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the litigation. In the absence of any express direction in the decree, it must be held that the receiver was in the first instance personally liable for the costs.

We accordingly allow this appeal with costs and setting aside the order of the court below allow the decree-holder's application for the execution of the decree for costs against Lala Ganeshi Lal personally. As Lala Ganeshi Lal is dead, the decree will be executable against the assets of the deceased in the hands of the heirs, if any.

APPELLATE CIVIL.

Before Justice Sir Shah Muhammad Sulaiman and Mr. Justice Young.

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December, 17.

ASIA BIBI (DECREE-HOLDER) *v.* MALIK AZIZ AHMAD AND OTHERS (JUDGMENT-DEBTORS).*

Civil Procedure Code, order XXI, rule 16, proviso—Decree under order XXXIV, rule 6, against heirs of mortgagor—Decree-holder with others inheriting the estate of a deceased judgment-debtor—Right to execute the decree not extinguished thereby—Merger.

The proviso to order XXI, rule 16, of the Civil Procedure Code applies to the case where a decree for the payment of money which is passed against two or more persons who are jointly and severally liable to pay the amount is transferred to one of them. In such a case the person who acquires the decree becomes entitled to execute the whole decree and is also liable to pay the whole decree jointly with his co-judgment-debtors. In such an event, there being complete merger of co-extensive rights and liabilities, the execution cannot proceed against the other judgment-debtors. But the proviso does not apply to the converse case where the joint and personal liability of one of two or more judgment-debtors is not fastened upon the decree-holder, but the latter acquires either by private treaty or by operation of law a share in the estate of one of the judgment-debtors. In such an event there is no co-extensiveness of rights and liabilities, and therefore no merger; and at no time can the decree be said to have been transferred to a person who is one of two or more persons against whom

*First Appeal No. 318 of 1930, from a decree of Maheshwar Prasad, Subordinate Judge of Allahabad, dated the 20th of May, 1930.

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a decree for the payment of money exists. Accordingly, the right to execute the decree is not extinguished.

Semble, the proviso to order XXI, rule 16, cannot at all apply to a decree passed against the assets of a deceased person in the hands of the defendants, as distinct from a decree against the persons of the judgment-debtors. The substitution of the expression, "for the payment of money", for the words "for money", in the proviso in the new Code was intended to emphasise that the proviso was confined to cases of personal decrees.

Messrs. *P. L. Banerji* and *Mushtaq Ahmad*, for the appellant.

Messrs. *Haribans Sahai* and *Sri Narain Sahai*, for the respondents.

SULAIMAN and YOUNG, JJ. :—This is a decree-holder's appeal arising out of an execution proceeding. In 1901 Bhawani Prasad and others obtained a decree for sale on the basis of a mortgage deed against one Faqir Bux. The mortgaged properties were put up for sale from time to time, but they proved insufficient to pay the whole decretal amount. Faqir Bux died during the pendency of these proceedings. In 1918 the decree-holders obtained a decree for money for the balance of the amount under order XXXIV, rule 6, against the heirs of Faqir Bux. The form of this decree was slightly defective, and we shall discuss it later. This decree was transferred in 1925 to Mst. Asia Bibi, the wife of Abdul Rauf, one of the heirs of Faqir Bux. It is not disputed that Asia Bibi was not a benamidar for her husband, but had purchased this decree in her own right. She put the decree in execution against the heirs of Faqir Bux, including her husband Abdul Rauf. During the pendency of the execution proceedings Abdul Rauf died in 1929, and she became one of his six heirs. The respondents judgment-debtors then objected that owing to a merger her right to execute the decree had become extinguished.

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The Subordinate Judge held that under order XXI, rule 16, the right of the decree-holder to execute the decree against the other judgment-debtors had become extinguished and her remedy was only by way of a separate suit for contribution.

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The principal question for consideration is whether the right to execute the decree has become extinguished by virtue of the provisions of order XXI, rule 16. The question whether the remedy of a decree-holder who acquires a part of the property of a judgment-debtor is by execution under section 47 of the Code of Civil Procedure or by a separate suit for contribution is really a matter of procedure, and not of any substantive law. Nor do we think that any question of equity, apart from mere convenience, is involved. Where the rights of a decree-holder and the liability of a judgment-debtor become united in one and the same person, there would obviously be merger. But the doctrine of complete merger involves the essential condition of the co-extensiveness of such rights and liabilities.

The proviso to order XXI, rule 16, is in the following words: "Provided also that where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others." That proviso applies to the case where a decree for the payment of money which is passed against two or more persons who are jointly and severally liable to pay the amount is transferred to one of them. In such a case it is obvious that the person who acquires a decree becomes entitled to execute the whole decree and is also liable to pay the whole decree jointly with his co-judgment-debtors. In such an event, the execution cannot proceed against the latter. The provision does not apply to the converse case where the joint and personal liability of one of two or more judgment-debtors is not fastened

on the decree-holder, but the latter acquires either by private treaty or operation of law a share in the estate of one of the judgment-debtors. In such an event there is no co-extensiveness of rights and liabilities, and there can be no merger.

The court below has relied in support of its judgment on certain observations contained in the judgment in the case of *Banarsi Das* v. *Maharani Kuar* (1). The passages quoted, if taken in their widest scope, might be considered to support this contention. But this question did not at all arise in that case, and the observations could at the most be treated as *obiter dicta*. In that case one of several joint judgment-debtors had acquired only a partial interest in the decree, and it was accordingly held that there had been no extinguishment of the right to execute it. Thus, it was a case where the decree had been transferred to one of the judgment-debtors, and also where the whole decree had not been transferred. The present case is just the converse.

Mst. Asia Bibi was the decree-holder entitled to recover the whole amount against the estate of Faqir Bux in the hands of his heirs, including her husband Abdul Rauf. When the decree was transferred to her she had no concern in the eyes of the law with any of the judgment-debtors. The subsequent death of Abdul Rauf only made her inherit a part of the share which Abdul Rauf had got in the assets of Faqir Bux. This inheritance did not make her jointly and personally liable for the payment of the whole decree which she held. We are accordingly of opinion that her right to execute the decree was not extinguished simply because she became an heir to one of the heirs of the original judgment-debtor. But inasmuch as part of the assets of the original judgment-debtor became vested in her by operation of law, she was bound to give credit for a proportionate

(1) (1882) I. L. R., 5 All. 27.

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amount of the decree, and accordingly the amount had to be reduced *pro tanto*.

There is another aspect of the case which also might strengthen the position of the appellant. The decree under order XXXIV, rule 6, was passed, not against Faqir Bux, the original mortgagor, himself, but against his heirs. In the application for the preparation of the decree the prayer was for a decree against the assets of the deceased Faqir Bux in the hands of his heirs, which were specified. The court ordered that the application be allowed with costs and a personal decree be passed as prayed. The decree was, however, drawn up on a printed form which is generally applicable to original mortgagors who are alive, and did not in the operative portion of it expressly state that the amount was to be realised out of the assets in their hands. It may further be mentioned that later on, on the 6th of September, 1929, the execution court directed that the decree should be executed by the sale of the entire assets of Faqir Bux, and not of shares in the hands of his individual heirs.

If the decree were to be treated as a decree against the assets of Faqir Bux in the hands of his heirs, then it would be obvious that these heirs were not jointly and personally liable to pay the amount. Their liability would be limited to the extent of the assets, if any, which they received. The case would then be analogous to a mortgage decree for sale of mortgaged property, in which no personal liability was involved. The substitution of the expression "for the payment of money", for the words "for money" in the proviso in the new Code was intended to emphasise that the proviso was confined to cases of personal decrees. This proviso would, therefore, not apply to the facts of this case. We, however, do not consider it necessary to decide whether the form in which the decree was actually prepared, even though

wrong, was one of a personal decree against the heirs of Faqir Bux.

There was a second death, namely, that of Abdul Rauf, and even if there had been a personal decree against Abdul Rauf, that personal liability has not devolved on his wife, Mst. Asia Bibi. Therefore Mst. Asia Bibi can execute her decree in spite of the fact that she has become an heir to the estate of Abdul Rauf, and will take her legal share in it, subject to any liability which had previously existed.

On the question whether the proviso can at all apply to a decree against an estate, as distinct from a decree against the persons of the judgment-debtors, there has been a conflict of opinion between the Bombay and the Madras High Courts. In the case of *Panachand Pomaji Marwadi* v. *Sundrabai* (1) the Bombay High Court, in a case which arose under the corresponding section 232 of the old Code, held that the proviso applied only where in the decree there was a distinct order upon the defendants personally to pay the money. In the case of *Sadagopa Aiyengar* v. *Sellammal* (2) the Madras High Court appears to have doubted the Bombay ruling. But according to the facts as stated in the reported judgment, the decree in that case was one for the payment of money against the first defendant and three others, and the first defendant was directed by the decree to pay the amount out of his family property. It was thought that this direction did not make the decree any the less a decree for the payment of the money against him. If the decree was primarily one for payment of money against the four defendants, the judgment was perfectly correct. The case of *Muhammad Abdul Kadir* v. *Abdul Kadir Marakayar* (3) is a single Judge decision, which certainly supports the respondents. In that case the decree had been assigned in 1919, and later on the

(1) (1907) I. L. R. 31 Bom., 308. (2) (1922) 72 Indian Cases, 861.
(3) (1926) 98 Indian Cases, 26.

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assignee of the decree became one of the heirs of the defendant No. 1. The objection of the other defendants that the decree had ceased to be executable was allowed, and the observations made in *Banarsi Das's* case (1) were relied upon. But this case appears to have been distinguished by a Division Bench of the same High Court in the case of *Subramanian Chetty* v. *Kasi Chetty* (2). The judgment does not make it quite clear on what basis the single Judge's decision was really distinguished. We have already pointed out that there, too, the assignee of the decree-holder had become an heir to the estate of one of the defendants long after the assignment in his favour. The fact, however, remains that a Division Bench of the same High Court came to the conclusion that where the plaintiff had obtained a money decree against his father, who had also a grandson, and the father died during the attachment of his property, the plaintiff becoming one of his heirs, he was nevertheless entitled to execute the decree against the half share of the house in the occupation of the grandson. The fact that the decree-holder had become entitled to a half share in the property of the judgment-debtor which had been attached did not, in the opinion of the learned Judges, make the proviso applicable to that case.

We are clearly of opinion that the proviso cannot apply to a case where the decree-holder by inheritance acquires an interest in the estate of one of the judgment-debtors. In such a case, at no time the decree can be said to have been transferred to a person who is one of two or more persons against whom a decree for the payment of money exists.

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We accordingly allow this appeal, and send the case back to the court below for disposal in the light of the observations made by us. The appellant will have the costs of this appeal from the respondents.

(1) (1882) I. L. R., 5 All., 27. (2) A.I.R., 1927 Mad., 937.