Order XXI, rule 58, of the Civil Procedure Code, and sections 4, 5, and 52 of the Provincial Insolvency Act. But it is necessary to look at the substance of the petition. It is clear from paragraph 4 of the petition that in reality he is making a claim or objection under Order XXI, rule 58. In these circumstances, we must hold that the order made on the petition is not appealable and that this appeal must be dismissed with costs.

OFFICIAL RECEIVER, KISTNA v. IMPERIAL BANK OF INDIA.

Solicitors for first respondent: *Moresby and Thomas.*

A.S.V.

APPELLATE CIVIL.

Before Mr. Justice Varadachariar.

MUTHURAMAN CHETTIAR MINOR BY NEXT FRIEND A.R.A. RAMAN CHETTY (PLAINTIFF), APPELLANT,

1934, May 9.

v.

ADAIKAPPA CHETTY AND FIVE OTHERS (DEFENDANTS 1 TO 6), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), *O. XXII, rr.* 4 *and* 11—*Appeal—Legal representatives of deceased defendant impleaded as respondents in—Death of one of, and his legal representative not brought on record—Decree in appeal against respondents—Null and void against legal representative not so brought on record, when not—Dead man—Decision against—Binding nature of, on his legal representative—Death of a party to an action—Jurisdiction of Court to give judgment, whether in his favour or against him, if put an end to by—O. XLIV, r.* 4, *of the Code—Applicability to case of respondents—Decree against a dead man—Validity of—Question as to—Applicability of rule to case of.*

During the pendency of a suit brought for the recovery of a share in certain properties against two defendants, one of

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* Second Appeal No. 468 of 1930.

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them died and his sons, the plaintiff's father and another, were brought on record as his legal representatives. The suit was dismissed by the District Munsif and, during the pendency of an appeal preferred by the plaintiff against his decree, the plaintiff's father died. No legal representative was brought on record in his place and the appellate Court reversed the decree of the District Munsif.

Held that the case was not one of such non-representation as would entitle the plaintiff to treat the decree of the appellate Court as null and void.

Quaere whether the case was one of such a complete representation as to preclude the plaintiff even from seeking to re-open the decree by appropriate proceedings in the Court which passed it.

A distinction ought to be made between cases in which the original party to the action dies and his legal representative is not brought on record, though there may be others having common interest with him, and cases in which only one of several legal representatives brought in *as such* during the pendency of an action dies and the estate continues to be represented by the remaining legal representatives. Whatever the position may be as regards the first group of cases, as regards the second group the preponderance of authority is in favour of the view that there will be no abatement if at least some representatives are on record and that, in the absence of fraud or collusion, the representation by some of the heirs will be sufficient representation.

A decision against a dead man is not binding on his representatives unless they have been made parties to the suit in which it is pronounced. Such a case is distinguishable from one in which the decision is in favour of a dead man. The rule stated in Black on Judgments that the decision would *prima facie* be valid in both cases cannot, in view of a long line of authority to the contrary, be applied in all its generality in this country.

Quaere whether the death of any party does not wholly put an end to the jurisdiction of the Court to give judgment, so far as he is concerned, whether in his favour or against him.

Order XLI, rule 4, of the Code of Civil Procedure can be invoked only in the case of appellants with a common defence in the lower Court and not in the case of respondents. Further, the rule provides only for some of the appellants getting a

decision in favour of all persons having a common interest and has no application to or bearing on a case where the question is whether a decree can be passed against a dead man, though there is another person on record with the same defence as that of the dead man.

APPEAL against the decree of the Court of the Subordinate Judge of Sivaganga in Appeal Suit No. 136 of 1928 preferred against the decree of the Court of the District Munsif of Sivaganga in Original Suit No. 281 of 1917.

T. M. Krishnaswami Ayyar and *K. S. Venkatarama Ayyar* for appellant.

V. Ramaswami Ayyar for respondents.

JUDGMENT.

This second appeal raises a point of processual law, namely, whether the plaintiff can maintain this suit for a declaration that the judgment in Appeal Suit No. 85 of 1924 on the file of the Ramnad Sub-Court and the proceedings subsequently taken on the basis thereof are null and void as against him or whether his only remedy is to apply to the Court which passed that decree to vacate it. That appeal arose out of a suit, Original Suit No. 766 of 1918 on the file of the District Munsif's Court of Sivaganga, which at later stages, by reason of transfers to different Courts, came to be numbered as Original Suit No. 348 of 1922 and Original Suit No. 412 of 1925, the last being the stage after the remand consequent upon the appellate decision in Appeal Suit No. 85 of 1924. That suit had been instituted by the present first defendant claiming a half share in certain properties as against the second defendant and one Muthuraman Chetti, the grandfather of

the present plaintiff. The District Munsif dismissed that suit but on appeal that decree was reversed and the suit was remanded to the Munsif's Court for passing a final decree in plaintiff's favour. Even while the suit was pending before the Munsif in the first instance, Muthuraman Chetti, the then first defendant, died and his two sons, viz., this plaintiff's father and another, were brought on record as his legal representatives, as defendants 4 and 3. When the matter was pending before the appellate Court, the present plaintiff's father died in or about 1924. No legal representative was brought on record in his place and the appellate Court reversed the lower Court's decree, perhaps in ignorance of the death. The plaintiff now contends that the decree passed by the appellate Court in reversal of the lower Court's decree, after the death of his father and without his legal representative on record, is null and void as against him.

The first Court dismissed this suit on the ground that the other son, i.e., the third defendant in that suit, who still continued on the record of Appeal Suit No. 85 of 1924, had the same defence as the plaintiff's father, that both of them had been represented by the same Vakil when the matter was before the Court of first instance, that this common defence was also urged before the Court of appeal, and that the case is governed by Order XLI, rule 4, of the Code of Civil Procedure, according to which one of several plaintiffs or defendants may obtain a reversal of the whole decree where it proceeds on a ground common to all. In the opinion of the learned District

Munsif, Appeal Suit No. 85 of 1924 did not abate by reason of the plaintiff's father's death. The lower appellate Court has confirmed his decree but on somewhat different grounds. In the opinion of the learned Subordinate Judge, the judgment passed by a Court even without a legal representative of a deceased party is not a nullity and hence cannot be set aside by a suit, but the legal representative who has not had a hearing can claim a re-hearing on the ground that he has been prejudiced. Reliance has been placed by the learned Subordinate Judge on *Vellayan Chetty* v. *Mahalinga Aiyar*(1) in support of this view and also on a passage from Black on Judgments cited in *Goda Coopooramier* v. *Soondarammall*(2).

I may say at once that cases like *Vellayan Chetty* v. *Mahalinga Aiyar*(1) have really no bearing upon the question now in dispute, because, where the decision is *in favour of* a dead man the position is different from a case where the decision is *against* the dead man. [See *Subramania Aiyar* v. *Vaithinatha Aiyar*(3)]. As explained in *Surya Narayana* v. *Joga Rao*(4), the principle underlying that class of cases is that a party who is alive and has been heard cannot take advantage of the death of his opponent and claim a re-hearing. Whether the death of any party does not wholly put an end to the jurisdiction of the Court to give judgment, so far as he is concerned, whether in his favour or against him, is a larger question that need not be considered here. Some cases seem to go that length. [Cf. *Vishvanath Dnyanoba* v. *Lallu Kabla*(5)].

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(1) (1914) I.L.R. 39 Mad. 386, 388. (2) (1909) I.L.R. 33 Mad. 167, 169.
(3) (1913) I.L.R. 38 Mad. 682. (4) A.I.R. 1930 Mad. 719.
(5) (1909) 4 I.C. 137.

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The passage from Black on Judgments is no doubt of very wide import and putting both cases on the same footing goes to the other extreme of holding the decision *prima facie* valid in both cases. The tenor of the discussion in *Goda Coopooramier* v. *Soondarammall*(1) would however show that the learned Judges were not prepared to go so far. They rest their conclusion upon the distinction between a case where the decision is *in favour of* a dead person and a case where it is *against* a dead person. Though the passage from *Goda Coopooramier* v. *Soondarammall*(1) has been cited without comment in a decision of the Lahore High Court in *Tota Ram* v. *Kundan*(2), it seems to me impossible, in view of a long line of authority to the contrary, to apply the rule stated by Black in all its generality in this country.

As early as in *Radha Prasad Singh* v. *Lal Sahab Rai*(3), the Privy Council observed that a decree obtained after the death of a defendant cannot bind the representatives of the deceased, unless they had been made parties to the suit in which it was pronounced ; and the same principle is re-affirmed by their Lordships in *Wajid Ali Khan* v. *Puran Singh*(4). Their Lordships observe, at page 273, that

> " where the appeal is heard in the absence of the legal representatives of the deceased respondent and the decree of the first Court is reversed, . . . it is clear that the legal representatives of the deceased respondent against whom the appeal has abated cannot be bound by the appellate decree. "

Much stronger and clearer language has been used in several judgments of the High Courts

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(1) (1909) I.L.R. 33 Mad. 167.
(2) A.I.R. 1928 Lah. 784.
(3) (1890) I.L.R. 13 All. 53 (P.C.).
(4) (1928) I.L.R. 51 All. 267 (P.C.).

in India, among which it is sufficient to refer to *Subramania Aiyar* v. *Vaithinatha Aiyar*(1), *American Baptist Foreign Mission Society* v. *Ammalanadhuni Pattabhiramayya*(2) and *Narendra Bahadur Chand* v. *Gopal Sah*(3). In some of these cases the question arose in the course of proceedings in execution of the decree and it was held that the decree is so far void as even to entitle the executing Court to refuse to execute it. That this is the true import of the Privy Council decision in *Radha Prasad Singh* v. *Lal Sahab Rai*(4) is also the view taken in the case of *Imdad Ali* v. *Jagan Lal*(5) which is referred to and followed in many of the later cases. [See also *Sripat Narain Rai* v. *Tirbeni Misra*(6)].

The other reason, stated in paragraph 2 of the lower appellate Court's judgment, that proceedings taken by a Court even after the death of a party are not void so long as no application is made to bring the legal representatives on record is unintelligible. If the learned Judge meant by that, so long as there is time to bring them on record, the statement may be intelligible even though it would not be correct. Anyhow that was not the fact in the present instance.

Turning now to the reasons given by the District Munsif, I must observe that his reasoning based upon Order XLI, rule 4, Civil Procedure Code, is not correct. There has been a difference of opinion as to whether this rule can be relied on by legal representatives when their predecessors in title had actually been parties to an appeal but

(1) (1913) I.L.R. 38 Mad. 682.
(2) (1918) 48 I.C. 859.
(3) (1912) 20 I.C. 506.
(4) (1890) I.L.R. 13 All. 53 (P.C.).
(5) (1895) I.L.R. 17 All. 478.
(6) (1918) I.L.R. 40 All. 423.

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on whose death the legal representatives have not chosen to come on the record [Cf. *Chenchuramayya* v. *Venkatasubbayya*(1) with *Amin Chand* v. *Baldeo Sahai*(2)]. But it is unnecessary to consider that point here, for Order XLI, rule 4, can be invoked only in the case of *appellants* with a common defence in the lower Court and not in the case of *respondents*. Further, Order XLI, rule 4, provides only for some of the appellants getting a decision *in favour* of all persons having a common interest and has no application to or bearing on a case like the present, where the question is whether a decree can be passed *against* a dead man, though there is another person on record with the same defence as that of the dead man.

I am however of opinion that, apart from the reference to Order XLI, rule 4, the conclusion of the District Munsif is correct. The position in the present case was that the suit had been originally instituted against the plaintiff's grandfather as one of the defendants, and all that was required for the purpose of upholding the jurisdiction of the Court to deal with the matter to the end was that the estate of the grandfather should continue to be duly represented. As stated already, on the death of the grandfather, his two sons were brought on record, that is, the estate was represented by two persons, as legal representatives. The question for consideration is, when one of them dies and his legal representative is not brought on record, does the original estate that was at first represented by two persons as legal representatives and is later on represented by one

(1) A.I.R. 1933 Mad. 655.

(2) A.I.R. 1934 Lah. 206.

of them only cease to be represented, for the purpose of that litigation. If the answer is in the negative, the Court will undoubtedly continue to have *jurisdiction* to deal with the matter in controversy, whatever other remedies any person may have, on the ground that he was interested in the controversy but was not brought before the Court. Argument has accordingly been directed to this aspect of the matter and a number of cases have been brought to my notice. In dealing with these cases it seems to me—though Mr. Krishnaswami Ayyar for the appellant maintains the contrary—that a difference has to be kept in view between cases in which the original party to the action dies and his legal representative is not brought on record, though there may be others having common interest with him, and cases in which only one of several legal representatives brought in *as such* during the pendency of an action dies and the estate continues to be represented by the remaining legal representatives. Whatever the position may be as regards the first group of cases, I am of opinion that in the second group there is no lack of representation of the estate, that the remaining representatives can as well represent the estate as the original group did and that the principle applicable to this class of cases is to be gathered from those decisions which uphold the doctrine of representation of an estate *by some* of the heirs of a deceased person when such heirs are sued as defendants in the first instance.

Some of the steps in the arguments bearing upon the above question are rendered doubtful by conflict of authority. Some decisions put a very strict construction upon the rules in Order XXII

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and go the length of holding that, unless *all* the legal representatives are actually on record, there can be no representation at all and the whole decree is void. [See, for instance, *Chuni Lal* v. *Amin Chand*(1), *Haidar Husain* v. *Abdul Ahad*(2) and *Muhammad Hassan* v. *Inayat Hussain*(3)]. The preponderance of authority is however in favour of the view that there will be no abatement if at least some representatives are on record. [See, for instance, *Shib Dutta Singh* v. *Sheikh Karim Bakhsh*(4) and *Mussammat Begam Jan* v. *Mst. Jannat Bibi*(5). See also *Ramanathan Chettiar* v. *Ramanathan Chettiar*(6)]. Apart from the provisions of Order XXII, the question whether, in any suit, an estate can in the first instance be represented by some of the heirs entitled thereto in the absence of other heirs has often come up for consideration and the preponderance of authority is in favour of the view that, in the absence of fraud or collusion, the representation by some of the heirs will be sufficient representation. [See *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*(7), *Govindaswami* v. *Annamalai*(8), *Abdulla Sahib* v. *Vageer Beevi Ammal*(9) and *Jehrabi* v. *Bismillabi*(10)]. Much the same reasoning has been imported even in the construction of provisions of the old Code corresponding to Order XXII in the judgment of this Court in *Musala Reddi* v. *Ramayya*(11).

In *Sripat Narain Rai* v. *Tirbeni Misra*(12) the Court left the question open as to what the effect

(1) A.I.R. 1933 Lah. 356.
(2) (1907) I.L.R. 30 All. 117.
(3) (1926) 100 I.C. 418.
(4) (1924) I.L.R. 4 Pat. 320.
(5) (1926) I.L.R. 7 Lah. 438.
(6) (1928) 30 L.W. 995, 1007.
(7) (1902) I.L.R. 26 Mad. 230.
(8) A.I.R. 1927 Mad. 1071.
(9) A.I.R. 1928 Mad. 1199.
(10) (1924) 26 Bom. L.R. 375.
(11) (1899) I.L.R. 23 Mad. 125.
(12) (1918) I.L.R. 40 All. 423.

of representation of the estate by other persons might be. It contented itself with saying that, *for the purpose of execution against the legal representatives* of the deceased person, there was no executable decree, because the predecessor had died before the decree was passed.

I am unable to agree with Mr. Krishnaswami Ayyar's contention that the omission to bring on record the legal representative of the fourth defendant in Appeal Suit No. 85 of 1924 made the estate of the deceased Muthuraman Chetti (first defendant) *unrepresented.* It is not necessary for the purpose of this case to say whether it is such a complete representation as to preclude the plaintiff even from seeking to re-open the decree in Appeal Suit No. 85 of 1924 by appropriate proceedings in the Court which passed that decree. It is sufficient to say that it is not a case of such non-representation as would entitle the present plaintiff to treat that decree as null and void. In this view the second appeal fails and is dismissed with costs.

A.S.V.