

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice,
and Mr. Justice Wilkinson.

BIYYAKKA AND OTHERS (APPELLANTS),

v.

FAKIRA AND ANOTHER (RESPONDENTS).*

1889.
Feb. 14.

Civil Procedure Code, ss. 234, 332, 588—Death of judgment-debtor between order for possession in execution of decree and delivery of possession—Appeal against appellate order reversing an order under s. 332.

A decree-holder in a District Munsif's Court obtained an order for possession of land in execution of his decree on 20th August, on which day the judgment-debtor died. Possession was delivered on 23th August. The persons dispossessed presented a petition under s. 332 of the Code of Civil Procedure disputing his right to be put into possession, on the ground, *inter alia*, that the judgment-debtor was not represented on the record.

On appeal against the appellate order of the District Judge :

Held, assuming that the order for possession was made prior to the death of the judgment-debtor, there was no necessity for the decree-holder to bring any other person on to the record between the date of that order and the date on which the order was executed. *Ramasami v. Bagirathi*(1) distinguished.

APPEAL against the order of R. Sewell, Acting District Judge of Cuddapah, on civil miscellaneous appeal petition No. 206 of 1887, reversing the order of A. F. Elliot, District Munsif of Cuddapah, on civil miscellaneous petition No. 443 of 1887.

This was a petition presented under s. 332 of the Code of Civil Procedure by three persons alleging that they had been dispossessed of certain immovable property belonging to them, in execution of the decree passed in original suit No. 49 of 1887 to which they were not parties.

The plaintiff, in whose favor the decree was passed, obtained an order for possession of the immovable property in question on 20th August 1887, on which day the judgment-debtor died. Possession was given to the decree-holder in pursuance of the above order, on 28th August, no steps having been taken in the interval for the representation of the interests of the deceased

* Appeal against order No. 73 of 1888.

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judgment-debtor. On the 23rd September the present petition was filed.

The District Munsif held on the authority of *Ramasami v. Bagirathi*(1) that the legal representative of the deceased judgment-debtor should have been brought on to the record before the decree was executed, and accordingly directed that the petitioners should be replaced in possession.

The decree-holder filed a petition of appeal to the District Court against this order under s. 588 of the Code of Civil Procedure, and the District Judge made an order thereon reversing the order of the District Munsif, and remanded the petition for disposal on the merits observing :—

“The final order to put plaintiffs in possession was passed during the life-time of the debtor, and no further order was required. Section 234 is permissive not mandatory. The decree-holder ‘may’ apply, not ‘shall’ apply, for execution against his representatives.

“I think the observations of Oldfield, J., in *Stowell v. Ajudhia Nath*(2) apply. Section 234, Civil Procedure Code, enables the holder of a decree, if a judgment-debtor dies before the decree has been fully executed, to apply to the Court which passed it to execute the same against the legal representative of the deceased ; but if the section is applicable to a case where the judgment-debtor dies while execution is proceeding and after sale of property has been ordered, there is nothing in it to imply that the sale is absolutely void, if no legal representative has been brought on the record, when it has been made on the authority of a Court having jurisdiction.”

The petitioners preferred this appeal against the order of the District Judge.

Subramanya Ayyar for appellants.

Sivagnana Mudaliar for respondents.

The arguments adduced on this appeal appear sufficiently for the purpose of this report from the judgment of the Court (Collins, C.J., and Wilkinson, J.).

JUDGMENT.—The question raised by the appellants’ pleader for determination is whether the decree-holder was bound to bring on the record the representatives of the deceased judgment-debtor

(1) I.L.R., 6 Mad., 130.

(2) I.L.R., 6 All., 255.

before possession was given to him. The order for possession was passed and the judgment-debtor died on the 20th August. The warrant was executed and possession given to the judgment-creditor on the 28th August. The persons in possession then came in under s. 332, Civil Procedure Code, claiming to be in possession on their own account. The District Munsif instead of following the procedure laid down by s. 332, held that the legal representative should have been brought in before application was made for execution and set aside the order for delivery, directing possession to be given to the claimants. On appeal the District Judge reversed the order of the Munsif. His order was right, but the grounds given for his order were wrong. The Munsif was bound to proceed to investigate the matter in dispute, and if he then found that the claimants were in *bona fide* possession of the property on their own account or on account of some person, other than the judgment-debtor, he could have made an order for restoration of the property. Section 234 had nothing to do with the case, as we must take it that the order was passed before the death of the judgment-debtor. So far as the judgment-creditor was concerned he obtained an order for possession prior to the death of the judgment-debtor, and there was no necessity for him to bring any other person on the record between the date of that order and the date on which the order was executed. He had nothing further to do unless he wished to bring in the legal representatives of the judgment-debtor. It was for the Court to execute the order passed, and s. 332 provides the remedy appropriate to the present case. Under these circumstances the rule in *Ramasami v. Bagirathi*(1) is not in point. The appeal fails and is dismissed with costs.

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(1) I.L.R., 6 Mad. 180.