

APPELLATE CIVIL.

Before Dawson Miller, C.J. and Mullick, J.

NATHUNI NARAYAN SINGH

v.

MAHANTH ARJUN GIR.*

1924.

Nov., 12.

Joint Decree—one of the defendants dead at the time of passing of—execution against survivor, validity of.

The fact that one of the defendants in a suit was dead at the time when a money decree was passed against all the defendants jointly does not preclude the decree-holder from executing the decree against all or any of the survivors.

Jangli Lall v. Laddu Ram Marwari(1), explained.

Appeal by the decree-holders.

The plaintiffs, who had been the landlords, sued the defendants, who were 51 in number, for the back rents of a *mukarrari* tenure. As the plaintiffs had, at the time of the suit, ceased to be the proprietors of the tenure they were not entitled to a rent decree within the meaning of the Tenancy Act. The defendant no. 9, Arjun Gir, and defendant no. 15, Muhammad Yusuf Khan, did not file any written statements, and on the 21st November, 1921, the Subordinate Judge made a money decree with costs jointly against all the defendants. It appeared that at the time when the decree was made the defendant, Muhammad Yusuf Khan, was dead and when the plaintiffs applied for execution in the Court of the Subordinate Judge the

* Miscellaneous Appeal no. 128 of 1924, from an order of F. F. Madan, Esq., I.C.S., District Judge of Gaya, dated the 15th May, 1924, reversing an order of Babu N. B. Chatarji, Subordinate Judge of Gaya, dated the 13th November, 1923. •

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defendant. Arjun Gir, raised an objection on the ground that as Muhammad Yusuf Khan was dead at the time when the decree was made the decree was a nullity not only against his heirs but against the other defendants in the suit. It was contended that the decree could not be executed.

The Subordinate Judge decided against the objector but on appeal the District Judge held that the whole decree was a nullity and that execution could not proceed. Against this order the decree-holders appealed to the High Court.

Susil Madhab Mullick and Kailaspati, for the appellants.

S. P. Varma (with him *Hareshwer Prasad Sinha*), for the respondents.

MULLICK, J. (after stating the facts set out above, proceeded as follows): The present second appeal has been filed by the plaintiffs and it is contended that the view taken by the learned District Judge is incorrect and that there can be no objection to the decree being executed against one or all of the defendants who were surviving at the time when the decree was made. Now there is nothing in the judgment of this Court in *Jungli Lall v. Laddu Ram Marwari* (1) upon which the learned District Judge relies which precludes the plaintiffs from executing the decree against the surviving judgment-debtors. Further, the Subordinate Judge had jurisdiction to make a decree against the respondents and so long as that decree subsists he cannot be heard to impeach its validity. The decree declared that the 51 defendants were all jointly liable for the decretal sum. Therefore, under section 43 of the Indian Contract Act, each defendant was liable for the whole debt and it was open to the plaintiffs

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to proceed against one judgment-debtor or all according as he pleased. The fact that one of them happened to be dead at the time the decree was made cannot affect the right of the decree-holders to recover the money in execution from all or any of the survivors. What would have been the position if the decree-holders had sought to sell the entire tenure in execution is not a question that we are concerned with at the present moment. The appeal will succeed and be decreed with costs in this Court and in the Court of the District Judge.

DAWSON MILLER, C. J.—I agree. I merely wish to add, as I was a party to the full bench decision of *Jungli Lall v. Laddu Ram Marwari* (1) upon which the learned District Judge relied in support of the decision at which he arrived, that that decision cannot be taken as an authority for the broad proposition which the learned District Judge appears to think it laid down. The only question in that case was whether the property of one of two defendants in the suit who had died before the decree was passed and against whom, before the decree was passed, the suit had abated, was liable to be taken in execution of that decree. It was contended on behalf of his representatives that the decree was a nullity in so far as the deceased was concerned. This Court accepted that argument and held that a decree passed against a deceased person was a nullity in so far as that deceased person was concerned but the Court never laid down the broad proposition that if one of several defendants happens to die before a decree is passed and no one is substituted in his place, the whole decree passed in ignorance of his death is a nullity even against the other defendants in the suit. I entirely agree with the judgment just pronounced by my learned brother.

Appeal allowed.

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