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MIRZA  
ZAMIN  
ABBAS  
v.LACHMI  
NARAIN.

Court of Small Causes, and direct that the suit be reinstated at its original number and tried on the merits. The applicant will get his costs in this Court.

*Application accepted.*

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### APPELLATE CIVIL.

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*Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.*

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Septem-  
ber, 23.

MIRZA MUHAMMAD SADIQ ALI KHAN (DECREE-HOLDER-APPELLANT) v. SAJJAD MIRZA *alias* MUNNEY AGHA (JUDGMENT-DEBTOR-RESPONDENT).\*

*Civil Procedure Code (Act V of 1908), order XXI, rules 15 and 16—Death of a decree-holder—Substitution of names of legal representatives—Execution of decree by any one of the several persons entitled to take out execution, whether takes effect in favour of all.*

*Held*, that there is no rule under which the legal representative of a deceased decree-holder can or should apply merely for substitution of names. The application should be for execution. [*Baij Nath v. Ram Bharose* (1), followed.]

Where there are several persons entitled to take out execution, any one of these may take out execution, and the action of any one will take effect in favour of all.

Mr. *Ali Zaheer*, for the appellant.

Mr. *Haider Husain*, for the respondent.

STUART, C.J., and RAZA, J. :—The late Nawab Baqar Ali Khan obtained a decree on the 23rd of November, 1918. He applied for execution on the 1st of March, 1919. He died on the 17th of January, 1921. On the 30th of January, 1921, certain of his heirs applied for substitution of names. In their application they stated

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\*Execution of Decree Appeal No. 42 of 1927, against the order of Bhagwat Prasad, First Additional Subordinate Judge of Lucknow, dated the 30th of April, 1927, dismissing the appellant's application.

(1) (1927) 25 A.L.J., 249.

that Nawab Sadiq Ali Khan, son of Nawab Baqar Ali Khan was also an heir. Notice was issued to Nawab Sadiq Ali Khan. His Counsel stated to the court that Nawab Sadiq Ali Khan claimed to be the sole heir of Nawab Baqar Ali Khan. He denied the title of Nawab Fakhar Jehan Begam to be the wedded wife of Nawab Baqar Ali Khan and he denied the title of Nawab Taqi Ali Khan and Nawab Abid Jehan Begam to be the legitimate children of Nawab Baqar Ali Khan, but he admitted that Nawab Sharaf Jehan Begam was his mother and that Nawab Kazim Ali Khan and Nawab Naqi Ali Khan were his own brothers. The Counsel stated, however, that Nawab Sadiq Ali Khan claimed under a family custom to be the sole heir of his father. The position which he took in the matter of execution was this. He said that the question of inheritance to his deceased father's estate was being decided in a separate suit and until that suit was decided he agreed provisionally that the applicants should be permitted to execute the decree provided that any proceeds of execution should be deposited in court to be distributed according to the decision in the regular suit as to who were the heirs of the deceased Nawab Baqar Ali Khan. In the evidence which the court took, it was clearly admitted by the applicants' witnesses that Nawab Sadiq Ali Khan was a son of Nawab Baqar Ali Khan. The Subordinate Judge decided on the 25th of April, 1922, that the application which he calls an application under order XXI, rule 16 for substitution of names, should be decided in favour of the applicants. It has been laid down in a Full Bench decision of the Allahabad High Court in *Baij Nath v. Ram Bharose* (1) that there is no rule under which the legal representative of a deceased decree-holder can or should apply merely for substitution of names. The application should be for execution. We

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take the same view. There was thus no necessity for these persons to have applied for substitution and we can only look upon their application as an informal method of bringing to the notice of the court the death of the decree-holder and the circumstance that the interest of the decree-holder had been transferred by operation of law resulting from his death to his heirs. But in these circumstances the application was sufficient to bring Nawab Sadiq Ali Khan on the record as one of those heirs.

The case then stood that after the death of Nawab Baqar Ali Khan the persons entitled to execute the decree were his widow, Nawab Sharaf Jehan Begam, her three sons, Nawab Sadiq Ali Khan, Nawab Kazim Ali Khan and Nawab Naqi Ali Khan, and his widow Nawab Fakhar Jehan Begam and her son Nawab Taqi Ali Khan and her daughter Nawab Abid Jehan Begam. Any one of those persons could take action in execution. The decree then became a decree jointly in favour of more persons than one and an application made by one of them took effect in favour of all.

We have now to see the history of the subsequent execution. There was an application for execution on the 1st of March, 1919. The next matter was the informal application of the 30th of January, 1922, for substitution of names. Unless this is treated as a step in aid of execution, the present application would be time-barred. In our opinion, however, the application, though it was not required by law, was a step taken by persons entitled to execute the decree and it certainly was in aid of execution as it advanced their position somewhat. In article 182 of the first schedule of Act IX of 1908 application in accordance with law to the proper court for execution are distinguished from steps in aid of application. There was no necessity, as we

have said, for these persons to have applied for substitution under the provision of order XXI, rule 16 and their application for substitution was certainly not an application for execution, but we consider that it was a step in aid. There was another step in aid when on the 28th of April, 1923, Nawab Taqi Ali Khan's heirs applied after his death to have their names brought on the record. In these circumstances the application made by Nawab Sharaf Jehan Begam on the 19th of July, 1923, which was an application in accordance with law for execution, was within time. It was not suggested in the court below that this application was not within time.

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We now come finally to the application of Nawab Sadiq Ali Khan on the 16th of July, 1926, against the rejection of which the present appeal is preferred. The learned Subordinate Judge took the position that as Nawab Sadiq Ali Khan had not obtained substitution of his name by a formal order and as he had applied for execution within more than three years after his father's death, his application for execution was time-barred. He took the position that Nawab Sadiq Ali Khan could not benefit by the action of the other heirs of Nawab Baqar Ali Khan. We do not agree with this view. In the first place we consider that the effect of the order of the 25th of April, 1922, read with the previous proceedings was effective in showing that the interest of the decree-holder in the decree had been transferred by operation of law after his death to all his heirs of whom Nawab Sadiq Ali Khan was one, and we further take the view that in a matter such as this in which there are several persons entitled to take out execution any one of these may take out execution and that the action of any one will take effect in favour of all. Holding these views we reverse the decision of the learned trial Judge. We

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find that the application in execution of Nawab Sadiq Ali was within time and a valid application. The appeal, therefore, succeeds. The judgment-debtor will pay his own costs and those of the decree-holder.

*Appeal allowed.*

### APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge, and Mr. Justice Muhammad Raza.*

ALI HUSAIN (PLAINTIFF-APPELLANT) v. AFZAL HUSAIN  
AND OTHERS (DEFENDANTS-RESPONDENT).\*

*Civil Procedure Code (Act V of 1908), order XXI, rule 36—  
Auction purchaser obtaining symbolical possession over  
property in actual possession of mortgagee—Limitation,  
starting of, from the date of symbolical possession.*

*Held*, that if upon an execution sale possession has been delivered to the auction-purchaser in accordance with the provisions of the law, the auction-purchaser gets a fresh start for the computation of limitation from the date of delivery of such possession. [*Jang Bahadur Singh and another v. Hanwant Singh* (1), followed.]

Where the property was in the possession of a mortgagee and the auction-purchaser had obtained possession against the mortgagor and his right was subordinate to the right of the mortgagee in possession, and he had obtained the same possession to which the mortgagor was entitled, that is to say, symbolical possession, the actual persons in physical possession remaining in physical possession and a proclamation being made by beat of drum as to the plaintiff's possession, he actually obtained possession under order XXI, rule 36 of the Code of Civil Procedure, and in these circumstances his possession was good in law.

Mr. *M. Wasim*, for the appellant.

Mr. *Bishambhar Nath Srivastava*, holding brief of  
Mr. *Bisheshwar Nath Srivastava*, for the respondents.

\*Second Civil Appeal No. 216 of 1926, against the decree of Syed Ali Hamid, Subordinate Judge of Bara Banki, dated the 3rd of February, 1926.