

*Before Mr. Justice Pearson, Mr. Justice Spankie, Mr. Justice Oldfield, and Mr. Justice Straight.*

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April 21.

DULARI (JUDGMENT-DEBTOR) v. MOHAN SINGH (AUCTION-PURCHASER).\*

*Sale in execution of decree—Death of decree-holder before sale—Effect on validity of sale—Act X. of 1877 (Civil Procedure Code), ss. 365, 366.*

A judgment-debtor applied that an execution-sale of property belonging to him should be set aside, as the decree-holder was dead when such sale took place, and such sale was in consequence invalid. This application was disposed of by the Court executing the decree in the presence of the judgment-debtor and the purchaser. The Court held that the fact of such sale having taken place after the decree-holder's death was no ground for setting it aside, and disallowed such application, and made an order confirming such sale.

*Held per* PEARSON, J., that the application for execution of the decree abated on the death of the decree-holder, not having been prosecuted by his legal representative, and such sale was under the circumstances improper and invalid, and the order confirming it should be set aside.

*Per* SPANKIE, J., that such sale was not invalid by reason of the decree-holder's death before it took place. The order confirming it, however, was improper, and should be reversed, and the case should be remanded to be dealt with under the provisions of ss. 365 and 366 of Act X. of 1877, as the Court executing the decree should have proceeded under those sections.

*Per* OLDFIELD, J., and STRAIGHT, J., that the death of the decree-holder prior to such sale did not render it void. The provisions of ss. 365 and 366 of Act X. of 1877 could not be adapted to execution-proceedings. As such sale had been published and conducted according to law, it had properly been confirmed.

CERTAIN immoveable property belonging to the judgment-debtor in this case was attached, and was ordered to be sold on the 14th August, 1880, and it was put up for sale on that day, and was purchased by one Mohan Singh. In the interval between the day on which such property was ordered to be sold and the day on which it was sold the decree-holder died. Before the order confirming the sale was made the pleader for the decree-holder informed the Court executing the decree of the decree-holder's death. The judgment-debtor objected to the confirmation of the sale on the ground that all the proceedings which took place after the decree-holder's death were invalid. The Court executing the decree disallowed this objection and made an order confirming the sale. The parties who appeared at the hearing of this objection were the judgment-debtor

\* First Appeal, No. 166 of 1880, from an order of Munsif Kamal-ed-Din Ahmad, Munsif of Saumbhal, in the district of Moradabad, dated the 16th September, 1880.

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and the purchaser Mohan Singh ; the legal representatives of the decree-holder were not called on to appear and did not appear. The judgment-debtor appealed to the High Court from the order confirming the sale. On her behalf it was again contended that the sale was invalid, inasmuch as it had taken place after the decree-holder's death, and without the legal representatives of the decree-holder being made parties to the execution-proceedings.

*Babu Lal Chand*, for the appellant.

*Lala Lalta Prasad*, for the respondent (purchaser).

The Judges of the Division Bench (PEARSON, J., and SPANKIE, J.,) before which the appeal came for hearing, differing in opinion, delivered the following judgments :—

SPANKIE, J.—An application on behalf of the decree-holder was presented to the Munsif on the 22nd January, 1880, by her pleader, and after attachment and fulfilment of the requirements of the law the sale was made of a *dalán* with side rooms on the 14th August, 1880, through the nazir of the Court. The property was purchased by Mohan Singh for Rs. 50, who deposited the purchase-money in due course. On the 18th August, four days after the sale, the judgment-debtor presented a petition to the effect that the decree-holder had died, and the name of her heir had not been substituted on the record ; that the sum due under the decree was Rs. 21-4-0, and only so much of the property should have been sold as would have satisfied the decree ; and that the sale after the death of the decree-holder was void, being illegal. The plaintiff's pleader represented that the decree-holder had died, and he had reported the fact to the Court. The date of his report by petition was 10th September, 1880, six days before the order of the Court now appealed. The Munsif admits that the auction-sale occurred after the death of the decree-holder, and observes that the Court was informed of her decease after the sale, but there was no reason why the sale should not be confirmed. He therefore confirmed it in favour of the auction-purchaser, but only to the extent of half the *dalán* and one side room, and for Rs. 25, returning the balance of the purchase-money to the auction-purchaser, and directing that the heirs of the deceased decree-holder should receive the

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amount due under the decree, and the balance be paid to the defendant. It is urged in appeal that, as the decree-holder died before the auction-sale, and the name of her legal representative was not substituted on the record, all the proceedings that were had after her death were null and void, and the auction-sale of the 14th August, 1880, ought to be set aside. I am not prepared to say that the proceedings in execution of a decree might not abate in the case of a sole decree-holder who dies during such proceedings, and where no application by the legal representative of the deceased is made to have his name substituted in the place of the deceased. S. 647 of the Code provides that the procedure prescribed in the Code up to that section shall be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction other than suits and appeals. There is in the present Code a different arrangement of Part II. Chapter XXI, or incidental proceedings relating to the death, marriage and insolvency of parties. This chapter follows the chapters which deal with a suit from its inception to its execution inclusive. This was not so with regard to the subject in Act VIII of 1859 which the present Code supersedes. This chapter on the death &c., of parties was introduced in Act VIII of 1859 in quite a different position, i.e., prior even to the examination of parties and documents, and prior to the first hearing, so that it might seem to have application only to suits strictly whilst pending before decree. Whereas as remarked above the chapter is now so placed after chapter XVII on judgment and decree, chapter XVIII which relates to costs of applications, chapter XIX on execution of decrees, and chapter XX on insolvent judgment-debtors. This being so, it may be reasonably argued that the Legislature, by making this distinction between the old and the new Code, meant to extend the procedure under chapter XXI to all those cases in which a suit was still before the Courts in one of its stages from inception to final process. Moreover, if it were otherwise and we had to fall back upon s. 647 of the Code, it is sufficient to say that the procedure relating to the death of parties can be made applicable without any difficulty to proceedings in execution, and therefore the requirements, if that section were applied in this case, would be fulfilled. In following this view I differ from the ruling in *Gulab Das v.*

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*Lalshman Narhar* (1), though I admit that there is force in the argument that before execution can be had at all a right must have been fully established and delay afterwards is merely indulgence to the judgment-debtor. But then it must be allowed that the Court cannot proceed to take steps in execution unless it is moved to do so, and if the decree-holder dies, and no one appears in his place who can be regarded as his legal representative, the proceedings in execution are naturally suspended. In order then to get rid of this inconvenience, it is desirable that the Court should have some well defined mode of procedure, and this it finds in chapter XXI of the Code or in s. 647, and either way s. 365 might apply to this case, inasmuch as the right to sue, *i.e.*, to take out execution under the decree, already exists, and does not die with the decree-holder, but survives in favour of his legal representative. But if s. 365 of the Code applies to this case, and no application referred to in that section has been made, we must pass on to see what is to be done. In s. 366, where no such application has been made, we find that the Court may pass an order that the suit shall abate, and award to the defendant the costs which he has incurred in defending the suit, to be recovered from the estate of the deceased plaintiff, or it may pass such other order as it thinks fit for bringing in the legal representative of the deceased, or for proceeding with the suit in order to a final determination of the matter in dispute, or for both these purposes. Here then, if the procedure in cases of death of a sole plaintiff be applicable to the case now before us, which I hold it to be, is a procedure which meets the difficulty and is certainly applicable in all respects. The lower Court cannot be said to have exercised any discretion under this section. The question as to the abatement of the execution-proceedings does not appear to have been present to the Munsif's mind. He saw no reason why the sale should be void because the decree-holder was dead, and so far as he considers the sale was not necessarily void, which is the contention of appellant, I agree with him. The sale as a sale is free from objection. It was made in accordance with the prayer of the deceased decree-holder and must be regarded as having been made by the Court at his instance. The sale is a fact, and having been

ordered and made on the formal application of the decree-holder, it is not necessarily bad because he died before it occurred. But a sale of immoveable property cannot become absolute in execution of a decree until it has been confirmed by the Court, and when it is confirmed it is so confirmed as regards the parties to the suit and the purchaser. It is clear that, if the decree-holder be dead when the sale is confirmed by order, it is only confirmed as regards one of the parties, the judgment-debtor, and the auction-purchaser. This being so, it seems to me that the lower Court's order in confirming the sale is improper and cannot be maintained. It should have dealt with the death of the decree-holder either under s. 365 or 366 of the Code as the circumstances of the case required. But the confirmation of the sale would be in abeyance until it had exercised the large discretion allowed by the section, yet the sale made at the instance and on the application of the decree-holder when living would not be voided by his death. I would so far decree the appeal as to reverse the order as it stands and remand the case to the Munsif to comply with the requirements of the law.

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PEARSON, J.—I apprehend that the ground of appeal is valid and must be allowed. There can be no doubt that a suit will abate on the death of a sole plaintiff if not prosecuted by his legal representative; and I cannot see why an application for execution for the execution of a decree should not abate in like manner on the decease of the decree-holder if not prosecuted by his legal representative. The action of a Court necessarily comes to an end when the party which set it in motion ceases to move it, and no one entitled to take his place continues the movement. The right to bring the property to sale had passed away from the decree-holder on whose application the sale was ordered before the sale was made. Under the circumstances the sale of the property of the judgment-debtor was improper and is invalid, and I would reverse the order of the lower Court and decree the appeal with costs.

My honorable colleague is of opinion, if I rightly understand, that, although the order confirming the sale is bad, the sale is good and may be confirmed after making the legal representative of the deceased decree-holder a party to the proceedings. There would thus appear to be a difference of opinion between us on a point

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of law, *viz.*, the validity of the sale ; and I therefore conceive it to be necessary for the proper disposal of the appeal that it be referred to one or more of the other Judges of the Court under the provisions of s. 575 of the Procedure Code.

The appeal accordingly was laid before OLDFIELD, J., and STRAIGHT, J., by whom the following judgments were delivered :

OLDFIELD, J.—It appears that the sale was made on the 14th August, 1880, at the instance of the judgment-creditor and after the requirements of the law had been fulfilled. Before, however, the sale had been held the judgment-creditor died, and on the 18th August the judgment-debtor objected to the confirmation of the sale on the ground that the sale after the death of the decree-holder was void, being illegal. This objection to the confirmation of the sale is certainly not one which can be entertained under s. 311, Civil Procedure Code, nor do I consider that the death of the judgment-creditor prior to the sale taking place, but after all the requirements of the law had been fulfilled, can otherwise afford sufficient ground for setting aside the sale. The proceedings cannot I think be held to have abated under the provisions of ss. 365 and 366 of the Civil Procedure Code. S. 647, Civil Procedure Code, is to the effect that the procedure prescribed in the Civil Procedure Code shall be followed as far as it can be made applicable in miscellaneous proceedings ; but I do not think ss. 365 and 366 can be made applicable to a proceeding in execution of a decree when the sole judgment-creditor dies, so as to cause abatement of the proceedings, if within the time limited by law no application has been made by the legal representative of the deceased to have his name entered in the record in place of the deceased, for I do not find that the Limitation Act provides a limitation in such a case. The only law to which we can be referred is art. 171, sch. ii of the Limitation Act, but that deals with applications by persons under ss. 363 and 365 to be the legal representatives of a deceased plaintiff or appellant, and obviously refers to parties who are plaintiffs in a suit or appellants in an appeal. I concur in the view expressed in *Gulab Das v. Lakshman Narhar* (1).

There does not appear to be any provision in the Procedure Code for abatement of proceedings in execution of decrees like suits. Under s. 232 applications for execution can be made by a legal representative of a deceased judgment-creditor, and there is nothing to prevent their being made at any time within the period of limitation prescribed by art. 179. When it is brought to the notice of the Court that the judgment-creditor is dead and no legal representative appears, the proper course would be to strike off the proceeding by default, leaving the legal representative to make a fresh application for execution. In the case before us the Court was unaware of the death of the judgment-creditor, and the order for sale, which had been properly made before his death, was carried out by the sale of the judgment-debtor's property, notwithstanding his death. The death of the decree-holder after execution taken out will not affect the validity of the sale which had been made on the authority of the Court's order which is unaffected by the decree-holder's death. By English practice, "if the plaintiff die after final judgment his executors must revive it against the defendant before they can have execution, or if the defendant die after final judgment it must be revived against his executors or against his heir and terre-tenants, but if the plaintiff die after a *fi. fa.* sued out, inasmuch as the sheriff derives authority from the writ, it may be executed notwithstanding."—Smith's Action at Law, 9th ed., p. 300. So here, the authority for the sale remained, and the validity of the sale is unaffected. I see no material objection to the confirmation of the sale with reference to s. 312, Civil Procedure Code. I would dismiss the appeal with costs.

STRAIGHT, J.—I do not think that the death of the decree-holder prior to the execution-sale rendered such sale void. It seems to have been published and conducted in accordance with the provisions of the law; and was therefore not open to any objection under s. 311 of the Procedure Code. At the time the decree-holder died she had satisfied all the preliminaries necessary to entitle her to the sale of her judgment-debtor's property, and all that remained to be done was for the order of the Court directing the sale to be carried out. It does not appear to me that the provisions of ss. 365-366 can be adapted to execution-proceedings, but I so far concur with Mr. Justice Spankie that I think it would

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have been better had the Court executing the decree made the representatives of the deceased decree-holder parties on the hearing of the application for confirmation of sale. At the same time the not doing so seems scarcely sufficient ground for disturbing the order of the Munsif, and I therefore concur with Mr. Justice Oldfield that the appeal should be dismissed and the order confirming the sale upheld.

*Appeal dismissed.*

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May 2.

*Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Oldfield.*

NAGAR MAI, (PLAINTIFF) v. MACPHERSON (DEFENDANT).\*

*Return of plaint to be presented to the proper Court—Rejection of plaint—Cause of action—Jurisdiction.*

The plaintiff in this suit claimed in a Civil Court (i) a declaration of his right to certain land ; (ii) that certain leases of such land, so far as their terms exceeded the term of settlement, should be cancelled ; and (iii) arrears of rent for such land. The Court held as regards claim (i) that the plaint did not disclose a cause of action, as it was not alleged that the defendant had disputed the plaintiff's right ; as regards claim (ii) that, with reference to the terms of s. 29 of Act XVIII of 1873, the plaintiff's cause of action had not yet arisen ; and as regards claim (iii) that it was cognizable in a Court of Revenue ; and it directed that under s. 57 of Act X of 1877 the plaint should be returned to the plaintiff to be presented to the Revenue Court. *Held* that under the circumstances the plaint should have been rejected and not returned.

THE plaintiff in this suit, which was instituted in the Court of the Subordinate Judge of Dehra Dún, claimed (i) a declaration of his right as proprietor to certain land ; (ii) the cancelment of certain leases of such land in so far as the terms of such leases exceeded the term of the settlement of such land ; and (ii) Rs. 812-5-6, principal and interest, being the rent due for such land from the 1st July, 1876, to the 30th June, 1879. The plaintiff represented the persons who had originally leased such land, and the defendant represented the persons to whom such land had originally been leased. The Subordinate Judge held that, as regards the claims for a declaration of the plaintiff's proprietary right and the claim for the cancelment of the leases, the plaint disclosed no cause of action ; inasmuch as it was not alleged that the defendant had denied or

\* First Appeal, No. 132 of 1880, from an order of F. H. Fisher, Esq., Judge of the Court of Small Causes at Dehra Dún exercising the powers of a Subordinate Judge, dated the 9th August, 1880.