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connexion with a case at Purnea," and this entry, as it does not refer to any case pending at Agra, makes the order illegal. That there was a case pending at Agra there can be no doubt, although no active steps were taken in that case by reason of a number of cases being pending against Ram Prasad. The mere entry of the words " in connexion with the case at Purnea " does not in any way vitiate the bail bond. Parbhu Dayal was asked to produce his son at Agra before the City Magistrate. He was bound to do so under the terms of this bond. I have, therefore, come to the conclusion that the order forfeiting the bond is correct, but in view of all the circumstances of this case, I am of opinion that the ends of justice will be served by directing that the order forfeiting the sum of Rs. 1,000 be reduced to a sum of Rs. 250.

APPELLATE CIVIL.

Before Mr. Justice Boys and Mr. Justice Kendall.

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April, 13.

CHANDI PRASAD (DEFENDANT) *v.* JAMNA (PLAINTIFF).*

Civil Procedure Code, order XXI, rules 22 and 66—Execution of decree—Death of judgement-debtor before issue of sale proclamation—Proclamation issued without bringing on record the judgement-debtor's legal representatives.

Order XXI, rule 66, of the Code of Civil Procedure, expressly requires that the proclamation shall be drawn up after notice to the decree-holder and the judgement-debtor. It is imperative on the court to issue a notice to the judgement-debtor.

* Second Appeal No. 220 of 1925, from a decree of Raj Rajeshwar Sahai, Third Additional Subordinate Judge of Aligarh, dated the 14th of October, 1924, confirming a decree of Aqib Nomani, Munsif of Koil, dated the 22nd of March, 1923.

Where, therefore, the judgement-debtor has died before issue of such notice to him, and no representative is brought upon the record, proceedings in execution cannot be validly continued.

Raghunath Das v. *Sundar Das Khetri* (1), followed. *Sheo Prasad* v. *Hira Lal* (2), *Bhagwan Das* v. *Jugul Kishore* (3), *Doraswami* v. *Chidambaram Pillai* (4) and *Rajagopala Ayyar* v. *Ramanujachariar* (5), referred to.

THE facts of this case were as follows :—

One Parbhu Lal was the original owner of the house which was the subject-matter of the suit. His wife was Musammat Sibo, and they had a daughter, Musammat Jamna. On the 12th of August, 1914, Parbhu Lal mortgaged this house to Chandi Prasad.

One Ram Dayal obtained a simple money decree against Parbhu Lal, and in pursuance of that decree attached the house.

On the 23rd of September, 1916, Parbhu Lal died, apparently after the order for sale had been made but prior to the drawing up of the proclamation under order XXI, rule 66, and, therefore, no notice under that rule could have been issued to him.

On the 29th of September, 1916, the sale proclamation was prepared, or, as described in the judgement of the lower appellate court, issued without the legal representative of Parbhu Lal, who at that time was Musammat Sibo, having been brought on the record, and was duly followed by a sale.

On the 13th of December, 1916, the sale took place, and Manni Lal purchased the house; but he never at any time obtained possession.

In 1918 Chandi Prasad brought the suit No. 185 of 1918 on his mortgage and impleaded both Musammat Sibo and Manni Lal. On the 19th of August,

(1) (1914) I.L.R., 42 Calc., 72. (2) (1889) I.L.R., 12 All., 440.
(3) (1920) I.L.R., 42 All., 570. (4) (1923) I.L.R., 47 Mad., 63.
(5) (1923) I.L.R., 47 Mad., 288.

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1918, he obtained a preliminary decree. On the 22nd of January, 1919, he applied for a final decree to be drawn up. On the 26th of January, 1919, Musammat Sibo died. She had possession of the house at her death and on her death Musammat Jamna succeeded as heir to her after Parbhu Lal, and continued to occupy the house. Musammat Jamna, however, was not at this stage impleaded as the legal representative of the mortgagor. On the 25th of February, 1919, the final decree was prepared. Several applications for execution were made against Manni Lal and Musammat Sibo, though the latter was dead.

On the 27th of May, 1919, Musammat Jamna was impleaded as a party. She made several objections, one of which was that she had not been a party to the preparation of the final decree. On the 6th of February, 1920, the decree-holder decided to exempt her, Chandi Prasad's vakil stating that "Musammat Sibo was not a necessary party, her rights have been sold and the purchasers were parties, therefore the objector's (Musammat Jamna's) name be struck off." In the beginning of 1921, Manni Lal decided to try to obtain possession of the house, and brought a suit against Musammat Jamna, which was dismissed on the 16th of May, 1921, on the ground that Musammat Sibo, who was the legal representative of Parbhu Lal after his death, had not upon the death of Parbhu Lal been made a party to the execution proceedings under Ram Dayal's decree. To this suit of Manni Lal, Chandi Prasad was not a party. Manni Lal did not appeal against the decree.

On the 22nd of July, 1919, sale took place in execution of Chandi Prasad's decree, and Chandi Prasad himself purchased the house. On the 8th of

November, 1922, Chandi Prasad applied to get possession and hence the present suit by Musammat Jamna to have it declared that the decree in suit No. 185 of 1918 was not binding on her, that the sale of the house in execution of the decree was also not binding on her, and that she was the owner of the house. The suit was decreed by the first court and this decree was upheld on appeal. The defendant appealed to the High Court.

Babu *Piari Lal Banerji*, for the appellant.

Munshi *Sarkar Bahadur Johri*, for the respondent.

The judgement of the Court (BOYS and KENDALL, JJ.), after setting out the facts as above, thus continued:—

The case for the plaintiff, Musammat Jamna, is, as it was in the suit brought against her by Manni Lal, that the purchase by Manni Lal in execution of the decree of Ram Dayal was a nullity, because, after the death of Parbhu Lal his legal representative, Musammat Sibo, had not been brought on the record; that, though she herself (Musammat Jamna) at one stage in the execution proceedings in the decree of Chandi Prasad had, after the death of Musammat Sibo, been made a party as the then legal representative of the mortgagor, Parbhu Lal, yet she had been exempted and, therefore, treated as if she had never been made a party, and the decree of Chandi Prasad was inoperative against her; and finally that the decree of Chandi Prasad against Manni Lal was inoperative, as the sale to him in execution of the decree of Ram Dayal was a nullity, and consequently he was not a legal representative of Parbhu Lal, the mortgagor. For the defence and for the appellant here it is frankly admitted that, if the execution proceedings subsequent to Parbhu's death, including the sale

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in favour of Manni Lal, were null and void then Manni Lal was not the legal representative of Parbhu Lal, the mortgagor, and that, as Musammat Jamana must be treated as if she had never been made a party to the execution proceedings in the decree of Chandi Prasad, her suit must succeed as it has succeeded in both the courts below.

The defendant appellant, therefore, has to establish that execution proceedings subsequent to Parbhu's death were not null and void. There is no question here of a mere irregularity in the sale, requiring to be supported by proof of substantial injury, before the sale could be set aside under order XXI, rule 90. The question is whether valid execution proceedings could continue in the absence of a living judgement-debtor or his legal representative.

Before considering the judicial authorities that have been quoted to us we will refer to the relevant sections and rules of the Code of Civil Procedure. The first of these is section 50. That section, in our view, does not call in any way for the issue of a notice beyond that it suggests that the law contemplates there being on the record either a living judgement-debtor or his legal representative. With the exception of this inference to be drawn from it all that it does is to inform a decree-holder that if the judgement-debtor has died before the decree has been fully satisfied he can, if he wishes to execute the decree, proceed against the judgement-debtor's legal representative. How he is to proceed is laid down in order XXI, rule 22. That provides that if an application for execution is made against the legal representative, the latter shall have notice to show cause. In reference to this it has been suggested

that it only applies where an application for execution is being made, and does not apply to the proceedings consequent on that application, and that, therefore, it would have no applicability to a case where the judgement-debtor was alive at the time of the application for execution and died subsequently to the commencement of the execution. We are, however, not called upon to decide this particular point, for in the present case the first step that had to be taken after the death of the judgement-debtor in this case was the drawing up of the proclamation. Order XXI, rule 66, expressly requires that the proclamation shall be drawn up after notice to the decree-holder and the judgement-debtor. It was, therefore, imperative on the court to issue a notice to the judgement-debtor. If the sale in the absence of a notice under rule 66 was not a nullity, then under order XXI, rule 90, it would be necessary for the legal representative of a judgement-debtor to show that he had sustained substantial injury by reason of the irregularity. In our view the matter is concluded by the decision of their Lordships of the Privy Council in *Raghunath Das* v. *Sundar Das Khetri* (1). That was a case which arose under the old Code of 1882, but the view of their Lordships was expressed in unequivocal terms that the failure to serve a proper notice on the legal representative rendered the sale "altogether irregular and inoperative." It was, moreover, a case not of failure to serve a notice of the application for execution, but the passing of the rights of the judgement-debtor to the Official Assignee in the middle of the execution proceedings. In that case execution proceedings had reached the stage of an order for sale having been passed. Before the sale had actually

(1) (1914) I.L.R., 42 Calc., 72.

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taken place an insolvency order was passed against the judgement-debtor whereby the property vested in the Official Assignee. The decree-holder took a step by way of serving a notice on the Official Assignee but the notice was merely to show cause why he, the Official Assignee, should not be substituted for the judgement-debtor and did not give him specific notice to resist the execution proceedings if he desired to do so. The Official Assignee ignored the notice and subsequently the decree-holder obtained an order from the court bringing the Official Assignee on to the record and an order for the sale to proceed. It proceeded and the decree-holder himself purchased. Subsequently the Official Assignee by due process of law himself sold the property. As against the second purchaser their Lordships held that the first sale, by reason of the failure to serve a proper notice on the Official Assignee to resist the execution proceedings, if he so wished, was a complete nullity. At page 80 of the report their Lordships said—

> "At any rate the execution could not proceed until the Official Assignee had been properly brought before the court, and an order binding on him had been obtained."

And again at page 82 they say :—

> "Their Lordships are of opinion that this sale was altogether irregular and inoperative"

and they gave three reasons for that view, all of which were apparently regarded as equally conclusive. In reference to the matter before us now they say :

> "In the second place no proper steps had been taken to bring the Official Assignee before the court and obtain an order binding on him and, accordingly, he was not bound by anything which was done."

In our view this concludes the present question.

It is, however, desirable to say a few words in reference to the argument which was addressed to us founded on the Full Bench decision of this Court in *Sheo Prasad* v. *Hira Lal* (1). In our view the whole of that argument was really beside the point. In that case the judgement-debtor had died after the proclamation of the sale and his legal representative was not brought on the record or served with a notice before the sale took place. Four of the learned Judges held that if the judgement-debtor had died before the attachment took place, the decree-holder was bound to proceed to bring the legal representative on the record; but where, as in that case, the property had been attached before the death of the judgement-debtor, the property was in the custody of the court and the sale could properly proceed without the legal representative being brought on the record. Whether, if this decision was still binding on us, we should be prepared to accept it without asking for the matter to be referred again to a Full Bench for fresh consideration, we need not determine, for there is another element in that case which indicates that it is clearly no longer binding on us. The four Judges (MAHMOOD, J., dissented) were clearly influenced in the decision at which they arrived by the consideration that they were unable to find throughout the Code any express provision requiring a fresh notice to be served on the judgement-debtor. It is true that at that time there was no express provision requiring notice to be served on the judgement-debtor either preparatory to drafting the proclamation, or, after the proclamation had been drafted, prior to the sale. In the present case, however, the facts are to this extent different that

(1) (1889) I.L.R., 12 All., 440.

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the judgement-debtor died not after the proclamation of sale had been drafted but before the proclamation, and a provision has been introduced into the Code of 1908 in order XXI, rule 66, corresponding to section 287 of the old Code, requiring the service of notice on the judgement-debtor. How far the insertion of this provision would override the decision of the Full Bench in a case where the judgement-debtor died after the sale proclamation, it is not necessary for us to determine. We were referred to a decision in *Bhagwan Das* v. *Jugul Kishore* (1), as being a case in which it was held that the decision of the Full Bench in *Sheo Prasad* v. *Hira Lal* (2) was still law under the present Code. But that has no bearing on the present case at all. All that occurred in the later Allahabad case was that the Division Bench, which decided that case, relied on the decision in the Full Bench that an attachment did not necessarily abate owing to the death of the judgement-debtor, and execution proceedings would not have to be commenced *de novo*. The only other decision with which we were pressed was that in *Doraswami* v. *Chidambaram Pillai* (3), which was, however, overruled in the Full Bench decision of the same court in *Rajagopala Ayyar* v. *Ramanujachariar* (4), and does not call for further notice.

In the result, in our view, the plaintiff's suit was rightly decreed and this appeal is dismissed with costs.

Appeal dismissed.

(1) (1920) I.L.R., 42 All., 570.
(2) (1889) I.L.R., 12 All., 440.
(3) (1923) I.L.R., 47 Mad., 63.
(4) (1923) I.L.R., 47 Mad., 288.