becoming residents had acquired a right of easement to use the water of the well. This seems to be a sufficient answer to this question which as I have said has now been raised for the first time. I agree with my learned brother that the Letters Patent Appeal must be allowed and the decree of the first Subordinate Judge restored. I agree with my brother with regard to his order as to costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Curgenven.

BADA KRISTAM NAIDU (PETITIONER), APPELLANT,

v.

DURVADA PATRUDU *alias* JANAKIRAMAYYA AND 2 OTHERS (RESPONDENTS AND PETITIONER), RESPONDENTS.*

1927, May 3.

Sec. 47 (3) *and O. XXI, r.* 16, *Civil Procedure Code (V of* 1908)—*Death of transferee decree-holder—Competency of executing Court to enquire whether the transferee was a benamidar and to allow real owner to execute.*

On the death of a transferee of a decree, it is open to the executing Court under section 47 (3) and Order XXI, Rule 16, Civil Procedure Code, to enquire whether the transferee was really a benamidar for another and to allow the real owner or his legal representatives to execute the decree. *Palaniappa Chettiar* v. *Subramania Chettiar*, (1925) I.L.R., 48 Mad., 553, distinguished.

APPEAL against the order of H. D. C. REILLY, District Judge of Ganjām, in E.P. Nos. 39 and 68 of 1916 in O.S. No. 20 of 1904.

The facts are given in the judgment.

---

* Appeals against Orders Nos. 141 and 64 of 1923.

KRISTAM NAIDU v. JANAKI-RAMAYYA.

C. S. Venkatachari (with *B. Satyanarayana* and *H. Suryanarayana*) for appellant.

S. Varadachari (with *V. Govindaraja Achari*) for respondent.

JUDGMENT.

ODGERS, J. ODGERS, J.—This is an appeal against the order of the learned District Judge of Ganjām on two Execution Petitions, namely, 39 of 1916 and 68 of 1916. In the former, Kamalanabham Naidu was the petitioner as transferee and benamidar of the late Parasuramayya Chowdhari stated to be the real owner of the decree. Kamalanabham Naidu having died, the real owner's undivided son Nandesam Chowdhari, a minor represented by his next friend Duvvada Butchamma, was the petitioner, and the respondents were Duvvada Patrudu *alias* Janakiramayya Chowdhari and Duvvada Gusayi Chowdhari. In E.P. No. 68 of 1916 the undivided brother of Kamalanabham Naidu, transferee, is the petitioner and the respondents are the same as in E.P. No. 39 of 1916. The learned District Judge, whose predecessor held that the question which of these two rival petitioners can execute the decree is one to be decided under section 47, Civil Procedure Code, decided on the merits that the brother of Kamalanabham Naidu is not entitled to execute the decree in E.P. No. 68 of 1916 and dismissed the execution petition.

The facts are that in O.S. No. 20 of 1904 a certain Bheemaraju Chetty obtained a decree which he transferred by Exhibit A to Kamalanabham Naidu. That was on the 25th November 1906. Kamalanabham Naidu applied to be brought on the record as transferee decree-holder and was so recognized on the 9th March 1908. In 1914 Kamalanabham Naidu died and the appellant is, as stated, his undivided brother. The petitioner in

the other petition is the undivided nephew of the judgment-debtor and a cousin of Kamalanabham Naidu's mother. This petitioner alleges that his father was the real transferee and that Kamalanabham Naidu was only a benamidar for him. It is therefore to be observed that the original parties, i.e., the original transferee and the original alleged benami transferee and the original alleged real transferee are all dead, and the first question is, can a question involving a benami transaction be gone into under section 47, Civil Procedure Code? It is maintained for the appellant that this has now been decided in *Palaniyappa Chettiar* v. *Subrahmaniya Chettiar*(1), and that decision must be taken to exclude every possible question of benami that may arise in execution. If that is so, the appellant is right. But the question is, does the decision go to that length? What the decision of the CHIEF JUSTICE and SRINIVASA AYYANGAR, J., amounts to is that where a decree has been transferred to a person in writing, nobody else can under colour of being the real owner apply to have the right of execution of the decree conferred on him. In other words the transfer is conclusive of the right to execute. In that case the assignment of the decree was taken in the personal name of one R. M. M. Subramaniam Chetty and it was attempted to be shown that this gentleman was only an agent with a general power from one S. N. Subramania Chetti and that therefore the assignment to R. M. M. Subrahmania Chetty was simply a benami transaction for the principal. The learned Judges held that Order XXI, rule 16, which lays down that where a decree is transferred by an assignment in writing or by operation of law, the transferee may apply for execution,

(1) (1925) I.L.R., 48 Mad., 553.

KRISTAM NAIDU v. JANAKI-RAMAYYA.

ODGERS, J.

excluded a person otherwise a stranger to the Court from coming forward and alleging that the transferee is a mere benamidar. SRINIVASA AYYANGAR, J., observed at the end of his judgment—

"It is also clear that the Code of Civil Procedure did really intend to prevent benamidars coming in and making applications to the Court on the general basis of the law relating to benami transactions".

The case seems to me to amount only to this, namely, that the rights of the transferee to come in are confined unlike those of the decree-holder to Order XXI, rule 16. This rule has to be read in connexion with section 47 (3) which lays down the procedure to be adopted when an assignee as representing his assignor wants to execute. In further support of his argument the learned vakil for the appellant cited *Paupayya and Subayya* v. *Narasanna and K. Subbayya*(1), which is a very similar case to *Palaniappa Chettiar* v. *Subramania Chettiar*(2), except that the decision which was disapproved in the later case was to the precisely opposite effect. There Johnston's name appeared on the face of the decree and it was alleged that he had obtained the decree as agent for Arbuthnot and Company. It was held that the decree-holder was the person whose name appeared on the face of the record or had been recognized as transferee. The decision in *Bhandari* v. *Ramachandra*(3), does not appear to help the appellant as in that case there was no decree when the assignment was made. The question really is whether on the death of the assignee, who we will assume for the present to be benamidar, the question under section 47 (3) can be reopened *de novo* and the matter decided as to who is really the representative of the decree-holder. It does

(1) (1880) I.L.R., 2 Mad., 216. (2) (1925) I.L.R., 48 Mad., 553.
(3) (1907) 17 M.L.J., 392.

not seem to me that the case in *Palaniappa Chettiar* v. *Subramania Chettiar*(1), understood in the way I have set out above affords us any assistance in a matter of this sort, unless it can be taken, as I do not think it can, to be a general declaration that no kind of transaction involving the doctrine of benami will be enquired into by the executing Court. If the law really meant that, it would have been quite easy to have inserted a provision in Order XXI, rule 16 or in section 47. There is no question here of going behind the decree, because the person named in the decree is dead and the question seems to me to resolve itself into one quite as much to the title to the decree as one involving this question of benami. In fact I would go so far as to say that this question of benami shrinks to very unimportant proportions in a matter of this sort, the question being who is the real owner of this decree which is at present so to speak floating about and without any person authorized to execute it. The right of the real owner to execute the decree is recognized in an earlier case in *Abdul Kareem* v. *Chukhun*(2), where the benamidar admitted that a certain sale to him was benami and that the real and beneficial transferee was the father of the applicant for execution on which the lower Court allowed the decree to be executed. MITTER, J., in that case, observed that the benami system is recognized in this country and a benamidar is not a transferee of the decree, whereas the section only authorized the Court to allow the transferee of the decree to apply for execution. That no doubt has been modified in modern times and benami transactions have been recognized in later decisions as for instance by the Privy Council in *Gur Narayan* v. *Sheolal Singh*(3), holding that a benamidar,

(1) (1925) I.L.R., 48 Mad., 553. (2) (1879) 5 C. L.R., 253.
(3) (1919) I.L.R., 46 Calc., 566 (P.C.)

KRISTAM NAIDU v. JANAKI-RAMAYYA.

ODGERS, J.

though not beneficially interested in property standing in his name, represents in fact the real owner and is, so far as their relative legal position is concerned, a mere trustee for him and is authorized to sue. Sir GEORGE FARWELL in an earlier case in *Bilas Kunwar* v. *Desraj Ranjit Singh*(1), observed that this system had a resemblance to a resulting trust. If that is so, it seems difficult to say that the title to this decree has not resulted to the appellant by operation of law such as is contemplated by section 82 of the Trusts Act. It has been argued that, when a benamidar dies, he being in the position of a trustee under the Trusts Act and there being no person under section 73 to appoint a successor to him, his legal representative must assume the benami character which was held by his father or other predecessor. The case in *Raja of Deo* v. *Abdullah*(2), was cited to us for the proposition that a trusteeship did devolve on the late trustee's legal representative. It is based on one sentence at the end of the Privy Council judgment where the facts are extremely complicated. The sentence runs as follows :—

> "Kashinath was a trustee for Raja Bhikham, and Lajjadhari could only succeed to his father's trusteeship."

Kashinath was a benamidar for the Raja and his son Lajjadhari executed a conveyance acting on the instructions of the Raja. It can hardly be denied that the Raja was the true owner and that Lajjadhari had nothing in himself that he could convey. I think that is all their Lordships meant by the sentence in question and that it would be an extraordinary doctrine to lay down that, when a benamidar dies, of necessity, the benamidarship is carried on by his relations who happened to be his legal representatives. A benami

(1) (1915) I.L.R., 37 All., 557 (P.C.). (2) (1918) I.L.R., 45 Calc., 909 (P.C.).

transaction is, I imagine, generally entered into with one who is personally trusted or personally selected for some reason that commends itself to the transferor and it is extremely unlikely that any benamidarship would be intended to last beyond the life of the person who is interested as benamidar. Various cases were cited to us on behalf of the respondent to show that the death of the benamidar merely removes a bar to the legal as well as the beneficial enjoyment of the property by the beneficiary. For instance in *Umasondury Dassy* v. *Brojonath Bhuttacharjee*(1), an executrix took out probate and obtained a decree for rent. The probate was revoked by a minor who applied for execution of this decree. The Court held the minor could execute as he had succeeded his father by the operation of law. So in *A. B. Miller* v. *Abinash Chunder Dutt*(2), where the adjudication in insolvency was annulled, it was held that the decree obtained by the Official Assignee was not annulled thereby and that the applicant had become assignee by operation of law as he had been appointed trustee to the estate of the late ex-insolvent. In *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*(3), promissory notes were taken from the debtors to an estate by the manager under the management of the Court of Wards for the latter. The Court held that they became vested in the mortgagee when the superintendence of the Court of Wards was withdrawn. Further *Mutthiah Chettiar* v. *Govindloss Krishnadoss*(4), which was heard by a Bench of three Judges, seems to imply that Order XXI, rule 16, is not exhaustive of every case which might come under its provisions. If that is so, it cannot be held that rule 16 is final for all executing purposes. But however that may be, I am of opinion that as a matter of fact, rule 16

(1) (1889) I.L.R., 16 Calc., 347.
(2) (1900) 4 C. W.N., 785.
(3) (1908) I.L.R., 31 Mad., 534.
(4) (1921) I.L.R., 44 Mad., 919.

KRISTAM NAIDU v. JANAKI-RAMAYYA.

ODGERS, J.

has little or no application to the present case. It seems to me that by the death of the original parties, the whole matter is set at large and that it is the duty of the Court under section 47 to decide on the merits which of the contestants is in fact entitled to execute this decree. So far then the contention of the appellant must be overruled and I now proceed to the merits of the case.

[Then his Lordship discussed the evidence and came to the conclusion that Parasuramayya provided the money for the transfer of the decree and that Kamalanabhayya was only a benamidar, and proceeded as follows:—] There is in my opinion no reason to think that the learned District Judge came to a wrong conclusion on the merits and as I am against the appellant also on the point of law, this Civil Miscellaneous Appeal must be dismissed with costs.

C.M.S.A. No. 64 of 1923 will also be dismissed.

CURGENVEN, J.

CURGENVEN, J.—Following *Palaniappa Chettiar* v. *Subramania Chettiar*(1) it is no doubt true that the real owner of a decree cannot claim under Order XXI, rule 16, to execute it where it has been transferred in writing to the name of a benamidar for him. But once the benamidar is dead, this decision does not appear to me to be any authority for the position pressed upon us that the real owner still cannot be heard to say that the decree is his; nor, I think, have we been shown any other authority for the proposition. Once the benamidar is dead, the question necessarily arises, who is his representative, or, to use the language of Order XXI, rule 16, who is his transferee by operation of law? In the ascertainment of this, there does not appear to be any provision in the Code, or any other authority, requiring the executing Court to exclude the real owner from

(1) (1925) I.L.R., 48 Mad., 553.

coming forward and proving that the decree is his property. We have been shown nothing in support of the contention that, in such circumstances, the ostensible owner is to be regarded as the real owner for the purpose of ascertaining his representatives. There is a series of cases *Umasoondury Dassy* v. *Brojonath Bhuttacharjee*(1), *A. B. Miller* v. *Abinash Chunder Dutt*(2), *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu*(3) in support of the view that, when the title of the holder of a decree or of a transferred decree terminates, when, for instance, the holder is an executor and probate is revoked, when he is a trustee under a trust found to be invalid, when he is an official receiver and the adjudication is annulled—the owner upon whom the title devolves may be substituted by the executing Court. That Court has clearly power under section 47 (3), C.P.C., to determine who, in this wide sense of the term, is the decree-holder's representative. To quote MOOKERJEE, J., in *Aoydhya Roy* v. *Hardwar Roy*(4)

"the term 'representative' as used in section 244 of the Code of Civil Procedure of 1882 means not merely the legal representatives in the sense of the heir, executor or administrator, but includes any representative in interest, that is, any transferee of the interest of the decree-holder".

The further question, then, is whether, when a benamidar dies, the real owner is his representative or transferee by operation of law. Some argument has been addressed to us to show that the *benamidar* was in the position of a trustee, and that, upon the death of a trustee, and until another trustee is appointed, his natural heir succeeds to the trust. That may be true of a trust created under the Trusts Act, but I do not think that an ordinary benami title is governed by this

(1) (1889) I.L.R., 16 Calc., 347.
(2) (1900) 4 C.W.N., 785.
(3) (1908) I.L.R., 31 Mad., 534.
(4) (1909) 9 C.L.J., 485.

KRISTAM-NAIDU v. JANAKI-RAMAYYA.

CURGEN-VEN, J.

rule. If the real owner sued to establish his title to the property, it is indisputable that he would be entitled to a decree declaring it, and, if that be so, he may equally establish his title in proceedings under section 47, C.P.C. In my view, therefore, the lower Court was right in deeming itself competent to go into this question. [Then his Lordship discussed the merits and agreed with ODGERS, J., in dismissing the appeals with costs.]

N.R.

APPELLATE CIVIL.

Before Mr. Justice Wallace and Mr. Justice Thiruvenkata Achariar.

1927, September 8.

SENAPATHY NARAYANA PATRUDU AND OTHERS (DEFENDANTS), APPELLANTS

v.

SETHUCHERLA VEERABADRA RAJU BAHADUR AND OTHERS (PLAINTIFFS), RESPONDENTS.*

Madras Estates Land Act (I of 1908), ss. 77, 25, 30 and 45—Suit in a Revenue Court for recovery of unascertained rent—Suit, maintainability of—Previous proceedings to ascertain rent, whether necessary—Jurisdiction—Duty of Court—Scope of ss. 25, 30, 45 and 77.

Under section 77 of the Madras Estates Land Act, in all cases not falling under section 25, 30 or 45 of the Act, a suit for recovery of unascertained rent is maintainable in a Revenue Court, and the Court is bound as part of its duty to ascertain the rent payable and pass a decree for the amount.

Mallayya v. *Narayanagajapathyraju*, (1925) 21 L.W., 42, followed; *Rangayya Appa Rao* v. *Bobba Sriramulu*, (1904) I.L.R., 27 Mad., 143 (P.C.), distinguished.

---

* Second Appeal No. 1550 of 1922.