

at this stage upon the alienations which they now propose to challenge. Credit of course must be given to them for the Rs. 15 they have already paid.

It is quite clear that the plaintiffs had no right whatsoever to an interim injunction in this case. They have no right to possession and they have no right to restrain the widow in this suit. It is a suit purely for a declaration and consequently an interim injunction should not have been granted. As the matter is before us in revision the Court has power to discharge the interim injunction and I would, therefore, discharge it.

In the result, therefore, I would allow this application in part and vary the order of the court below and direct that Court to calculate the court-fee upon the lines indicated in my judgment. The ad interim injunction will also be discharged. Each party will bear its own costs.

KHAJA MOHAMAD NOOR, J.—I agree.

S.A.K.

Application allowed in part.

APPELLATE CIVIL.

Before Rowland and Chatterji, JJ.

MAZHARUL HAQ

v.

RAGHUBER SINGH.*

Execution—application for execution against surety—death of surety—heirs not brought on record—heirs entering appearance—Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 22, notice under, whether necessary.

Execution proceedings started against a surety cannot be continued, after his death, against his estate without bringing

* Appeal from Appellate Order no. 71 of 1939, from an order of T. G. K. N. Ayyar, Esq., I.C.S., District Judge of Saran, dated the 30th November, 1938, reversing an order of Babu Bijay Krishna Sarkar, Subordinate Judge at Chapra, dated the 24th June, 1938.

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on the record his legal representatives. While substituting the heirs the Court should issue notice under Order XXI, rule 22, Code of Civil Procedure, 1908, against them, and their objection, if any, should be heard before the execution proceeding can be further continued; the fact that the legal representatives have already entered appearance is immaterial.

Kanchamalai Pathar v. Shahaji Rajah Sahib(1), *Smith v. Kailash Chandra Chakraverty*(2) and *Raghunath Das v. Sundar Das Khetri*(3), followed.

Fakhrul Islam v. Rani Bhuvaneshwari Kuer(4), distinguished.

Per Rowland, J.—The correct procedure for the initiation of proceedings against the surety is first to call on him to produce the judgment-debtor; next, on his failure to do so, to call on him to show cause against forfeiture and execution; next, on failure to show cause to the satisfaction of the Court, to obtain an order of the Court directing execution to proceed against the person and properties of the surety.

The correct procedure after the death of the surety is to substitute his heirs in the execution proceeding and obtain leave of the Court to continue the execution against them; thereafter, to serve them with notices under Order XXI, rule 22, and on their appearance the Court, after hearing and determining any objections that they might make, should permit or disallow the continuance of the execution.

Doraswami v. Chidambaram Pillai(5), not followed.

Kanchamalai Pathar v. Shahaji Rajah Sahib(1), *Raghunath Das v. Sundar Das Khetri*(3) and *Smith v. Kailash Chandra Chakraverty*(2), referred to.

Appeal by the legal representatives of the (surety) judgment-debtor.

(1) (1935) I. L. R. 59 Mad. 461, F. B.

(2) (1931) I. L. R. 11 Pat. 241.

(3) (1914) I. L. R. 42 Cal. 72, P. C.

(4) (1928) I. L. R. 7 Pat. 790.

(5) (1923) I. L. R. 47 Mad. 63.

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

S. K. Mitra and *M. Rahman*, for the appellants.

S. M. Mullick (with him *Jaleshwar Prasad* and *Thakur A. D. Sinha*), for the respondents.

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CHATTERJI, J.—The respondents obtained a money decree against one Zafarullah. In execution of that decree in execution case no. 54 of 1935, Zafarullah was arrested. When brought to court he intimated that he would file an application for adjudication as insolvent and in accordance with the provisions of section 55 (4) of the Code of Civil Procedure, one Razaq Mian stood surety for him. In the surety bond Razaq hypothecated certain properties belonging to him. Zafarullah did file an application for insolvency, but it was dismissed by the District Judge. On appeal to the High Court, the order was confirmed. Soon after the disposal of that insolvency case by the District Judge the decree-holder filed on the 5th March, 1937, an application for execution of the decree against Razaq, the surety. On the 5th April, 1937, notice under Order XXI, rule 22, was issued on Razaq fixing the 26th April, 1937, for his appearance. On the 26th April, 1937, Razaq appeared and filed an objection mainly on the ground that the application for execution was not maintainable against him as the provisions of law had not been complied with. On the same day the Court issued a notice against Razaq calling upon him to produce the judgment-debtor and also to shew cause why the execution should not proceed against him. On the 22nd May, 1937, the date fixed in the notice, Razaq neither produced the judgment-debtor nor shewed cause; but he filed an application for time and it appears that time was allowed and the case was adjourned to 12th June, 1937. On the 12th June, the Court issued an order of attachment of the properties mentioned in the surety bond. In the meantime the execution proceedings

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were stayed pending the disposal of the High Court appeal arising out of the insolvency proceeding. As the execution proceeding was stayed, Razaq did not want to proceed with his objection which was dismissed for non-prosecution on the 21st September, 1937. After the High Court appeal was disposed of the decree-holder made an application to continue the execution proceeding which was allowed. On the 4th May, 1938, after the sale proclamation had been issued Razaq died. Thereafter on the 17th May, 1938, his legal representatives appeared and filed an objection stating that the execution could not proceed against them. This objection was allowed by the Subordinate Judge on the 24th June, 1938. He held that there were certain irregularities in the execution proceedings and in face of them he would not continue the execution. Against that order the decree-holder filed an appeal to the District Judge who allowed it. He took the view that the liability of Razaq under the surety bond having been admittedly incurred, the decree-holder was entitled to proceed in execution against his properties. He further held that it was not necessary in the execution proceeding to substitute the heirs of Razaq or to issue any notice against them. Against this decision this miscellaneous second appeal has been preferred by the heirs of Razaq.

Three points are urged in this appeal: *first*, that the execution which was started on the 5th March, 1937, against Razaq was not maintainable, because the requisite notices were not served on him;

second, that the decree-holder should have after the death of Razaq substituted his legal representatives under section 50 of the Code of Civil Procedure and issued notices against them under Order XXI, rule 22;

third, that the decree-holder could not proceed at the same time both against the surety and the judgment-debtor.

In connection with this last point, I ought to have mentioned that when the Subordinate Judge allowed the objection of these appellants, the decree-holder prayed for arrest of the judgment-debtor which was granted.

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I will deal with the second point first. Indeed the execution proceeding had already reached the stage of the sale proclamation having been issued when Razaq died; but it by no means follows that the decree-holder was at liberty to proceed with the execution against a dead man. The learned District Judge seems to be of opinion that in the circumstances the execution proceeding can be continued without substituting the heirs of Razaq. I am unable to support this view of the law. Suppose in an execution proceeding the judgment-debtor dies after attachment and issue of sale proclamation and the property is sold without substituting his heirs, who in that case will exercise the statutory right conferred by Order XXI, rule 89, of the Code of Civil Procedure and make the necessary application? A dead man is on the record and his legal representatives may have no knowledge of the proceedings. On principle I do not think the Court can sell the property of a dead man. I am, therefore, of opinion that the decree-holder before he could proceed with the execution should have substituted the heirs of Razaq. In this connection reference may be made to the Full Bench decision of the Madras High Court in *Kanchamalai Pathar v. Shahaji Rajah Sahib*⁽¹⁾, where though the facts were dissimilar, the principle was laid down that execution proceeding could not be continued against the estate of a dead man without bringing on the record his legal representatives. What happened there was that after the sale proclamation the judgment-debtor died and the sale was held without substituting his legal representatives. Subsequently they made an application to set aside the sale. It was held by their Lordships that the sale

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was void and was liable to be set aside at the instance of the legal representatives. The proper order, therefore, to be passed in the present case is that the decreeholder should, in order that he may continue the execution proceeding, substitute in the place of the deceased, Razaq, his legal representatives. While substituting them the Court should issue notice under Order XXI, rule 22, against them and their objections, whatever they may have to urge, should be heard before the execution proceeding can be further continued against them.

On behalf of the respondents, Mr. Jaleshwar Prasad contends that inasmuch as the legal representatives already entered appearance in the execution proceeding, there was no necessity of issuing a notice under Order XXI, rule 22. He has relied on a decision of this Court in *Fakhrul Islam v. Rani Bhubaneshwari Kuer*⁽¹⁾, where a notice under Order XXI, rule 22, was in fact issued but not served and the legal representatives entered appearance and filed objections. It was held that no fresh notice under Order XXI, rule 22, was necessary. That case is quite distinguished from the facts of the present case. It has been held by the Privy Council in *Raghunath Das v. Sundar Das Khetri*⁽²⁾ and also by this Court in *Smith v. Kailash Chandra Chakraverty*⁽³⁾ that the issue of a notice under Order XXI, rule 22, unless the Court dispenses with it, is necessary to give jurisdiction to the Court to execute the decree.

In this view it is not necessary to deal with the other objections because when the legal representatives, the appellants, have been substituted and been served with notices they will be at liberty to urge their objections and they will be dealt with according to law.

I would, therefore, allow the appeal, set aside the order of the District Judge and direct that the

(1) (1928) I. L. R. 7 Pat. 790.

(2) (1914) I. L. R. 42 Cal. 72, P. C.

(3) (1931) I. L. R. 11 Pat. 241.

Subordinate Judge do proceed with the execution in accordance with law giving opportunity to the decree-holder to substitute, in the place of deceased Razaq, his legal representatives, the present appellants. In the circumstances the parties should bear their own costs throughout.

I may mention that the attachment that has already been effected of the properties of Razaq should continue so long as the present execution proceeding is to last.

ROWLAND, J.—I agree. The case illustrates the difficulties that arise out of attempts to take short cuts in matters of procedure. The correct procedure for the initiation of proceedings against the surety was, first, to call on him to produce the judgment-debtor; next, on his failure to do so, to call on him to shew cause against forfeiture and execution; next, on failure to shew cause to the satisfaction of the Court, to obtain an order of the Court directing execution to proceed against the person and properties of the surety. The correct procedure after the death of Razaq was to substitute his heirs in the execution proceeding and obtain the leave of the Court to continue the execution against them; thereafter to serve them with notices under Order XXI, rule 22, and on their appearance the Court, after hearing and determining any objections that they might make, would permit or disallow the continuance of the execution. When the heirs of Razaq appeared in this case they seem to have appeared in their personal capacity as owners of property sought to be taken in execution of a decree not passed against them. They were not yet persons who had taken Razaq's place as judgment-debtors, a position which would not be theirs until the decree-holder had obtained substitution of their names in his execution petition. The Subordinate Judge's order seems to have been understood by the parties as meaning that the execution could not proceed against the heirs of Razaq though the point he had to decide was that

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the sale could not be held so long as no representative of Razaq was on the record. In that view he was certainly right and the District Judge was in error. Some colour is lent to the view of law taken by the District Judge by a decision in *Doraswami v. Chidambaram Pillai*(1), where it seems to have been held that a sale of the effects of a deceased judgment-debtor was merely irregular and not illegal. But this decision was overruled by the Full Bench of the same Court in *Kanchamalai Pathar v. Shahaji Rajah Sahib*(2), a decision based on the Privy Council authority in *Raghunath Das v. Sundar Das Khetri*(3), which was interpreted in a similar sense in this Court in *Smith v. Kailash Chandra Chakraverty*(4). The view taken by the Full Bench of the Madras High Court was that such a sale was void and not merely voidable. Such a sale cannot proceed.

When the execution case is properly constituted by bringing heirs of Razaq on the record, the time will come for them as his representatives to raise objections, if any, as to the result of the departure from the regular order of procedure in the matter of the initiation of execution proceedings against Razaq, and for the Court to consider those objections.

K. D.

Appeal allowed.

APPELLATE CIVIL.

Before Varma and Rowland, JJ.

SURAJ PRAKASH PURI

v.

SANT LAL SINGH.*

Code of Civil Procedure, 1908 (Act V of 1908). Order XLI, rule 33, scope of—appellate court's power to interfere.

* Appeal from Appellate Decree no. 491 of 1938, from a decision of Babu Bijay Krishna Sarkar, Subordinate Judge of Chapra, dated the 30th September, 1937, reversing a decision of Maulavi Syed Ali Jawad, Munsif at Chapra, dated the 30th June, 1936.

(1) (1923) I. L. R. 47 Mad. 63.

(2) (1935) I. L. R. 59 Mad. 461, F. B.

(3) (1914) I. L. R. 42 Cal. 72, P. C.

(4) (1931) I. L. R. 11 Pat. 241.

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