

It is urged that the District Magistrate should have recorded his reasons for transferring the case. Now section 528 of the Criminal Procedure Code does not require in terms that the Magistrate should give any reason, but it is a sound rule of practice that there should be something on the record showing why the order was made. In the present case it is possible that the fact that Mr. Nawab had held a preliminary inquiry into the case before the issue of process may have had some weight with the District Magistrate. He may also have thought that there were other grounds but the omission to record these ought not to be fatal to the order. The learned District Magistrate has exercised a jurisdiction vested in him and unless strong grounds for so doing are shown we are not prepared to vacate the order. If Mr. Singh had not transferred the case to Mr. Nawab he himself would have disposed of it. Matters have now been restored to the state in which they were when the complaint was filed and as it has not been shown that Mr. Singh is disqualified in any way from trying the case we ought not to interfere.

The application fails both on the point of jurisdiction and the merits and is dismissed.

KULWANT SAHAY, J.—I agree.

*Application rejected.*

## APPELLATE CIVIL.

*Before Das and Adami, J.J.*

MAHARAJA KESHO PRASAD SINGH

v.

SHAMNANDAN RAI.\*

*Rent Decree against a dead tenant—whether the rest of the decree is a nullity—tenant, joint and several liability of, to pay rent.*

\* Appeal from Appellate Decree no. 1013 of 1922, from a decision of J. F. W. James, Esq., i.c.s., District Judge of Shahabad, dated the 26th June, 1923, confirming a decision of M. Saiyid Hasan, Additional Subordinate Judge of Shahabad, dated the 2nd September, 1921.

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A decree against a dead person is a nullity.

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*Jungli Lal v. Laddu Ram Marwari* (1), followed.

But the question whether the whole decree is a nullity depends on the question whether the failure on the part of the plaintiff to bring the representative-in-interest of the deceased defendant on the record affects his right to proceed with the suit.

The liability of a tenant to pay rent being joint and several, it is always open to a landlord to bring a suit for rent against all or any of the tenants; though a decree against some of them only can be executed only as a money decree, and a sale held in execution thereof will pass only the right, title, and interest of the judgment-debtors.

*Ananda Kumar Naskar v. Hari Das Halder* (2), *Jogendra Nath Roy v. Nagendra Narain Nandi* (3), *Chandra Nath Tewari v. Protap Udai Nath Sahi* (4), *Joy Gobind Laha v. Manmotho Nath Banerji* (5), *Abdul Aziz v. Basdeo Singh* (6) and *Nathuni Narayan Singh v. Mahanth Arjun Gir* (7), relied on.

Where, therefore, a decree was obtained by a landlord against his tenants, some of whom were dead at the time of the institution of the suit, and, in execution thereof, the holding was sold, *held*, that the liability being joint and several, only so much of the decree as affected the rights of the deceased defendants was a nullity and that the sale passed the right, title, and interest of the surviving judgment-debtors.

### Appeal by the defendant.

The Maharaja of Dumraon, who was the appellant in this case, brought a rent suit against the present plaintiffs, the present defendants 4 to 10 and seven other persons who were dead at the date of the institution of the suit. The Maharaja was made aware of the fact that seven of the defendants were already dead and it appeared that he filed a petition

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- (1) (1919) 4 Pat. L. J. 240.  
 (2) (1899-1900) 4 Cal. W. N. 608.  
 (3) (1906-07) 11 Cal. W. N. 1026.  
 (4) (1913-14) 18 Cal. W. N. 170.  
 (5) (1906) I. L. R. 33 Cal. 580.  
 (6) (1912) I. L. R. 34 All. 604.  
 (7) (1925) 6 Pat. L. T. 526.

in the Court asking the Court not to pass any decree against the dead persons. He recovered judgment as against those tenants who are living but in the decree the names of the dead persons were included. The judgment was pronounced on the 26th April, 1919. In due course the Maharaja took out execution and the holding was purchased by the present defendants 2 and 3. It was alleged by the present plaintiffs that defendants 2 and 3 were the benamidars of the Maharaja. The present plaintiffs applied for setting aside the sale under the provisions of Order XXI, rule 90, of the Code and that application was rejected on the 8th May, 1920. On the 17th July, 1920, defendants 2 and 3 took delivery of possession of the holding. On the 18th August, 1920, the suit out of which this appeal arose was instituted by the plaintiffs-respondents for setting aside the decree of the 26th April, 1919, on the ground of fraud. Various allegations were made in the plaint so as to raise a case of fraud from start to finish. These allegations were not examined either by the primary Court or by the lower appellate Court. The courts below decreed the suit on the ground that the decree of the 26th April, 1919, obtained by the Maharaja, was a nullity inasmuch as it was obtained against dead persons. The holding purchased by defendants 2 and 3 comprised an area of 14.55 acres and the plaintiffs in this suit claimed to recover 6.36 acres as their share in the holding.

*L. N. Sinha* and *N. N. Sinha*, for the appellant.

*P. Dayal* and *C. S. Banerji*, for the respondents.

DAS, J. (after stating the facts set out above, proceeded as follows): It is not open to doubt that a decree against a dead person is a nullity. This was laid down in *Jungli Lal v. Laddu Ram Marwari* <sup>(1)</sup>; but the question whether the whole decree is a nullity must depend on the question whether the failure on the part of the landlord to bring the representatives in

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interest of the deceased tenants on the record affected his right to proceed with the suit. This again must depend on the question whether the tenants who are properly sued could take the plea that the suit could not proceed until the representatives in interest of the deceased tenants were brought on the record. Now on this question it seems to me that only one answer is possible. Under section 43 of the Indian Contract Act the liability of the joint promissor is joint and several and that section excludes the right of the joint contractor to be sued along with his co-contractors. It was in my opinion open to the landlord to bring a suit for rent against all or any of the tenants; though it may be conceded that a decree against some of the tenants cannot be executed as a rent decree and can only be executed as a money decree. This view has been affirmed in cases far too numerous to mention. In *Ananda Kumar Naskar v. Hari Das Halidar* (1) a decree was obtained in a suit for rent against some only of the tenants. It was held that the sale did not pass the entire jama but that only the right, title and interest of the judgment-debtors passed. In *Jogendra Nath Roy v. Nagendra Narain Nandi* (2) it was held that a suit for rent against some of several joint tenants is maintainable as joint tenants are jointly and severally liable. In *Chandra Nath Tewari v. Protop Udai Nath Sahi* (3) it was held that a decree obtained against some of the tenants cannot be executed as a decree for rent but that it is open to the landlord to treat the decree as a decree for money and to execute it as such. In *Joy Gobind Laha v. Manmutho Nath Banerji* (4) the question arose whether the whole appeal had abated because one of the tenants had died and no legal representative of the deceased had been brought on the record. It was held that the liability of the tenants being joint and several the death of one of the tenants without his legal representatives being substituted in his place did not have the

(1) (1899-1900) 4 Cal. W. N. 608.

(2) (1906-07) 11 Cal. W. N. 1026.

(3) (1913-14) 18 Cal. W. N. 170.

(4) (1906) I. L. R. 33 Cal. 580.

effect of exonerating the other defendants from the liability. This case was followed in *Abdul Aziz v. Basdeo Singh* (1). I find that a similar view has been taken in this Court in *Nathani Narayan Singh v. Mahanth Arjun Gir* (2).

Now this being the position, it is quite clear that the entire decree obtained by the Maharaja on the 26th April 1919 cannot be regarded as a nullity. It is quite true that the holding did not pass at the execution case which followed the decree of the 26th April 1919 and it is also true that the interests of those tenants who were dead before the institution of the suit did not pass at the sale. But the present plaintiffs were parties to the suit and their interests undoubtedly passed at the sale. In my opinion the Courts below were wrong in decreeing the claim of the plaintiffs on the ground that the decree of the 26th April, 1919, was a nullity.

But the questions which were raised by the plaintiffs have not been investigated by the Courts below and I should like to point out that the course adopted by the learned Additional Subordinate Judge was wrong. It may be that he was confident that his decision on the point of law was a correct decision; but it is at least conceivable that a superior court may differ from him as to his decision on the point of law and in my opinion the learned Additional Subordinate Judge should have tried all the issues that arose in the case. This would have had the effect of not only shortening the litigation but of saving of costs to the parties.

I would allow the appeal, set aside the judgments and the decrees passed by the Courts below and remand the case to the lower appellate court with instructions that it should remand the case to the Court of first instance for decision of the questions of facts raised in the case. The appellant is entitled to the costs both of this Court and in the Courts below. The costs

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incurred in the first court will abide the result and will be disposed of by the learned Subordinate Judge.

We are informed that one of the plaintiffs is the representative in interest of one of the dead persons. If that be so, his interest has not passed by the execution sale. The learned Subordinate Judge in dealing with the case will bear this in mind.

ADAMI, J.—I agree.

*Case remanded.*

### APPELLATE CRIMINAL.

*Before Mullick and Kulwant Sahay, J.J.*

RAMSUNDAR ISSER

v.

KING-EMPEROR.\*

1925.  
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*Penal Code, 1860 (Act XLV of 1860), sections 34, 149 and 436—Notification making an offence under section 436 triable by a jury, whether applicable to a trial for an offence under section 436 read with section 149.*

Under section 269(1) of the Code of Criminal Procedure, 1898, "The Local Government may.....by order in the official Gazette direct that the trial.....of any particular class of offence, before any Court of Session, shall be by jury in any district".

By a notification published in the official Gazette on the 11th September, 1921, certain offences, including an offence under section 436, Penal Code, were directed to be tried by jury, in the district of Darbhanga. An accused person was committed by the Subdivisional Magistrate to the Court of Session for trial on charges of arson and abetment of arson. In the Session Court these charges were dropped and the accused was charged under section 436 read with section 149, and was tried by a Judge with the aid of assessors.

*Held*, that the effect of the notification was to make a charge under section 436 read with section 149 triable by jury, and, therefore, the trial by the Judge with the aid of assessors was void.

\* Criminal Appeal no. 158 of 1925, from a decision of Rai Bahadur J. Chatterji, Sessions Judge of Darbhanga, dated the 29th August, 1925.