APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Cornish.

1934, September 27.

MINOR LAKSHMANAN CHETTIAR, BY HIS MOTHER AND GUARDIAN LAKSHMI ACHI, AND ANOTHER (RESPONDENTS 10 AND 11), APPELLANTS,

v.

MINOR CHIDAMBARAM CHETTIAR, BY HIS MOTHER AND NEXT FRIEND UNNAMALAI ACHI, AND SEVEN OTHERS (SECOND PETITIONER AND RESPONDENTS 1 TO 4 AND 6 TO 8), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), *O. XXII, rr.* 4 (4) *and* 11—*Appeals—Applicability—Respondent not entering appearance within time limited by notice of appeal—Death of —Legal representatives of—Bringing on record of—Necessity—Decree adverse passed without his legal representatives—Nullity, if—O. XLI-*(A), *rr.* 2 *and* 3; *O. XLI, r.* 14—*Applicability and effect of—Executing Court—Validity of decree—Jurisdiction to question.*

The plaintiff in a suit for the recovery of some property appealed to the High Court from the decree dismissing his suit. One of the defendants who had contested the suit in the Court below and was impleaded as a respondent in the appeal was served with notice of the appeal but he failed to comply with the terms of the notice by not entering an appearance within the thirty days allowed. He died subsequently during the pendency of the appeal and an application to bring his legal representatives on record was dismissed on the ground that, under Order XXII, rule 4, of the Code of Civil Procedure, no legal representatives need be impleaded. The appeal was heard in due course and the decree of the lower Court reversed. For the purpose of executing the appellate decree a petition was filed in the lower Court for the addition of the heirs of the said respondent as legal representatives.

Held, that the order exempting the plaintiff-appellant from the necessity to substitute the legal representatives of the deceased respondent was one which the High Court had jurisdiction to pass, that the appellate decree had the same force

* Appeal against Order No. 464 of 1932.

and effect as if it had been pronounced before the said respondent died and that the order of the lower Court bringing his legal representatives on record for the purpose of executing the decree was right.

Semble, the executing Court is not entitled to enquire into the validity of the appellate decree passed against the said respondent.

Govindan Nadar v. *Natesa Pillai*, (1931) 61 M.L.J. 520, approved.

Subramania Ayyar v. *Vaithinatha Aiyar*, (1913) I.L.R. 38 Mad. 682, and *Arunachalam Chetty* v. *Abdul Subhan Sahib*, (1925) 50 M.L.J. 232, disapproved.

APPEAL against the order of the Court of the Subordinate Judge of Devakottah dated the 24th day of October 1932 in Execution Petition No. 105 of 1932 in Original Suit No. 22 of 1923.

T. M. Krishnaswami Ayyar for appellants.

C. S. Venkatachariar for respondents.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by CURGENVEN J.—The appeal arises out of execution proceedings taken in a suit filed to recover some property from a number of defendants. We are here concerned with the ninth defendant. With the others he contested the suit and it was dismissed with costs. The plaintiff appealed to the High Court, the ninth defendant being impleaded as the eighth respondent. On 2nd May 1926 he was served with notice of the appeal but he failed to comply with the terms of the notice by not entering an appearance within the thirty days allowed. The appeal was disposed of in December 1930 and sometime in June 1927, while it was pending, the eighth respondent died. After his death three petitions were filed by the appellant in the appeal—(i) to excuse the delay which had

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occurred, (ii) to set aside the abatement of the appeal, and bring on the legal representative of the eighth respondent, namely the present first appellant, as tenth respondent and (iii) to appoint his mother as his guardian, he being a minor. In disposing of these petitions the learned Judges, PHILLIPS and DEVADOSS JJ., passed an order in these terms :

"Under Order XXII, rule 4, Civil Procedure Code, no legal representative need be impleaded. The petitions are dismissed."

The appeal was heard in due course and the decree of the lower Court reversed, the appellate decree directing the respondents to put the legal representative of the plaintiff in possession. For the purpose of executing this decree a petition (Execution Petition No. 105 of 1932) was then filed praying that the present appellants might be added as legal representatives of the deceased ninth defendant, and that has been ordered by the lower Court.

That order is contested on the grounds that rule 4 (4) of Order XXII, Civil Procedure Code, has no application to appeals, that the learned Judges who passed their order under this rule had therefore no jurisdiction to exempt the appellant from the necessity to substitute the legal representatives of the deceased respondent and accordingly that the appellate judgment, having been pronounced against the dead eighth respondent, is not binding on his legal representatives.

Rule 11 of Order XXII provides for the application of the Order to appeals, so far as may be. Unless therefore there is something in the terms of rule 4 (4) which precludes its application to appeals, there can be no doubt that, equally with

a number of other provisions of the Code which are in language adapted to suits, the intention is to apply a similar rule to both forms of proceeding. It is worth notice that a provision of somewhat analogous character, embodied in the proviso to rule 14 of Order XLI, and enabling the appellate Court to dispense with service of notice on respondents against whom the suit has proceeded *ex parte*, was introduced into the Code at the same time as rule 4 (4) of Order XXII. Mr. T. M. Krishnaswami Ayyar argued that it is not possible to apply this latter rule to appellate procedure. He contends that no such omission or default can be made by a respondent in an appeal as will correspond to that of a defendant

> "who has been declared *ex parte* or who has failed to file his written statement or who, having filed it, has failed to appear and contest at the hearing."

Such a respondent cannot be declared *ex parte*. He has nothing to do and cannot therefore commit default in doing anything, until the actual hearing of the appeal. Even if he has failed to enter an appearance, yet if he appears in person or by pleader on the day of the hearing he must be heard.

This does not, we think, give quite a correct view of the position of a respondent, at least in relation to proceedings before this Court. The procedure is specified in Order XLI-(A), which modifies Order XLI of the Civil Procedure Code. Rule 2 (2) of this Order prescribes a period of thirty days from service of notice for entry of appearance by the respondent and filing by him of a memorandum of cross-objections if any. Under rule 3, if the respondent intends to appear and defend the appeal he shall within the period

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specified enter an appearance by filing in Court a memorandum of appearance. If he fails to enter an appearance within the time allowed and in the manner provided, he shall not be allowed to translate or print any part of the record. Failure therefore to appear may involve the exclusion of part of the record from consideration in appeal, so that, even though a respondent who has not complied with these rules may be heard, he must do without such portions of the record as the appellant has not been interested to print. He cannot have something done for him the time for doing which is over. It appears to us that this is just the nature of the penalty attached to default by a defendant in a suit. If a defendant is *ex parte*, Order IX, rule 7, provides that he can only be heard in answer to the suit as if he had appeared on the day fixed for his appearance, if he assigns good cause for his previous non-appearance. If he has failed to file a written statement or, having filed it, has failed to appear and contest at the hearing, he cannot claim to go back to the stage reached before the default occurred. On the other hand, it is always open to him at any time after such default to appear and contest the suit in its remaining stages. No more than in an appeal therefore does any finality attach to a default of appearance in a suit. We think that the rule, alike for suits and appeals, is grounded not upon some irrevocable default committed by the defendant or respondent before his death but upon the creation, by his conduct, of a reasonable expectation that, had he survived the later stages of the suit or the hearing of the appeal, he would have remained *ex parte*. That expectation seems to us to be at least as strong in the case of a

respondent who has failed to put in an appearance within the time allowed as in the case of a defendant who for instance has filed a written statement but has not appeared and contested at the hearing and has then died. The power which the rules give to the Court to grant exemption is of course only discretionary and probably it rarely will be exercised in the case of a single respondent. Where, as in the present case, there are several respondents whose interests are common, and some contest and others do not enter apearance, it is fairly safe to assume that the defence of the decree has been left in the hands of some on behalf of all. We think therefore that the learned Judges who passed the order under reference had jurisdiction to pass it, that the appellate decree has the same force and effect as if it had been pronounced before the eighth respondent died and that the order of the lower Court bringing on his legal representatives must be confirmed.

We have heard some further argument upon the question whether, assuming the order to have been without jurisdiction, so that the appellate decree would not bind the eighth respondent's heirs, the matter can be raised in execution. Since anything which we may now say on this point will be merely *obiter*, we do not propose to discuss the question at length. We have been referred to two Privy Council cases in which it is said objection has been allowed in execution to the validity of the decree. In *Khiarajmal* v. *Daim*(1) the question was whether the right of a mortgagor to redeem was affected by certain sales

(1) (1904) I.L.R. 32 Calc. 296 (P.C.).

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in execution under decrees in which he as a minor was not properly represented, and it was held that he could proceed to redeem without taking any proceedings to get the sales and decrees set aside. The principle accepted was, therefore, that in a separate suit such a decree could be treated as a nullity, and nothing was said as to the power of an executing Court to go behind the terms of the decree. In *Wajid Ali Khan* v. *Puran Singh*(1) the trial Court passed a decree for pre-emption. There was an appeal, and while it was pending one of the respondents (plaintiffs) died and the legal representative was not brought on. The suit was dismissed in appeal and the defendant obtained restitution of possession. The plaintiffs then contended that by reason of the death of one of their number the whole appeal had abated and that the appellate decree was a nullity, so that the defendant was not entitled to possession. It was held that the abatement was limited to the appeal against the deceased respondent's interest and that the appellate decree did not bind his legal representatives, so that they were entitled to re-delivery of possession. The point was not raised or decided whether the validity of such a decree could be questioned in execution proceedings. Moreover the proceedings were by way of restitution and it is at least doubtful whether the same principle would apply to them. So far as this Court is concerned, we have been shown three decisions of single Judges, *Subramania Aiyar* v. *Vaithinatha Aiyar*(2), *Arunachalam Chetty* v. *Abdul Subhan Sahib*(3) and *Govindan Nadar* v. *Natesa*

(1) (1928) I.L.R. 51 All. 267 (P.C.). (2) (1913) I.L.R. 38 Mad. 682.
(3) (1925) 50 M.L.J. 232.

Pillai(1). In the first of these OLDFIELD J. and in the second MADHAVAN NAIR J. have accepted the principle that an executing Court can satisfy itself whether or not a decree is a nullity for some such reason as improper representation. JACKSON J. has come to a contrary decision in the third case and in our judgment the opinions which he expressed are supported by the greater weight of authority, especially the two Calcutta cases, *Kalipada Sarkar* v. *Hari Mohan Dalal*(2) and *Gora Chand Haldar* v. *Prafulla Kumar Roy*(3), and appear to us in other respects to be more acceptable. We should therefore hold, if it were necessary, that the executing Court was not entitled to enquire into the validity of the appellate decree passed against the deceased eighth respondent.

We dismiss the appeal with costs.

A.S.V.

(1) (1931) 61 M.L.J. 520. (2) (1916) I.L.R. 44 Calc. 627.
(3) (1925) I.L.R. 53 Calc. 166 (F.B.).