

APPELLATE CIVIL.*Before Khaja Mohamad Noor and Luby, JJ.*

F. A. McNAUGHT

1934.

July, 25.

v.

MUSAMMAT SARASWATI THAKURAIN.*

Execution—substitution—representative of deceased decree-holder, whether can get his name substituted during the pendency of execution proceeding—Code of Civil Procedure, 1908 (Act V of 1908), Order XXII, rules 3, 4 and 12.

Rule 12 of Order XXII, Code of Civil Procedure, 1908, by excluding proceedings in execution from the operation of rules 3 and 4, does not prohibit the substitution of a name in execution proceeding.

Therefore, the representative of a deceased decree-holder can get his name substituted during the pendency of an execution proceeding and can proceed with it.

Venkatachalan Chetti v. Ramaswamy Servai(1), *Musammat Gulab Kuer v. Syed Mohamad Zaffar Hassan Khan*(2) and *Musammat Bhagwantia Kuer v. Dewan Zamir Ahmad Khan*(3), followed.

M. P. P. S. T. Palaniappa Chettiar v. Valliammai Achi(4), not followed.

Bajnath v. Ram Bharos(5) and *Mirza Muhammad Sadiq Ali Khan v. Sajjad Mirza*(6), referred to.

Appeal by the representatives of the decree-holder.

The facts of the case material to this report are set out in the judgment of Khaja Mohamad Noor, J.

* Appeal from Original Order no. 91 of 1933, from an order of Babu Nidheshwar Chandra Chandra, Subordinate Judge of Purnea, dated the 24th February, 1933.

(1) (1931) I. L. R. 55 Mad. 352, F. B.

(2) (1921) 6 Pat. L. J. 358.

(3) (1924) I. L. R. 3 Pat. 596.

(4) (1926) I. L. R. 50 Mad. 1.

(5) (1927) I. L. R. 49 All. 509, F. B.

(6) (1927) I. L. R. 3 Luck. 126.

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Mehdi Iman and Azizullah, for the appellants.

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U. N. Banerjee, for the respondent.

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KHAJA MOHAMAD NOOR, J.—The simple question involved in this appeal is whether the representatives of a deceased decree-holder can get their names substituted during the pendency of an execution proceeding and proceed with it. It seems that Mr. A. J. Forbes held a decree against the respondent. He died, and his estate was administered by his executor, Mr. A. H. Forbes. Mr. A. H. Forbes took out execution of the decree and then died. His executors applied for the substitution of their names in the execution proceedings in place of Mr. A. H. Forbes and wanted to proceed with the execution. There were certain objections raised as to the right of the executors of Mr. A. H. Forbes to continue the execution proceedings. That has been decided in favour of the appellants, and there is no cross-objection before us.

The second objection was that there was no provision in the Civil Procedure Code by which a representative of a deceased decree-holder could be substituted in the course of an execution proceeding. This objection prevailed before the learned Subordinate Judge. He relied upon a decision of the Madras High Court in *M. P. P. S. T. Palaniappa Chettiar v. Valliammai Achi*⁽¹⁾ and held that the representative of a deceased decree-holder should start fresh execution proceedings. The executors of Mr. A. H. Forbes have preferred this appeal.

It appears that the decision relied upon by the learned Subordinate Judge was expressly overruled by a Full Bench of the Madras High Court in *Venkatachalam Chetti v. Ramaswamy Servai*⁽²⁾. The reason for the decision in *M. P. P. S. T. Palaniappa Chettiar v. Valliammai Achi*⁽¹⁾ was that the Code

(1) (1926) I. L. R. 50 Mad. 1.

(2) (1931) I. L. R. 55 Mad. 352, F. B.

made no provision for the substitution of the name of the representative of the decree-holder during the course of execution proceedings, and further that Order XXII, rule 12, clearly took out the provision of rules 3 and 4 of Order XXII of the Civil Procedure Code from the execution proceedings. As has been pointed out by the two learned Judges, who composed the Full Bench of the Madras High Court, rule 12 by excluding rules 3 and 4 does not prohibit the substitution of a name in execution proceedings. It is needless to give in detail the reasonings given by them for holding that substitution is permissible. We respectfully agree with the views expressed by them, and the decision must be followed. The learned Advocate on behalf of the respondent has drawn our attention to two cases; one is a Full Bench decision of the Allahabad High Court in *Baij Nath v. Ram Bharos*(¹). The observations relied upon by the learned Advocate are to be found at page 514 of the report; but those observations, in my opinion, are more or less-obiter dicta. What was decided in the case was that an application for substitution was not a fresh application so as to come within the mischief of section 48 of the Civil Procedure Code, but it was an application to continue the pending execution. This case helps the appellants. The learned Advocate has further relied upon the case of *Mirza Muhammad Sadiq Ali Khan v. Sajjad Mirza*(²), but that case also, in my opinion, helps the appellants rather than the respondent. There also there was an application for substitution and the Oudh Chief Court held it to be an application to continue the pending execution proceedings. These two decisions were noticed by the Full Bench of the Madras High Court and the learned Judges used them as well as the two decisions of this Court to which I shall presently refer in support of the view that substitution in the course of the execution proceedings was permissible. A

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similar view seems to have been taken by a Bench of this Court in *Musammatt Gulab Kuer v. Syed Mohamed Zaffar Hussan Khan*(¹) where it was held that where the decree-holder assigned his interest to another, an application by the assignee for substitution of his name in place of that of the assignor was an application under Order XXI, rule 16, of the Code of Civil Procedure, 1908, and not an application under Order XXII, rule 10; and if, at the time of such application, execution proceedings were pending, the application was not a fresh application for execution but merely an application for bringing the assignee on the record and for continuing the pending execution proceedings. This case was followed in the case of *Musammatt Bhagwantia Kuer v. Dewan Zamir Ahmad Khan*(²) where an application for substitution of the name of the representative of a deceased decree-holder filed in the course of the execution proceedings was held to be an application to continue the execution proceedings so as to save the application from becoming barred by limitation.

No doubt, there is no express provision for substitution of the name of a representative of the deceased decree-holder during the pendency of the execution proceedings; but, as is apparent from a number of decided cases, such applications are filed and allowed, and the Courts have almost invariably treated such applications to be applications for continuation of the pending execution proceedings. It has been held more than once that the Code is not exhaustive. It is clear from Order XXII, rule 12, read with rules 3 and 4, that an execution proceeding does not abate on the death of the decree-holder. If so, there is no bar to the execution continuing at the instance of his representative. I see no reason why a fresh application should be necessary. I am, therefore, of opinion that in view of the decisions of this Court and of the Full

(1) (1921) 6 Pat. L. J. 358.

(2) (1924) I. L. R. 3 Pat. 596.

Bench decision of the Madras High Court, the view taken by the learned Subordinate Judge is wrong. His order is set aside. He is directed to substitute the names of the appellants, and then proceed to execute the decree according to law.

The appeal is allowed with costs.

LUBY, J.—I agree.

Appeal allowed.

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LETTERS PATENT.

Before Courtney Terrell, C.J. and Agarwala, J.

SRIMATI PARBATI KUMARI

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DOMAN MANJHI.*

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Chota Nagpur Tenancy Act, 1908 (Ben. Act VI of 1908), section 64(3)—tenant commenced to convert land into Korkar—Deputy Commissioner, whether has exclusive jurisdiction in the matter of ejectionment.

Section 64(3), Chota Nagpur Tenancy Act, 1908, provides :

“ Where the consent of the landlord is required by this section for the conversion of land into korkar, such consent shall be deemed to have been given if, within two years from the date on which the cultivator commenced such conversion, the landlord has not made an application to the Deputy Commissioner for the ejectionment of the cultivator (and no cultivator who is a tenant or resident of a village, shall be ejected from land of that village, which he has commenced to convert into korkar, otherwise than upon such an application) ”.

Held, that the concluding sentence of the section has the effect of giving to the Deputy Commissioner exclusive jurisdiction in the matter of ejecting a tenant or a resident of the village from land which he has begun to convert into korkar.

The only way in which that jurisdiction can be ousted in favour of the civil court is by showing that the defendant is neither a tenant nor a resident of the village.

* Letters Patent Appeals nos. 180—188 of 1933 from a decision of the Hon'ble Mr. Justice Khaja Mohamad Noor, dated the 14th November, 1933.