (3). I further contend that the matter of the substitution of the heirs of the deceased decree-holder is concluded by the order of the District Judge dated 8th March, 1928, inasmuch as parties to a proceeding are bound by the orders made in the course of the proceedings. After the order of the 8th March, 1928, it was not open to the judgment-debtor or any one claiming through him to reopen the proceedings. See, in this connection, *Jang Bahadur v. Bank of Upper India, Limited* (4).

*Mr. Amarendranath Basu* (with him *Mr. Hemantakumar Basu*), for the respondents. The Howrah court, to which the decree had been transferred for execution, had no jurisdiction to make the substitution. If that court had passed the decree, the heirs, no doubt, could continue execution proceedings in the same court. The court which passed the decree could alone make the substitution under Order XXI, rule 16. See *Jogendra Chandra Roy v. Shyam Das* (5).

(1) (1909) 14 C. W. N. 752.

(2) (1925) I. L. R. 4 Pat. 507 ;  
L. R. 52 I. A. 188.

(3) (1926) 30 C. W. N. 735.

(4) (1928) L. R. 55 I. A. 227.

(5) (1909) I. L. R. 36 Calc. 543.

*Mr. Bhattacharya*, in reply. Order XXI, rule 16 does not apply in this case, because here there was no assignment in writing or by operation of law as stated in that rule.

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MUKERJI AND GUHA JJ. This appeal was filed by one Lakshmimani Dasi, as decree-holder appellant, against the judgment-debtor and a claimant, one Surendranath De, as respondents. The application for execution was filed by the original decree-holder. The decree was one for money, passed by the High Court on its Original Side on the 19th January, 1925. It was transferred for execution to the court of the District Judge of Howrah, to which a certificate of non-satisfaction was sent by the High Court Original Side. The execution petition was registered in the court of the Additional District Judge on the 23rd August, 1926. Under Order XXI, rule 22, Civil Procedure Code, notices were issued, and then notices under Order XXI, rule 66, Civil Procedure Code. In January, 1927, the original decree-holder died. On the 14th February, 1927, the legal representatives of the deceased decree-holder, being his three sons, all minors, represented by their mother Lakshmimani Dasi, entered appearance and prayed to be substituted in the place of the said deceased. On the 8th March, 1928, the substitution was ordered in the presence of the judgment-debtor. On 2nd April, 1928, one Surendranath De filed objection under section 47, Civil Procedure Code, alleging that he had a claim. An objection, formulated in the following way, namely, that the decree-holder having died, the heirs could not be substituted in the execution case, was urged, and the learned Judge, holding, in view of Order XXII, rule 12, the contention to be sound, ordered that the decree-holder's heirs must file a new application for execution and dismissed the execution case by an order dated 3rd May, 1928. From this order, the present appeal was taken. As already stated, Lakshmimani, who was not personally interested in the decree, but was only the guardian of her sons in

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the proceedings, filed the appeal on her own behalf. This was due to a *bonâ fide* mistake on the part of her legal adviser, who was misled by certain certified copies that were placed before him. The appeal, as originally filed, is incompetent. It is dismissed. But in view of the exceptional circumstances of the case, we allow the heirs of the decree-holders to file a proper appeal now and, the memorandum of that appeal being before us, and all the parties being represented therein, we have heard them.

Order XXII, rule 12, Civil Procedure Code, lays down that the provisions as to abatement of a suit or appeal, in consequence of death or insolvency of a party, do not apply to execution proceedings. It follows, therefore, that the provision is for the benefit of a decree-holder or his heirs and that the heirs need not take steps for substitution. This is clear from the decision of the Judicial Committee in the case of *Kedarnath Goenka v. Anant Prasad Singh* (1). There are two courses, either of which may be availed of by the heirs, that is to say, that they may apply immediately for carrying on the proceedings in execution of the decree or they may apply for fresh execution under Order XXI, rule 16, Civil Procedure Code: *Akhoy Kumar Talukdar v. Surendra Lal Pal* (2). The contention that, upon the death of an applicant for execution of decree, his legal representatives are not entitled to carry on the proceedings, and that their only remedy is to initiate a fresh proceeding and that, in the latter event, they may be successfully met by the plea of limitation, was overruled in the case of *Manmotha Nath Mitter v. Rakhal Chandra Tewary* (3).

The present case is, however, complicated by the fact that it was the decree of another court, namely, the High Court on its Original Side, that was being executed by the Howrah court. In these circumstances, it has been contended on behalf of the judgment-debtors respondents, that the appellants

(1) (1925) I. L. R. 4 Pat. 507; L. R. (2) (1926) 30 C. W. N. 735.

52 I. A. 188.

(3) (1909) 14 C. W. N. 752, 753.

were bound to apply to the court which passed the decree, namely the Original Side of the High Court, under Order XXI, rule 16, Civil Procedure Code. The appellants contend that this rule has no application in this case, as it is not a case of transfer by operation of law, but this contention cannot be upheld, as transferee by operation of law includes the legal representatives of a deceased decree-holder: *Gour Sundar Lahiri v. Hem Chunder Chowdhry* (1), *Mathurapore Zamindary Co., Ltd. v. Bhasaram Mandal* (2). It has been held by this Court in a well-reasoned judgment by Banerjee J., Stevens J. concurring, that an application by the transferee of a decree for execution, after substitution of his name, can be entertained only by the court which passed the decree, and the court to which the decree has been sent for execution has no jurisdiction to entertain it: *Amar Chundra Banerjee v. Guru Prosunno Mukerjee* (3). This decision has been approved by the Judicial Committee in the case of *Jang Bahadur v. Bank of Upper India, Limited* (4), in which, however, their Lordships pointed out that, when substitution is made by the executing court of the legal representatives of a judgment-debtor, deceased since the transfer of a decree, it is an irregularity, but the irregularity may be waived by acquiescence, and when it has been waived, the party acquiescing cannot turn round and question the jurisdiction of the executing court. In a case where a decree-holder dies before the decree is transferred, the legal representatives have to apply, not really for substitution, but to have their names brought on the record and to have the decree transferred for execution, a procedure that appears to have been followed in the case of *Jogendra Chandra Roy v. Shyam Das* (5). In a case where, after the decree has already been transferred, the death takes place, the same procedure may be followed or the legal representatives may apply to the executing court for

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(1) (1889) I. L. R. 16 Calc. 355.

(3) (1900) I. L. R. 27 Calc. 488.

(2) (1924) I. L. R. 51 Calc. 703, 708. (4) (1928) L. R. 55 I. A. 227.

(5) (1909) I. L. R. 36 Calc. 543.

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carrying on the proceedings, and may subsequently produce from the court, which passed the decree, the necessary order under Order XXI, rule 16, Civil Procedure Code; and, as has been held in the case of *Manorath Das v. Ambika Kant Bose* (1), the failure or omission of the legal representatives to produce such an order from the court, which passed the decree, at the moment of his application to the executing court does not entirely vitiate his application to the executing court.

To consider whether the irregularity that has occurred should be treated as fatal in the present case, we must bear in mind that the judgment-debtors took this precise objection on the 10th February, 1927, and thereafter, on the 8th March, 1928, the executing court made the order for substitution. The claimant, Surendranath De, purporting to have purchased the property on the 12th February, 1928, took no appeal from this order and put forward the same objection in the same court. In the circumstances, the order of the 8th March, 1928, must be taken to conclude the matter.

The appeal is allowed, but the appellants must pay the respondents costs for the infructuous appeal that was at first filed, hearing-fee being assessed at 5 gold mohurs.

*Appeal allowed.*

R. K. C.

(1) (1909) 13 C. W. N. 533.