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us that there is no prospect of any change in his outlook. We have to consider, therefore, what is a sufficient punishment for his offence. Taking into account his age and what appears to us to be a mental infirmity—an incapacity to admit that he had done wrong—we think that if he is confined till the 15th of November, he will have been sufficiently punished. We direct that he be released from prison on that date.

P. S.

*Sentence reduced.*

### LETTERS PATENT APPEAL.

*Before Addison and Abdul Rashid JJ.*

CHEDA LAL (PLAINTIFF) Appellant  
*versus*

AIJAZ HUSSAIN AND OTHERS (JUDGMENT-DEBTORS)  
 Respondents.

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 June 5.

**Letters Patent Appeal No. 124 of 1935.**

*Civil Procedure Code, Act V of 1908, section 108 and Order XXII, rules 11, 12 — Proceedings in appeal against an order passed in execution of a decree — whether can be called “proceedings in execution of a decree” — Abatement — rules of — whether applicable to proceedings in appeal.*

*Held*, that the proceedings in the appellate Court in an appeal against an order passed in execution proceedings cannot be described as “proceedings in execution” within the meaning of rule 12 of Order XXII of the Civil Procedure Code, and are therefore not excluded from the operation of the rules relating to abatement given in the Code. There is no distinction made in the Code between appeals from orders in execution and appeals generally.

*Raja of Kalahasti v. P. Jagannadha Rayanimgar* (1), *Subhavarapu Gangunaidu v. Murru Muttenna* (2), *Chhanga Mal v. Ram Dularey Lal* (3), *Hari Saran Das v. Har Kishen*

(1) I. L. R. (1932) 55 Mad. 1006. (2) 1934 A. I. R. (Mad.) 664 (1).

(3) I. L. R. (1933) 55 All. 509.

*Das* (1) and the dissenting judgment of *Das J.* in *Hakim Syed Mohammad Taki v. Rai Fateh Bahadur Singh* (2), relied upon.

*Mir Khan v. Sharfu* (3), *Mussammat Sarjubai v. Dhanraj* (4), and the majority judgment in *Hakim Syed Mohammad Taki v. Rai Fateh Bahadur Singh* (2), dissented from.

*Appeal under clause 10 of the Letters Patent from the judgment of Din Mohammad J., passed in Civil Appeal No. 812 of 1929, on 20th June, 1935, affirming that of Bawa Dasondha Singh, Subordinate Judge, 1st Class, Delhi, dated 28th December, 1928, dismissing the application for permission to execute the decree as legal representative of the deceased decree-holder.*

JAGAN NATH AGGARWAL and MELA RAM for Appellant.

NAWAL KISHORE, R. K. TANDAN and MOHAMMAD AMIN, for Respondent (1).

ADDISON J.—In the course of an appeal to this Court against an order in execution, one of the respondents *Mussammat Mehr Sultan* died on the 2nd October, 1931, but no steps were taken to bring her legal representatives on the record up to the 1st October, 1934, when the appeal came on for hearing before a learned Judge of this Court. On that date the counsel who represented the respondents brought to the notice of the Court and the appellant's counsel that the lady had died some three years before and the Court gave the appellant one month's time within which the necessary application to bring her legal representatives on the record should be put in. In spite of this the application was not presented till the 12th

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(1) 1934 A. I. R. (Oudh) 337.

(3) 1923 A. I. R. (Lah.) 560.

(2) I. L. R. (1930) 9 Pat. 372 (F. R.)

(4) (1925) 86 I. O. 17

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January, 1935. When the appeal again came on for hearing, it was contended on behalf of the respondents that the application was barred by time and that the appeal had abated *in toto* inasmuch as the deceased respondent's interest was not divisible from the rest and the right to sue did not survive against the surviving respondents alone. The learned Judge who heard the appeal agreed with this contention and, holding that the appeal had abated *in toto*, dismissed it. Against this decision the appellant has preferred this appeal under the Letters Patent.

On the merits there is no question but that the decision of the learned Single Judge is correct. But a new contention was raised before us, namely, that there could be no abatement under Order 22, Civil Procedure Code, in the case of an appeal from an order in execution. The learned counsel appearing for the appellant cited three authorities to this effect. The first is a judgment of a learned Single Judge of this Court in *Mir Khan v. Sharfu* (1), in which a preliminary objection was raised that as the appellant and three respondents had died and no application to substitute their legal representatives had been presented in time, the appeal by and against them had abated and consequently the appeal must fail *in toto*. The learned Judge repelled this contention, observing that these were proceedings in execution of a decree and rule 12 of Order 22, expressly excluded such proceedings from the operation of rules 3 and 4 of the same Order. He further held that rule 11 did not help the respondents. There was no other discussion of the question. A learned Single Judge of the Nagpur Judicial Commissioner's Court took the same

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(1) 1923 A. I. R. (Lah.) 560.

view in *Mussammat Sarjabai v. Dhanraj* (1). All he said was that he considered that the provisions of Order 22, rule 4, read with rule 11, of the Civil Procedure Code, would have been applicable to the case, had it not been for rule 12 of the said Order. The same question was considered by a Full Bench of the Patna High Court in *Hakim Syed Mohammad Taki v. Rai Fateh Bahadur Singh* (2). There, two learned Judges took the view that by virtue of rule 12 of Order 22, rules 3 and 4, did not apply to appeals arising out of an order passed in the course of proceedings in execution of a decree or order and that, therefore, such an appeal did not abate on the death of the respondent. The dissenting Judge, Das J., held to the contrary that "proceedings in execution" as used in rule 12 of Order 22 meant proceedings in the Court which passed the decree or in the Court to which it was sent for execution, and relating to the "execution, discharge or satisfaction of the decree," but they did not include proceedings in the appellate Court. As no distinction had been drawn in the Code between appeals in execution matters and appeals generally, and as the provision of rule 11 was without qualification or exception, he held that rules 3, 4 and 8 did apply to appeals in execution matters.

On the other hand, a Division Bench of the Madras High Court in *The Rajah of Kalahasti v. P. Jagannadha Rayanimgar* (3), held that the rules of abatement in Order 22 of the Code of Civil Procedure, applied to appeals against orders made in execution proceedings as to other appeals and that an appeal against an order made in execution proceedings was

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(1) (1925) 86 I. C. 11. (2) I. L. R. (1930) 9 Pat. 372.

(3) I. L. R. (1932) 55 Mad. 1006.

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not itself a proceeding in execution of a decree or order within the meaning of rule 12 of Order 22 of the Code. This was followed by another Division Bench of the same Court in *Subhavarapu Gangunaidu v. Murru Muttenna* (1). The question has thus been settled so far as the Madras High Court is concerned. Similarly, a Division Bench of the Allahabad High Court in *Chhanga Mal v. Ram Dularey Lal* (2) has also held that Order 22, rule 12, of the Civil Procedure Code, does not exempt pending appeals from the operation of rule 8 of that Order, even though the appeals arise out of execution proceedings. Lastly, a Division Bench of the Chief Court of Oudh in *Hari Saran Das v. Har Kishen Das* (3), followed the Madras and Allahabad view.

Order 22, rule 11, runs as follows:—

“ In the application of this Order to appeals, so far as may be, the word ‘ plaintiff ’ shall be held to include an appellant, and the word ‘ defendant ’ a respondent, and the word ‘ suit ’ an appeal;”

while Order 22, rule 12, is:—

“ Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.”

What, then, is the meaning of the words “ proceedings in execution of a decree or order ” in Order 22, rule 12? The procedure as to execution is given in Part II and Order 21 of the Code, and appeals from orders in execution proceedings are not dealt with in any of the sections dealing with execution. On the other hand, the procedure as to appeals is given in Part VII and Orders 41, etc. of the Code. In these

(1) 1934 A. I. R. (Mad.) 664 (1). (2) I. L. R. (1933) 55 All. 509.  
(3) 1934 A. I. R. (Oudh) 337.

provisions as to appeals there is no distinction drawn between appeals in execution proceedings and ordinary appeals. In particular, it is enacted in section 108 of the Code, that "the provisions of Part VII relating to appeals from original decrees shall, so far as may be, apply to appeals—

(a) from appellate decrees, and

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided."

Having regard to this, I think that the words "proceedings in execution" in Order 22, rule 12, mean proceedings provided for in Part II and Order 21 of the Code, that is, they are proceedings in the Court which passed the decree or in the Court to which the decree has been sent for execution. An appellate Court may have to consider the propriety of the orders passed by these Courts but the proceedings in the appellate Court cannot properly be described as proceedings in execution. They are separate proceedings, merely testing the validity of the order made by the executing Court.

Further, rules 3, 4 and 8 apply in terms to suits while rule 11 makes those provisions applicable to all appeals. It has already been shown that no distinction is made in the Code between appeals from orders in execution and appeals generally. Rule 12 lays down that rules 3, 4 and 8 shall not apply to proceedings in execution of a decree or order and this is a necessary provision; for when a decree-holder dies, the execution proceedings come to an end; but it is open to the legal representatives of the decree-holder to commence fresh execution proceedings against the judgment-debtor; while, similarly, a decree-holder has a right to

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proceed against the legal representatives of a deceased judgment-debtor in a fresh execution proceeding, provided always that the fresh application is within the period of limitation of three years. But there is no provision in the Code for a succession of appeals in execution matters. There can only be the one appeal, which has to be kept alive under Order 22, rule 11, which provides for all kinds of appeals. From the structure of the Code it can safely be said that there is a procedure for suits, a procedure for executions and a procedure for appeals; and rules 3, 4 and 8 apply to suits by their own force and to appeals by force of rule 11. As it was put by Das J. in *Hakim Syed Mohammad Taki v. Rai Fateh Bahadur Singh* (1) :—

“ In my judgment, as no distinction has been drawn in the Code between appeals in execution matters and appeals generally, and as the provision of rule 11 is without qualification or exception, rules 3, 4 and 8 apply to appeals in execution matters.”

This means that an appeal from an order passed in execution cannot be held to be a mere continuation of the execution proceedings, as, to hold this to be the case, would be going against the Code of Civil Procedure and its design.

For the reasons given I would dismiss this appeal with costs.

ABDUL  
RASHID J.

ABDUL RASHID J.—I agree.

P. S.

*Appeal dismissed.*