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sub-tenants of his lessee, and when he has given due notice to and terminated the tenancy of the latter, and it may be, as here, has resorted to legal measures to evict him, it would be a hardship on him to find that he had to begin proceedings all over again against the sub-tenants. An assignee of a lease is of course in a different position, for he is brought by his assignment into direct relations with the landlord.

The surrender of a lease by the lessee also gives rise to wholly different considerations—*Great Western Railway Company* v. *Smith*[1].

We must, therefore, hold on the facts as found by the District Judge that notice by the plaintiff to the defendant in this case was not necessary, and reversing his decree restore that of the Subordinate Judge, with costs throughout on the defendant.

Decree reversed.

(1) 2 Ch. D., 235.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Strachey.

1895. *December* 9.

RA'MA'CHA'RYA AND OTHERS (PLAINTIFFS), APPELLANTS, *v.* ANANTA'CHA'RYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

Execution of decree—Decree—Death of a party to a suit after argument and before delivery of judgment—Execution against the heirs of deceased judgment-debtor—Civil Procedure Code (Act XIV of 1882), *Secs.* 234, 248-250—*Practice—Procedure.*

On the 30th November, 1892, an appeal in the High Court was argued and the case adjourned for judgment.

On the 12th June, 1893, one of the defendants-respondents died.

On the 6th July, 1893, the High Court pronounced its judgment, and a decree was drawn up as if the deceased respondent was still living.

On the 15th December, 1893, the decree-holder applied for execution of the decree, but the application was rejected by the Court of first instance on the ground that as the heirs of the deceased defendant had not been placed on the record before the judgment of the High Court was delivered, the decree was incapable of execution.

Held, reversing the lower Court's decision, that the decree was, on its face, a good decree, and it could be executed against the heirs of the deceased defendant under sections 234 and 248-250 of Civil Procedure Code (Act XIV of 1882) without placing them on the record.

*Appeal, No. 99 of 1895.

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APPEAL from the decision of Ráo Bahádur K. B. Maráthe, First Class Subordinate Judge of Sátára, in Suit No. 1137 of 1893.

The plaintiffs filed a suit for partition of certain joint property consisting of lands, houses, and the profits of an ancestral trade.

The Court of first instance passed a decree awarding a portion of the plaintiffs' claim.

Against this decree the plaintiffs appealed to the High Court.

The appeal was argued on the 23rd and 30th November, 1892, and the case then stood over for judgment.

Judgment was delivered on the 6th July, 1893, when the decree of the Court of first instance was confirmed.

In the meantime defendant (respondent) No. 1 died on the 12th June, 1893, but no steps were taken to amend the record by substituting in his place his heirs and legal representatives.

On the 15th December, 1893, the plaintiffs presented an application for execution of the High Court's decree, making the heirs and legal representatives of the deceased defendant No. 1 parties to the execution proceedings.

The Subordinate Judge dismissed this application, holding that as the names of the heirs of the deceased defendant had not been placed on the record before the date of the High Court's decision, the decree could not be executed against the heirs.

Against this decision the plaintiffs appealed to the High Court.

Ganpat Sadáshiv Ráo for appellant :—In this case the judgment should be regarded as if pronounced at the date of the argument. The decree speaks from the day on which the argument was closed, and binds all parties. The suit does not abate, if either the plaintiff or defendant dies in the interval—*Turner* v. *London and South-Western Railway Company*(1). Where the delay arises from the act of the Court, it ought not to prejudice the rights of the suitors. In such cases it is the practice of the Courts in England to pass judgment *nunc pro tunc*—*Harrison* v. *Heathorn*(2); *Lawrence* v. *Hodgson*(3); *Moor* v. *Roberts*(4). There was no neces-

(1) L. R., 17 Eq., 561.
(2) 6 Scott's N. R., 797.
(3) 1 Y. and J., 368.
(4) 27 L. J., (C. P.), 161.

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sity to bring on the record the heirs of the deceased respondent. Under section 234 of the Civil Procedure Code the decree could be executed against the heirs—*Hirachand* v. *Kasturchand*(1); *Surendro* v. *Doorgasoondery*(2). No steps were taken by the heirs of the deceased to set aside the decree, and it is not shown that they have been in any way prejudiced by it. The ruling in *Narna* v. *Manager Parambhatta*(3) is conclusive on this point.

Branson (with him Ráo Sáheb *Vásudev J. Kirtikar*) for respondents:—The Courts in India have no power to enter up judgment *nunc pro tunc*. They cannot alter the date of a decree. Under section 198 of the Code of Civil Procedure if the case is adjourned for judgment, the Court is bound to give notice to the parties of the day when judgment will be delivered. How can such a notice be given, if one of the parties is dead, unless his representatives are brought on the record? Sections 202, 205, 206 of the Code also show that the date of the decree cannot be altered unless the decree is amended. These provisions of the Code are quite inconsistent with the practice of the Courts in England to pass judgment *nunc pro tunc*. I contend that section 368 of the Code applies; the heirs of the deceased respondent not having been brought on the record, the appeal abated, and the decree passed against the deceased respondent is now incapable of execution—*Vishrám* v. *Ganu*(4); *Roop Narain* v. *Ramayee*(5); *The Representatives of Girendronáth Tágore* v. *Huronáth Roy*(6); *Monee Lal* v. *Kazee Fazul*(7); *Imdad Ali* v. *Jagan Lal*(8).

Ganpat S. Ráo in reply:—The cases cited do not apply. In every one of them the death of the defendant or respondent had occurred before the argument.

FARRAN, C. J.:—In this case the High Court on the 6th July, 1893, passed a decree for partition of the property in suit in confirmation of the decrees of the lower Courts. The plaintiff applied for execution of this decree to the Court of the Subordi-

(1) I. L. R., 18 Bom., 224.
(2) I. L. R., 19 Cal., 513.
(3) P. J. for 1894, p. 403, Sub. Nom. *Narna* v. *Anant*; I. L. R., 19 Bom., 807.
(4) P. J. for 1883, p. 5.
(5) 3 Cal. L. R., 192.
(6) 10 Cal. W. R., 455.
(7) 14 Cal. W. R., 337.
(8) I. L. R., 17 All., 478.

nate Judge, First Class, at Sátára. That Court refused to execute the decree on the ground that one of the defendants was dead at the time when the judgment was pronounced and the decree drawn up. It appears that after the arguments had been concluded on the 30th November, 1892, the High Court took time to consider. The first defendant Anantáchárya died on the 12th June, 1893, before judgment was pronounced on the 6th July, 1893. The decree was drawn up as though Anantáchárya was still living. It was dated on the day on which judgment was delivered. On its face it is, therefore, a good decree which can be executed against the legal representatives of Anantáchárya under sections 234 and 248–250 of the Civil Procedure Code without placing them on the record of the suit—*Hirách and* v. *Kasturchand* [1]—unless the decree by reason of the death of Anantáchárya is inherently defective.

The practice in English Courts of Equity was in such cases to disregard the fact of the death of a party occurring while the Court was considering, and to deliver judgment and draw up the decree as though he were still living. The question was much considered in the case of *Eyre* v. *Hollier* [2], where a defendant died while the House of Lords was considering its judgment. The Lord Chancellor of Ireland in the course of his judgment (at p. 610) said: "Nothing is better settled than that where a cause is heard and merely stands over for consideration, the Court will pronounce judgment though the plaintiff or defendant die; and that judgment refers back and is conceived in the same terms as if pronounced when the cause was heard." In a note appended to that case the practice of the English Court of Chancery was thus stated by its Registrar: "As to the drawing up decrees after the death of a party in cases where judgment has been deferred, we give the decree the date at which the judgment was pronounced, and that decree speaks from the day on which the argument closed, and binds all parties then before the Court, and also the representatives of any parties deceased in the *interim* or persons taking under parties living at the time of the hearing." The practice, however, as to the dating of the decree was not uniform. It was sometimes dated as of the day

(1) I. L. R., 18 Bom., 224. (2) 12 Ir. Eq. R., 607.

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when the arguments concluded. This appears from the several cases noted by the Registrar in his letter above referred to and in the judgment and notes to *Turner* v. *London and South-Western Railway Co.*(1).

The practice prevailing in such cases in the Courts of Common Law was that judgment was entered as of the date when the Court took time to consider. This was done on the principle that the Court will in general permit a judgment to be entered *nunc pro tunc* where the signing of it has been delayed by the act of the Court. "It was a power at common law and by the ancient practice of the Court to prevent an unjust prejudice to the suitors by the delay unavoidably arising from the act of the Court "—Chitty's Archbold's Practice, Ch. LXXXVIII, where the authorities are collected. The power is now confirmed by Order XVII, R. 3, of the High Court of Justice.

In *Surendro* v. *Doorgasoondery* (2) the Privy Council, notwithstanding the death of one of the parties pending consideration, delivered judgment and remitted the case to the Indian Courts for disposal without requiring the record to be amended.

We have referred to the English practice and that of the Privy Council to show that there is nothing anomalous or contrary to principle in the delivery of a judgment and drawing up a decree thereon though one of the parties to the suit is dead and the record has not been amended, provided that he has been fully heard in his life-time.

Sections 198, 202, 205, 206, 368 and 574 of the Civil Procedure Code have, however, been read to us, and it has been contended that these provisions are inconsistent with such a course of procedure as has been adopted in England. It has been pointed out that the notice required by section 198 cannot be given without amendment. We think, however, that, as there is no question of principle involved, we ought to follow the ruling in *Narna* v. *Manager Parambhatta*(3), and to consider the drawing up of the decree in this case as at the utmost merely irregular. The legal representatives of the defendant Anantáchárya have not pointed

(1) L. R., 17 Eq., 561. (2) I. L. R., 19 Cal., 513, at p. 538.
(3) P. J. for 1894, p. 403.

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out that they have been in any way prejudiced, nor have they taken any steps to set aside or vary the decree.

We have ascertained that the defendant in *Vishrám* v. *Gann*(1) (the case which the lower Court has followed) had died before the argument; and the cases cited by Mr. Branson—*Roop Narain* v. *Ramayee*(2), *The Representatives of Girendronáth Tágore* v. *Huronáth Roy*(3), *Monee Lall* v. *Kazee Fuzul*(4), *Imdád Ali* v. *Jagan Lal*(5)—were similar in their circumstances. They are not, therefore, at variance with the decision in *Narna* v. *Manager Parambhatta*(6). We shall allow the appeal, and setting aside the order of the Subordinate Judge, First Class, direct him to proceed with the execution of the decree. The respondents have no merits. They must pay the costs of the appellants both here and in the Court below.

Order reversed.

(1) P. J. for 1883, p. 5.
(2) 3 Cal. L. R., 192.
(3) 10 Cal. W. R., p. 455.
(4) 14 Cal. W. R., p. 337.
(5) I. L. R., 17 All., 478.
(6) P. J. for 1894 p. 403.

APPELLATE CIVIL.

Before Chief Justice Farran and Mr. Justice Parsons.

BA'BU AŃA'JI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS, *v.* RATNOJI KRISHNARA'V (ORIGINAL PLAINTIFF), RESPONDENT.*

1895. *December* 9.

Hindu law—Reversioner—Interest of reversioner expectant on widow's death does not pass on insolvency to official assignee—Adoption—Adoption by widow relates back to her husband's death—Succession of a brother to a deceased brother's estate—Subsequent adoption by deceased's widow divests estate—Conditional vesting of estate in heir—Inheritance.

Balvant and Mahádev were brothers. Mahádev was adopted by his cousin's widow and as adopted son had succeeded to property. He died childless in 1870 or 1872, leaving his widow Mathurábái as his heir. His brother Balvant was next reversionary heir after Mathurábái, and in 1880 he (Balvant) became insolvent, and his estate vested in the official assignee, who sold to the plaintiff his interest in certain mortgaged property which had belonged to Mahádev and was then in the possession of Mathurábái as his heir. Mathurábái died in 1886 and after her death the plaintiff sued to redeem the property from the mortgage.

Held that at the date of h's insolvency, Mathurábái being then alive, the interest of Balvant as reversionary heir in the said property was only a *spes successionis* which

* Second Appeal, No. 403 of 1894.