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appellate court has not gone into the question as it should have done and in view of the fact that the appeals fail on the first point it is not necessary to deal with the matter any further. These appeals must be dismissed with costs.

COURTNEY TERRELL, C.J.—I agree.

Appeals dismissed.

FAZL ALI, J.

APPELLATE CIVIL.

1932.

Before Courtney Terrell, C.J., and Fazl Ali, J.

August 29.

RAMESHWAR PRASAD BHAGAT

v.

RAM RATAN RAM.*

Execution—decree in favour of two coparceners of joint Hindu family—death of one coparcener—execution by the surviving coparcener decree-holder—Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 16, whether applies—rule 15, applicability of—omission to mention fact of death of the deceased decree-holder, whether fatal to execution.

Upon the death of a coparcener of a joint Hindu family his share and interest in the family property becomes extinct and the surviving coparceners become the full owners of the whole estate. It is really not a case of the transfer of the interest held by the deceased coparcener but the total extinction or absorption of that interest.

Order XXI, rule 16, Code of Civil Procedure, 1908, is intended primarily for those cases where the name of the applicant for the execution of the decree does not appear as a decree-holder in the decree and he bases his right to execute the decree on the ground that the interest of one or more of the decree-holders has been assigned to him in writing or transferred to him by operation of law.

Where, therefore, the application for execution is on behalf of one of the decree-holders as the sole surviving coparcener and he bases his title not as a transferee but as the surviving decree-holder, the provision of Order XXI, rule 16, does not apply.

* Appeal from Original Order no. 68 of 1931, from an order of Babu Rabindra Nath Ghosh, Subordinate Judge of Santal Parganas, dated the 3rd January, 1931.

Held, further, that the provision of Order XXI, rule 15, applies to such a case and that the mere omission to mention the fact of death of the deceased decree-holder in the application for execution is not such a vital omission as to entitle the court to reject the petition.

Appeal by the decree-holder.

The facts of the case material to this report are stated in the judgment of Fazl Ali, J.

S. C. Mazumdar, for the appellant.

S. N. Bannerji, for the respondents.

FAZL ALI, J.—This is an appeal by a decree-holder whose application for execution has been struck off by the Subordinate Judge of the Santal Parganas. The facts of the case are briefly these:—The decree which is sought to be executed was passed in favour of two persons, namely, Ganesh Lal Bhagat and the appellant Rameshwar Prasad Bhagat, on the 8th January, 1918, in the Birbhum district. On the 23rd June, 1928, it was transmitted to the court at Rajmahal for execution. On the 30th July, 1929, Ganesh Lal Bhagat, one of the decree-holders, died. On the 13th December, 1929, Rameshwar Prasad Bhagat applied for execution of the decree. It may be stated here that both Ganesh Lal and Rameshwar Prasad Bhagat were members of a joint family and as a result of the death of Ganesh Lal Bhagat, Rameshwar Prasad Bhagat became the sole person interested in the decree by right of survivorship.

Two objections were taken on behalf of the judgment-debtors before the learned Subordinate Judge. It was urged in the first place that the appellant should have, under Order XXI, rule 15, of the Code of Civil Procedure, mentioned the fact of Ganesh Lal Bhagat's death in the execution petition itself and that fact not having been mentioned, the petition for execution could not be amended at a later stage. The second objection was that properly speaking the interest of Ganesh Lal Bhagat had been transferred to the appellant by operation of law and,

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therefore, under Order XXI, rule 16, of the Code of Civil Procedure the appellant should have made his application for execution to the court which originally passed the decree.

The learned Subordinate Judge has held that in this case the appellant should have made his application under Order XXI, rule 16, before the court which passed the decree and the application could not, therefore, be entertained by him. The real question thus is whether Order XXI, rule 16, is applicable to the present case. It is urged on behalf of the respondents that in this case the interest of Ganesh Lal Bhagat has been transferred by operation of law to the appellant but I do not think that this is a correct view. It is well recognised that upon the death of a coparcener of a joint Hindu family his share and interest in the family property becomes extinct and the surviving coparceners become the full owners of the whole estate. It is really not a case of the transfer of the interest held by the deceased coparcener but the total extinction or absorption of that interest. It seems to me that Order XXI, rule 16, is intended primarily for those cases where the name of the applicant for the execution of the decree does not appear as a decree-holder in the decree and he bases his right to execute the decree on the ground that the interest of one or more of the decree-holders has been assigned to him in writing or transferred to him by operation of law. Here the appellant is not a stranger but one of the decree-holders and he claims to execute the decree not as a transferee but as the surviving decree-holder. In my opinion, therefore, the present case falls under Order XXI, rule 15, which provides that where a decree has been passed jointly in favour of more persons than one and any of them has died any one or more of such persons may apply for the execution of the whole decree for the benefit of the survivors and the legal representatives of the deceased. Here one of the decree-holders has died without leaving any legal representative and without leaving any other survivor except the appellant and, therefore, it is permissible

for the appellant decree-holder to apply for the execution of the decree as if he was the sole decree-holder.

It is urged on behalf of the respondents that even though it may be assumed that the case will be governed by Order XXI, rule 15, the fact of the death of Ganesh Lal Bhagat should have been mentioned in the execution petition and it should have been stated there that the appellant was executing the decree as a survivor. What has, however, to be remembered is that this provision has been enacted in order to protect the interests of the persons other than the decree-holder applying for the execution of the decree and with this object sub-rule (2) of Order XXI, rule 15, provides that where the court sees sufficient cause for allowing the decree to be executed on an application made under that rule it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application. It is thus clear that the information is required under the rule merely to enable the court to protect the interests of the persons who have not joined in the application. In this particular case there are no persons other than the appellant who are interested in the decree and it was not necessary for the court to pass any orders under sub-rule (2) of Order XXI, rule 15. The facts that Ganesh Lal Bhagat is dead and that Rameshwar Prasad now claims to execute the decree as a survivor have been brought to the knowledge of the court in the course of the execution proceedings and I do not think that the mere omission to mention the death of Ganesh Lal Bhagat in the execution petition is such a vital omission as to entitle the court to reject the petition. In my opinion the court should proceed to execute the decree after making a note of the fact that Ganesh Lal Bhagat is dead and that Rameshwar Lal Bhagat is the surviving decree-holder. I would, therefore, set aside the order of the court below and allow this appeal with costs.

COURTNEY TERRELL, C.J.—I agree.

Appeal allowed.

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FAZL ALI, J.