Lachmas Das, so also the alteration in Brij Narain's case was equally ineffectual, and ought not to have been allowed to stand.

Their Lordships will humbly advise His Majesty that this appeal should be allowed. The respondent will pay the costs.

Appeal allowed.

Solicitors for the appellant:—*Barrow, Rogers and Nevill* J. V. W.

APPELLATE CIVIL.

1910
February 1.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

IMAM-UD-DIN AND ANOTHER (JUDGMENT-DEBTORS) *v.* SADARATH RAI (DECREE-HOLDER)*

Abatement of appeal—Death of a respondent pending appeal—Representative not brought on record—Decree against all—Cause of action not surviving in favour of other respondents—Civil Procedure Code (1882), *section* 368—*Pre-emption.*

One of the defendants respondents in a suit for pre-emption died pending appeal. No application was made within limitation to bring his representatives on to the record, but the appeal was decreed as against all the respondents.

Held that the suit being one in which the cause of action did not survive against the other respondents, the decree must be set aside as a whole. *Raj Chunder Sen* v. *Ganga Das Seal* (1) referred to. *Imdad Ali* v. *Jagan Lal* (2) distinguished.

THE facts of this case were as follows:—

THE decree-holder plaintiff who had instituted a suit for pre-emption, obtained a decree on the 15th April, 1907, from the High Court in S. A. 588 of 1905. At the date of the above judgement the Court was in ignorance of the fact that Nanhu, one of the defendants respondents, had died on 28th October, 1906. The decree-holder paid into court the purchase money and applied in execution of his decree for possession on 24th August, 1907, and obtained possession on 3rd September, 1907. The present appellants, who were the two judgement-debtors other than the deceased, Nanhu, applied to the executing court on 25th September, 1907, for re-delivery of possession to them, on the ground that as the decree was passed after the death of Nanhu, it was

*Second Appeal No. 719 of 1908 from a decree of H. Dupernex, District Judge of Saharanpur, dated the 22nd of May 1908, confirming a decree of Sudarshan Dyal, Munsif of Deoband, dated the 3rd of February 1908.

(1) (1904) I. L. R., 31 Calc., 467. (2) (1895) I. L. R., 17 All., 478.

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inoperative as being passed against a dead person. A similar application was also made by the wife and children of Nanhu. The court held that only the share of Nanhu, which was inherited by his wife and children, should be exempted, as they were not brought upon the record. It refused to order re-delivery of the whole property. On appeal by the present appellants, this order was confirmed. The two judgement-debtors, thereupon, appealed to the High Court.

Pending this second appeal, the decree-holder also applied to the High Court, on 23rd January, 1909, for review of its judgement in S. A. 588 of 1905 delivered on 15th April, 1907, and referred to above, on the ground that as one of the defendants respondents had died before judgement and his representatives were not brought on the record, the appeal should be reheard after the representatives were brought on the record, so that a proper decree might be passed.

The decree-holder's application for review and the judgement-debtors' appeal were heard together.

Mr. *Nihal Chand*, for the judgement-debtors appellants:—

The entire decree is incapable of execution. It was a decree in a pre-emption suit and the decree was indivisible. One of the defendants having died and his representatives not being brought upon the record, the whole suit abated, as the right to sue did not survive as against the remaining respondents. He referred to the Code of Civil Procedure, 1908, order XXII, rule 4, and the Code of Civil Procedure, 1882, section 368, and relied on *Arzani Bakhsh* v. *Shere Ali* (1), *Kashi Nath* v. *Mukta Prasad* (2), *Makundi* v. *Sarabsukh* (3), *Ram Dayal* v. *Magu Lal* (4) and *Raj Chunder Sen* v. *Ganga Das Seal*. (5).

As regards the application for review, it was presented long beyond the time prescribed by Article 173 of the Limitation Act, viz., 90 days, and no sufficient cause was alleged for the delay. Moreover, even if the application for review were granted, the time prescribed for bringing the representatives of a deceased respondent on the record had expired.

(1) Weekly Notes, 1882, p. 79.
(2) Weekly Notes, 1884, p. 119.
(3) Weekly Notes, 1884 p. 144
(4) Weekly Notes, 1884, p. 165.
(5) (1904) I. L. R., 31 Calc., 487.

Mr. *M. L. Agarwala*, for the decree-holder, contended that the decree as far as the judgement-debtors, who were alive were concerned, was a perfectly good decree. He relied on *Imdad Ali* v. *Jagan Lal* (1), *Ram Sahai* v. *Gaya* (2) and *Inayat Ullah* v. *Gopal Narain* (3). As regards the application, he submitted that it would be governed by Article 178 of the Limitation Act and the three years' rule would apply.

The judgement of the Court dealing with the facts of the whole case was delivered in connection with the application for review:—

KNOX and RICHARDS JJ.:—This application for review and the connected second appeal arise out of a suit for pre-emption. The second appeal in this suit came before one of us on the 15th of April 1907, with the result that the suit was decreed, subject to the payment of the purchase money. It now transpires that at the date this judgement was given one of the respondents was dead. The judgement, of course, was passed in ignorance of his death. It is admitted that the suit was one in which the cause of action did not continue against the surviving defendants. It was necessary to bring on the record the representatives of the deceased respondent. The respondent died on the 28th of October, 1906. An application for execution of the decree was made on the 24th of August, 1907. Possession was obtained on the 3rd of September, 1907. Imamuddin and Karimuddin applied to the execution court to set aside the execution on the ground that the decree having been passed after the death of Nanhu was void and of no effect. There was a similar application about the same time by the wife and children of Nanhu. The court set aside the execution as to the share of Nanhu, deceased, but refused to set aside the execution as against the other judgement-debtors. This decision was confirmed on appeal. The second appeal before us is the appeal by Imamuddin and Karimuddin against so much of the order as allowed the execution to stand against them. They contend that the decree was invalid and could not be executed in part. It seems to us that the proper course for the plaintiff decree-holder to have taken was, as soon as possible after it was discovered that Nanhu was dead, to have

(1) (1895) I. L. R., 17 All., 478. (2) (1884) I. L. R., 7 All., 107.
(3) Weekly Notes, 1901, 187.

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applied to this Court to bring on the record the representatives of Nanhu and to rehear the appeal. Instead of taking this course, he attempted to execute the decree. The present application purports to be under order XLVII, rule 1 of Act V of 1908, *i. e.*, an application for review of judgement by a person considering himself aggrieved. We must remark at once that the time limited for such an application is 90 days from the date of the decree. The present application was not made until the 23rd of January, 1909, nearly two years after the decree. Even if we were to treat the application as one to bring on the record the representatives of Nanhu deceased, such an application should have been made within six months of the death. The applicant having taken the course he did take, we see no reason for extending limitation, even assuming that we have the power to do so.

We now have to deal with the appeal. Mr. *Agarwala* on behalf of Sadarath Rai, contends that the execution should be allowed to stand against those persons who were on the record at the time the decree was passed, and cites in support of his contention the case of *Imdad Ali* v *Jagan Lal*(1). In that case, as in the present case, a decree had been passed against a deceased judgement-debtor in ignorance of the fact of his death. The representatives in execution objected and the court held that the question was one which properly arose under section 244 of Act XIV of 1882. The execution was set aside as against the representatives of the deceased and it was allowed to stand as against the other judgement-debtors. In that case the decree was clearly treated as being capable of execution against some of the judgement-debtors to the exclusion of the representatives of the deceased. The question was not argued that it was a judgement which could be only executed in whole or not at all. The decree in the present case was a decree for pre-emption and the entire property, if it was a good decree regularly made, could have been taken in execution. In the case of *Raj Chunder Sen* v. *Ganga Das Seal* (2), the respondent to whom money was due under a decree died pending an appeal from the decree. No application was made to have the representatives substituted within six months and no sufficient cause was shown for the

(1) (1895) I. L. R., 17 All., 478. (2) (1904) I. L. R., 31 Calc., 487.

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delay. Their Lordships of the Privy Council held, that the suit being one in which the cause of action did not survive against the remaining respondent, the appeal abated. Applying this ruling to the present case, it is quite clear that as no representatives were brought on the record in the place of Nanhu the appeal abated. In our judgement the decree which was passed on the 15th of April, 1907, was not capable of being executed either against the surviving judgement-debtors or the representatives of Nanhu. The present application fails and is dismissed with costs.

In the appeal, the following judgement of the Court was delivered :—

For the reasons given in our judgement on the application of Sadarath Rai for review of judgement we allow this appeal and set aside the orders of both the courts below so far as they refuse to restore the property to the judgement-debtors on the condition that Imamuddin and Karimuddin do first repay the amount of money received by them from the decree-holder. The appellants will have their costs.

Application for review dismissed.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

1910

February 2.

DURGA DAT JOSHI (DEFENDANT) *v.* GANESH DAT JOSHI AND ANOTHER (PLAINTIFFS).*

Hindu law — Mitakshara — Partition — Self-acquired property — Gains of science—Astrology—Earnings made by unaided efforts without detriment to the family property.

In a joint Hindu family governed by the Mitakshara one of the sons obtained certain elementary education in astrology from his father, but no money of the family was expended on that education. While still quite young this son ceased to live with the rest of the family ; continued his studies in astrology on his own account, and ultimately managed, by the exercise of his skill as an astrologer, to acquire a considerable sum of money without detriment to the family property. *Held* that this money was his self-acquisition and could not properly be regarded as belonging to the joint family.

Katyayana's definition of " acquisition through learning which is not partiçipable " cited in the Mitakshara [I. 4,8.] is not exhaustive, but illustrative

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* First Appeal No. 231 of 1908 from a decree of Aziz-ur-Rahman, Subordinate Judge of Benares, dated the 1st of July 1908.