

APPELLATE CIVIL.

1918
March, 2.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

SRIPAT NARAIN RAI (OPPOSITE PARTY) v. TIRBENI MISRA
(PETITIONER)*

Civil Procedure Code (1908), order XXI, rule 7—Execution of decrees—Decrees passed against a deceased person—Objection by alleged representatives of the deceased judgment-debtor that the decrees is a nullity and incapable of execution against them.

It is a good answer to an application for execution against the alleged representatives of a judgment-debtor to show that the judgment-debtor was dead at the time that the decree was made, and that such decree is void and incapable of execution as against the person so dead. *Imdad Ali v. Jagan Lal* (1) followed.

IN this case a decree for pre-emption was obtained against three persons, one of whom was Bindeshri. Bindeshri having died, an application for execution was made against the surviving judgment-debtors and also against the sons of Bindeshri as his legal representatives. The sons of Bindeshri objected that as a matter of fact Bindeshri had died before the decree against him was passed, and that therefore, so far as he was concerned, the decree was a nullity and could not be executed against them. The lower appellate court dismissed the application for execution against the sons of Bindeshri as his legal representatives. The decree-holder appealed to the High Court.

Munshi *Haribans Sahai*, for the appellant.

Munshi *Iswar Saran*, for the respondent.

RICHARDS, C. J., and BANERJI, J. :—This appeal arises out of execution proceedings. It appears that a decree for pre-emption was obtained against three persons, one of whom was Bindeshri. It is alleged, and it is possibly correct, that all the three persons constituted a joint Hindu family. The question of jointness is not now before us. Bindeshri died, and the present application was for execution against the surviving defendants and also against the sons of Bindeshri as his legal representatives. It

* Execution Second Appeal No. 686 of 1917 from a decree of W. R. G. Moir, District Judge of Gorakhpur, dated the 1st of March, 1917, reversing a decree of Syed Muhammad Said-Ud-din, Munsif of Bangaon, dated the 30th of September, 1916.

(1) (1895) I. L. R., 17 All., 478.

1918

SRI PAT
NARAIN RAI
v.
TIRBENI
MISRA.

was objected that Bindeshri had died before the decree was made. Having regard to the order of the court below and to what happened when this case was before us on a previous occasion, we intend to deal with the case on the assumption that Bindeshri was dead at the time the decree was made against him. The lower appellate court has dismissed the application for execution as against the sons of Bindeshri as his legal representatives. This Court has held in the case of *Imdad Ali v. Jagan Lal* (1) that it is a good answer to application for execution against the alleged representatives of a judgment-debtor to show that the judgment-debtor was dead at the time the decree was made, and that such a decree is void and incapable of execution as against the person so dead. This is an authority which we think we ought to follow unless it can be shown that it is no longer law. It is contended that there has been a change in the new Code of Civil Procedure by the omission from order XXI, rule 7, of the word "jurisdiction." We think that this alteration in no way modifies the authority of the case to which we have referred. No question of "jurisdiction" of the court to make the decree arises because no court can make a decree against a dead man; and a decree so made is a nullity. In this view we think the decision of the court below was correct. It is suggested that as the family is joint it was sufficiently represented by the members of the family who were alive when the decree was made, and that it is unnecessary that the sons of Bindeshri should be named as judgment-debtors. A good deal might be said for this contention, particularly if the pre-emption money is accepted by the joint family, but we have not to decide this matter in the present appeal. We express no opinion as to what the effect of the execution of the decree against the surviving defendants will be. But we think the court below was justified in dismissing the application for execution against the sons of Bindeshri as his legal representatives. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1895) I. L. R., 17 All., 478.