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until the present stage, which is an attempt to obtain revision of an order confirming the order of conviction. Section 537 of the Code is a complete answer to the contention.

The result, therefore, is that the conviction and sentence under section 209 of the Penal Code must be set aside, and the convictions and sentences under sections 193 and 471 confirmed.

LUBY, J.—I agree.

Conviction and sentence partially set aside

APPELLATE CIVIL.

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August, 30. September, 2.

Before Khaja Mohamad Noor and Saunders, JJ.

GOBARDHAN MUKHERJEE

v.

SALIGRAM MARWARI.*

Code of Civil Procedure, 1908 (*Act V of* 1908) *s.* 146, *Order XXII, rules* 3 *and* 10—*assignment by legal representative of a deceased party—legal representative not brought on the record—application by assignee, whether maintainable—rule* 10, *applicability of—rule* 3, *whether applies to a person claiming as assignee.*

Order XXII, rule 10, Code of Civil Procedure, 1908, which empowers the court to give leave to a person to continue the suit, applies to cases in which there has been an assignment by a party who is already on the record.

Where, therefore, the legal representative of a deceased party instead of coming forward and himself taking up the responsibility of the suit, transferred his interest to another person and such other person applied for leave to continue the suit under rule 10 of Order XXII, and the trial court refused to give leave.

Held, that the application was rightly rejected.

*Appeal from Original Order no. 190 of 1934 and Civil Revision no. 439 of 1934, from an order of Babu Narendra Nath Banarji, Subordinate Judge of Manbhum, dated the 14th of February, 1934.

Maharaja Sir Manindra Chandra Nandi v. *Ram Lal Bhagat*(1), followed.

Held, further, that rule 3 of Order XXII, does not apply to a person who does not come in as a legal representative of a deceased party but as an assignee from him.

Appeal by the applicant.

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

G. C. Mukharji, for the appellant.

R. S. Chattarji, for the respondents.

KHAJA MOHAMAD NOOR, J.—This appeal and the revision application are directed against an order of the Subordinate Judge of Manbhum refusing to substitute the name of the appellant in place of a deceased sole plaintiff of a suit named Matangini, who had instituted the suit for certain property against the present respondents. She died during the pendency of the suit. The date of her death is stated to be 15th November, 1933. On the 2nd of December, 1933, the present appellant Gobardhan Mukharjee filed an application to the effect that he had acquired a 99 years' lease of the disputed property from the deceased plaintiff and wanted that he should be substituted in her place. On the 8th of January, 1934, the learned Subordinate Judge passed an order which, in my opinion, was an order rejecting the application. The order ran thus:

"Now Matangini has died and an application has been made for substitution by Gobardhan Mukherjee as being ijaradar of Matangini. Matangini had limited interest according to the plaint. Therefore the ijaradar cannot be substituted in her place after her death".

By a second petition filed on that date (the 8th of January, 1934) Gobardhan Mukherjee made a fresh prayer for substitution of his name on the basis of a document which he claimed to have obtained from one Priyasakhi said to be the daughter of the deceased Matangini. He also asked that Priyasakhi should be

(1) (1922) I. L. R. 1 Pat. 581, P.C.

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made a *pro forma* defendant. By his order, dated the 14th of February, 1934, the learned Subordinate Judge rejected this application and Gobardhan Mukherjee has come up in appeal. Being doubtful about his right to appeal he has also filed a revision application.

The learned Advocate for the appellant has contended that his client was entitled to have his name brought on the record as plaintiff either under Order XXII, rule 3, read with section 146 of the Code of Civil Procedure or under Order XXII, rule 10, either as representative of the original plaintiff now dead or as representative of her daughter Priyasakhi. I shall deal with the two applications of the appellant before the lower Court separately. The first application of the appellant was for substitution of his name as an assignee from the original plaintiff and not as her legal representative within the meaning of the Code. Order XXII, rule 3, deals with substitution after the death of a party. This rule, in my opinion, does not apply to a man who does not come in as a legal representative of a deceased party but as an assignee from him. It is accidental in this particular case that the first application of the appellant was filed after the death of the original plaintiff. But the right which the appellant claimed did not accrue to him on the death of the plaintiff but on a transfer made to him by her in her lifetime. Therefore, it is obvious that he cannot come in as a man entitled to have his name substituted in consequence of the death of the original plaintiff. The term 'legal representative' is defined in section 2(*11*) of the Code of Civil Procedure thus:

> "Legal representative means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued".

It cannot for a moment be argued that the appellant having obtained a lease from Matangini has become

her legal representative. He does not even represent the whole of the disputed property, much less he represents the estate of Matangini. The alleged ninety-nine years' lease relied upon by the appellant reserves an annual rent of Rs. 189, and, therefore, assuming this lease to be a genuine transaction, interest in the disputed property to that extent was left in Matangini.

I now come to the question whether the appellant could have his name substituted for that of Matangini under Order XXII, rule 10, on the basis of this lease. Now there is a difference between rule 3 and rule 10. In case there is a death of a party to a suit, the Court on a proper application, is bound to substitute the legal representative of the deceased party under rule 3 while rule 10 refers to cases of assignment, creation or devolution of an interest during the pendency of a suit other than on death, etc. In this case the Courts have a discretion to give leave for the suit to be continued by or against the person to or upon whom such interest has come or devolved. It may be that the appellant came under this rule, but the learned Subordinate Judge by his order dated the 8th of January has rejected his first application on the ground that Matangini had claimed only a life-interest in the property in suit. That order, in my opinion, has become final. No appeal was preferred against it within the time allowed by law. The present appeal is against an order rejecting the second application based upon an assignment from Priyasakhi and is described by the appellant as having been passed on the 14th of February, 1934, and confirmed on the 17th of February, 1934. The first order cannot, therefore, be interfered with. I however regret this result. It would have been much better for the administration of justice if the claim of the appellant to have acquired a lease from Matangini could have been investigated. The circumstances under which the lease came into existence are very suspicious. Matangini died on

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the 15th of November, 1934. This document is dated the 14th of November, i.e. a day before her alleged death, but was registered by her Mukhtar-Am Upendra Nath Banarji on the 15th of November, the day Matangini is said to have died. The time of the death is not known and it cannot be said whether it was registered before or after her death. The defendants alleged that this document was bogus and fictitious. Matangini sued in *forma pauperis* and the defendants' suggestion was that this Mukhtar-Am got up this document in order to continue the suit in that form. Priyasakhi, the heiress of Matangini, could not have done so, as she has properties of her own. This suggestion is to some extent supported by the fact that Priyasakhi did not come forward to apply for substitution of her name in spite of the fact that, if the lease is genuine, her mother had reserved to herself an interest of Rs. 189 a year in the disputed property and the appellant is admittedly a beggar by profession. However, the matter has ended and nothing further need be done.

I now proceed to consider the appellant's second application dated the 8th of January, 1934, based upon an assignment from Priyasakhi. The learned Advocate appearing on his behalf has attempted to bring this application also under Order XXII, rule 3. It is clear from what I have said above that rule 3 applies to substitution in case a party dies. Priyasakhi is not dead. Nor can the appellant be a legal representative of Priyasakhi even if she were dead. The learned Advocate, however, tried to apply section 146 of the Code of Civil Procedure and argued that whatever could have been done by Priyasakhi can be done by her assignee the appellant. Conceding that section 146 of the Code has any application to this case the utmost which can be said is that the appellant is entitled to make an application; but the only application which he can make is for substitution of the name of Priyasakhi in place of Matangini.

Section 146 authorizes a person claiming under another person to make an application which the other person could have made. The appellant can make an application which Priyasakhi could have made, namely, for substitution of her name. I fail to understand how he can apply for substitution of his own name.

Now comes the question as to whether the appellant can get leave to continue the suit under Order XXII, rule 10. The learned Subordinate Judge, relying upon certain observations of the Privy Council in *Maharaja Sir Manindra Chandra Nandi* v. *Ram Lal Bhagat*(1) and on the decision in *Chunnaghat Kalli Kutti Amma* v. *Kallingal Tarvad Karunawan*(2), has held that that rule applies to cases in which there has been an assignment by a party who is already on the record. The observations of the Privy Council do not apply very much to the facts of the present case, but the Madras decision which is of a Single Judge is exactly in point and, if I may say so, I entirely agree with the view taken there and in my opinion the learned Subordinate Judge has rightly rejected the application. Rule 10 empowers the Court to give leave to a person who has taken an assignment from a party to continue the suit. The 'party' there obviously refers to a party already on the record. Now in this particular case there has been no substitution of the legal representative of the deceased plaintiff Matangini. Her daughter Priyasakhi seems, as I have said, to be unwilling to come up and prosecute the suit for reasons of her own. It will be defeating the object of the law if the legal representative of a deceased party instead of coming forward and himself taking up the responsibility of the suit transfers his interest to another man and that man be permitted to continue the suit. This disadvantage will be obvious if we refer to the facts of this particular case. The appellant is admittedly a beggar by profession, Priyasakhi is unwilling to

(1) (1922) I. L. R. 1 Pat. 581, P.C.
(2) (1925) A. I. R. (Mad.) 1166.

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come forward, and, if the appellant be allowed to prosecute the suit, the defendants will be deprived of their costs. Assuming, however, that it was open to the learned Subordinate Judge to allow the appellant to prosecute the suit, the circumstances of this case were such in which the discretion ought not to have been exercised.

I see no ground for interference. The appeal is dismissed with costs and the civil revision petition is rejected. No separate costs will be taxed for the revision application.

SAUNDERS, J.—I agree.

Appeal dismissed.

Rule discharged.

APPELLATE CIVIL.

1935.

August, 1, 2, 5, 6, 7. September, 23.

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

MAHABIR PRASAD MARWARI

v.

SYED SHAH MOHAMMAD YEHIA.*

Muhammadan Law—wakf—sajjadanashin—mutawalli, how far can incur debts and bind the trust estate—sanction of Kazi, whether necessary—carrying out of the objects of trust, whether is a valid purpose for incurring debts—position of mutawalli, whether different from that of mahanth of Hindu math.

Where a trustee has incurred a debt the creditor cannot recover against the trust property unless the trustee, if he had paid the debt, could have claimed indemnity out of the trust property. In other words, the principle of subrogation applies; the creditor can only claim to stand in the shoes of the trustee against the trust property and his rights are no greater than those of the trustee.

*Appeal from Original Decree no. 140 of 1932, from a decision of Maulavi Abdul Aziz, Subordinate Judge of Monghyr, dated the 8th August, 1932.