

MANU/BH/0226/1919

Equivalent Citation: 50Ind. Cas.529

**IN THE HIGH COURT OF PATNA
FULL BENCH**

Miscellaneous Civil Appeal No. 281 of 1917

Decided On: 04.02.1919

Appellants: **Jungli Lall**

Vs.

Respondent: **Laddu Ram Marwari**

Hon'ble Judges/Coram:

Sir Thomas Fredrick Dawson Miller, Kt., C.J., W.S. Coutts and Manuk, JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: Lalit Mohan Ghosh, Paranasi Prosad Jhunjunwalla and Nabo Kumar Chowdhuri

For Respondents/Defendant: D.N. Sarkar

JUDGMENT

Sir Thomas Fredrick Dawson Miller, Kt., C.J.

1. The plaintiffs, who are respondents before us, instituted a mortgage suit before the Munsif of Bhagalpur against two brothers Bangli Lall and Raghu Lall, the property, the subject-matter of the mortgage, being owned by these defendants jointly as co-parceners.

2. On the 2nd March 1914 the plaintiffs obtained a preliminary decree against the defendants.

3. On the 16th March 1914 Raghu Lall died.

4. On the 12th May 1915 the conditions of the preliminary decree necessary to avoid a sale of the mortgaged property not having been complied with, the plaintiffs applied for a final decree before the Munsif.

5. On the 26th May 1915 after hearing the Pleader for the plaintiffs and reading the affidavit in support of the application, the final decree in the suit was passed by the Munsif against Bangli Lall and Raghu Lall whose names still appeared on the record as defendants, ordering the mortgaged property to be sold. Up to this time no steps had been taken by the plaintiffs to bring the representatives of Raghu Lall upon the record, although he had died more than a year earlier. No one appeared on behalf of the defendants on the application for a final decree, which is not surprising in the case of Raghu Lall as he had been dead for over a year. It appears from the record that the schedule of the plaintiffs' costs in the application includes a fee for service of process. How notice was served upon Raghu Lall we are not informed, nor is the peon's report before us. In due course the plaintiffs proceeded to take steps to execute their decree against Bangli Lall, the surviving defendant, and Jangli Lall and others, the minor sons and heirs of the deceased defendant Raghu Lall who were then

entered on the record in the execution case as judgment-debtors. The final decree was filed as that of which execution was sought. Objection was taken on behalf of the judgment-debtors Jangli Lall and others whose names now appeared on the record that the decree sought to be executed was a nullity having been passed against a dead man and could not be executed. This objection was disallowed by the Munsif, who considered that it was not tenable at that stage and that the executing Court could not go behind the decree or enquire into its validity. On appeal the District Judge upheld the Munsif's ruling considering that the judgment of the Calcutta High Court in *Kalipada Sirkar v. Harimohan Dalal* MANU/WB/0055/1916 : 35 Ind. Cas. 856 : 44 C. 627 : 24 C.L.J. 375 : 21 C.W.N. 1104 was conclusive on the point. The representatives of Raghu Lall appealed from that decision to the High Court. The learned Judges of this Court considered that the decisions on the point were conflicting and that the matter was of sufficient importance to be referred to a Full Bench. The case was accordingly referred to this Bench for determination, the following question being formulated, namely: "Whether it is open to the representatives of a judgment-debtor to object to execution of a decree on the ground that the judgment debtor was dead at the time the decree was made against him and that the decree was, therefore, a nullity." In my opinion, this Question should be answered in the affirmative.

6. The contention of the appellants is that a decree passed against a dead man is a mere nullity and cannot be executed unless the circumstances bring the case within the provisions of Order XXII, rule 6, of the Civil Procedure Code. They further contended that under Order XXII, rule 4, the suit had abated against the deceased defendant before the final decree was passed, as the right to sue did not survive against the surviving defendant alone and no application had been made to the Court to substitute the deceased's legal representatives as parties within six months of his death or any steps taken to set aside the abatement.

7. It is not disputed by the respondents that as a general proposition it is true to say that a decree passed against a dead man is a nullity, but they contend that the executing Court cannot take notice of this defect and is bound to execute the order contained in the decree without question, the only remedy open to the objectors being by a separate suit or by appeal from the decree.

8. They further contend that this question does not really arise in the particular circumstances of the present case, as the bearing terminated on or before the 2nd March 1914 when the preliminary decree was passed, and judgment was pronounced either at that date or at the date of the final decree on the 26th May 1915. If the former date is to be taken as that of the judgment, then it was passed before the death of Raghu Lall who died a fortnight later and the plaintiffs' rights against him and his estate were merged in the preliminary decree which can be executed against his representatives, the final decree being merely a part of the procedure necessary to enforce the rights conferred upon them by the judgment and the preliminary decree. If, on the other hand, the judgment must be taken as having been pronounced at the date of the final decree in 1915, then they contend there can be no abatement as Raghu Lall died between the hearing and the pronouncement of judgment within the meaning of Order XXII, rule 6, which provides as follows:--

"Notwithstanding anything contained in the foregoing rules whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment but judgment may in such case be pronounced

notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place."

9. It is convenient to consider this contention of the respondents before dealing with the broader question. In support of the first branch of this argument the respondents rely on the case of *Munna Lal Parruck v. Sarat Chunder Mukerjee* MANU/PR/0026/1914 : 27 Ind. Cas. 683 : 19 C.W.N. 561 : 42 C. 776 : 28 M.L.J. 470 : 2 L.W. 282 : 17 Bom. L.R. 408 : 21 C.L.J. 118 : 17 M.L.T. 120 : 42 I.A. 88 (P.C), a decision of Sir Lawrence Jenkins, C.J., affirmed on appeal to His Majesty in Council as showing that the preliminary decree was in itself complete and was really that of which execution was sought. The passage relied on in that judgment merely decides that a decree under section 89 of the Transfer of Property Act is a decree for sale which requires no further decree to perfect it and that the subsequent order required by the procedure prescribed by that Act is an order for the realisation of the decree. It was accordingly decided that an application for such an order was an application to enforce a judgment within Article 183 of the Limitation Act. That decision was expressly confined to a consideration of the effect of the procedure laid down by the Transfer of Property Act. The present procedure prescribed by Order XXXIV of the Code of 1908 differs from that of the Transfer of Property Act in that it requires a final decree to be passed before execution can take place, and until that is done there is no decree or judgment that can be executed. In fact the decree which was filed for execution in the present case was the final decree. Before this can be passed there must be a judgment determining whether the defendants have complied with the provisions of the preliminary decree, compliance with which would bar the plaintiffs' right to the sale. Judgment is defined in the Code as the "statement given by the Judge of the grounds of a decree or order" and it was that judgment which was to be enforced by execution in the terms of the final decree. I am of opinion, therefore, that the judgment which it is sought to enforce was that which was delivered at or immediately before the date of the final decree.

10. The question then arises whether Order XXII, rule 6, applies, Raghu Lall having died shortly after the preliminary decree was passed and about a year before the final decree. The respondents' argument is based on the hypothesis that the hearing terminated on or before the date of the preliminary decree. In my opinion, Order XXII, rule 6, has no application to the circumstances of this case. The hearing contemplated in that rule must, I think, be taken as the hearing of the issues upon which judgment was to be delivered determining the plaintiffs' right to a final decree, which alone could be executed. Although the plaintiffs' right to execution depended in part upon the determination of the issues upon which the preliminary decree was based, no final decree could be obtained without a further hearing and determination of subsequent issues and I think it must be taken that the hearing contemplated in Order XXII, rule 6, was the final hearing which had necessarily to take place before a decree capable of execution could be passed. It follows, therefore, if this view be accepted that Raghu Lall did not die between the conclusion of the hearing and the pronouncement of judgment and that when the judgment was pronounced and a decree passed against him, the suit as against him had long abated.

11. It remains to consider whether the decree or that which in the present case purports to be a decree can be objected to in execution proceedings on the ground that it is a nullity, having been passed against a person who died before the hearing and before judgment. I am unable to distinguish the present case from that of *Narendra Bahadur Chand v. Gopal Sah* MANU/WB/0680/1912 : 20 Ind. Cas. 506 : 17 C.L.J. 634, where the same question arose for determination and was decided in the

affirmative. Another instance where the Calcutta High Court decided that a decree passed against a dead person is incapable of execution is the case of Roop Narain Singh v. Ramayee Singh 3 C.L.R. 192, decided in 1878, where the application for execution was made under section 11 of Act XXIII of 1861. There are numerous later cases where a decree passed in favour of or against a dead person has been pronounced to be a nullity and incapable of execution. Imdad Ali v. Jagan Lal MANU/UP/0045/1895 : 17 A. 478 : A.W.N. (1895) :109 : 8 Ind. Dec. (N.S.) 632, Vishvanath Dnyanoba v. Lallu Kabla MANU/MH/0078/1909 : 4 Ind. Cas. 137 : 11 Bom. L.R. 1070 and Subramania Aiyar v. Vaithinatha Aiyar MANU/TN/0252/1913 : 31 Ind. Cas. 198 : 38 M. 682 are cases where the High Courts of Allahabad, Bombay and Madras have upheld an objection taken in execution of decrees of this nature. The learned Vakil for the respondents, however, has urgently called our attention to the decision of the Calcutta High Court in Kalipada Sirkcar v. Harimohan Dalal MANU/WB/0055/1916 : 35 Ind. Cas. 856 : 44 C. 627 : 24 C.L.J. 375 : 21 C.W.N. 1104 which decided that the validity of a judgment cannot be impeached in execution proceedings on the ground that a lunatic plaintiff was represented in the suit by a person not legally competent to act in that capacity. There are no doubt dicta in that judgment which, if taken as of general application and apart from the context, would be wide enough to include the present case. The following passage occurs at page 632 of the report:--"It is indisputable that the Court executing a decree must take the decree as it stands and has no power to go behind the decree or to entertain an objection to the legality or correctness of the decree." There are other similar expressions to be found in the judgment to the effect that the validity of the decree cannot be questioned by the executing Court. The proposition here laid down would appear to be wide enough to cover not only a decree which is voidable but one which is void ab initio and if this is intended to be the meaning of the passage quoted. I must respectfully decline to accede to that proposition. A passage at the end of the judgment, however, would seem to indicate that such was not the intention. After referring to the principle laid down by Lord Cottenham in *Chick v. Cremer* (1846) 2 Phil. 113 : 1 Coop. C.C. 338 : 16 L.J. Ch. 92 : 41 E.R. 884 : 78 R.R. 45 that every order and judgment however erroneous is good until discharged or declared inoperative, the judgment proceeds. "This no doubt assumes that there is a valid decree in existence) that is, an adjudication by a Court of Justice, a decree or order which has not ceased to be operative and is capable of execution." If the broad proposition that an enquiry into the validity of a decree is in all cases outside the functions of the executing Court must be taken subject to the proviso that there is a valid decree in existence, it would seem to follow that in the opinion of the learned Judges who delivered that judgment the limitations imposed on the executing Court are removed if there is no valid decree which it can execute. I am unable to accept the view that it was their intention to lay down the broad proposition contended for, that in no case can the validity of a decree be called in question by the executing Court when at the same time the proposition is restricted to cases where there is a valid decree in existence.

12. It should be unnecessary to point out the distinction between that which is void and that which is merely voidable, but a failure to bear this obvious distinction in mind is apt to lead to confusion and to the use of language which does not accurately express the meaning intended, That which is void can be treated as non-existent and of no binding force or effect; that which is merely voidable is valid and binding until it is declared to be invalid by a competent tribunal. In the latter case the executing Court is not competent to make such a declaration; in the former case neither the executing Court nor any other tribunal is bound to take notice of that which is a nullity although it may take the form of a decree. The decision in *Kalipada Sirkar v.*

Harimohan Dalal MANU/WB/0055/1916 : 35 Ind. Cas. 856 : 44 C. 627 : 24 C.L.J. 375 : 21 C.W.N. 1104 was based mainly upon the judgment of the Judicial Committee in Rashid-un-nissa v. Muhammad Ismail Khan MANU/PR/0010/1909 : 3 Ind. Cas. 864 : 31 A. 572 : 13 C.W.N. 1182 : 10 C.L.J. 318 : 6 A.L.J. 822 : 11 Bom. L.R. 1225 : 6 M.L.T. 279 : 19 M.L.J. 631 : 36 I.A. 168 (P.C.) and the facts were similar. The latter case, however, is no authority for the proposition now contended for. The basis of that judgment was that objection could not be taken in execution proceedings by a person who is not a party nor a representative of a party to the suit in which the decree was passed within the meaning of section 244 of the Civil Procedure Code, 1882. In the present case it is not disputed that the appellants were the representatives of a person who was a party to the suit. They were so treated by the respondents who made them parties to the execution proceedings in their representative capacity, and as such they were competent to take proper objection to the execution of the decree before the executing Court and if my view expressed above is right that Court was bound to hear the objection. In any case if the decree is void, it can and ought to be disregarded without any formal proceedings to set it aside and the Court has no jurisdiction to execute it against the property of the deceased defendant. In my opinion this appeal should be allowed and the order of the District Judge affirming the order of the Munsif, in so far as it refused to hear the appellants' objection, should, be set aside and the case referred back to the executing Court to hear the objection according to law. The appellants are entitled to their costs of the appeal here and in the Court below.

W.S. Coutts, J.

13. I agree with the learned Chief Justice that this appeal must be allowed.

14. The appeal arises out of an order passed by the District Judge of Bhagalpur, confirming the decree of the Munsif, refusing to entertain an objection made in certain execution proceedings that the decree having been passed against a person, who was dead at the time of the decree, was a nullity.

15. The facts of the case are shortly that one Laddu Ram Marwari obtained a preliminary decree for the sale of certain mortgage property against two persons Bangli Lall Sahu and Raghu Lall Sahu. This preliminary decree was passed on the 2nd March 1914. On the 16th March 1914, Raghu Lall died, but in spite of this on the 12th of May 1915, or more than a year later, Laddu Ram applied for a final decree against Bangli and Raghu. The 22nd May 1915 was fixed for the hearing of this application. From the final decree it appears that the matter was heard on that day, and no objection being made, a final decree for the sale of the property mortgaged was passed. Subsequently Laddu Ram applied to execute the decree against Bangli Lall and the representatives of the deceased judgment-debtor Raghu Lall. His legal representatives objected on the ground that the final decree against Raghu was a nullity but their application was rejected on the ground that the executing Court could not go behind the decree. On appeal to the District Judge he upheld the decision of the Munsif on the authority of *Kalipada Sirkar v. Harimohan Dalal* MANU/WB/0055/1916 : 35 Ind. Cas. 856 : 44 C. 627 : 24 C.L.J. 375 : 21 C.W.N. 1104 and it is against this order that the present appeal has been filed. The appeal was first heard by a Divisional Bench of this Court, which, in view of the importance of the question involved, referred it to a Full Bench for a decision of the question, whether it is open to the representatives of a judgment-debtor to object to the execution of a decree on the ground that the judgment-debtor was dead at the time the decree was made against him and the decree was, therefore, a nullity.

16. The general proposition is not denied that a decree against a dead person is a nullity, but two arguments have been addressed to us to show that the decree in the present case is not a nullity. I am doubtful whether under the terms of the reference it was open to the respondent to raise this question, but as it has been argued at some length and as it is of importance, it has been considered.

17. The first contention is that the decree which was to be executed was the preliminary and not the final decree and the second is that even if this were not so, the decree is saved from being a nullity by the provisions of Order XXII, rule, 5, of the Civil Procedure Code.

18. With regard to the first point it is true that the date of the decree given in the application for execution is the date of the preliminary decree, but the decree which the Court was asked to execute, a copy of which was attached to the application, was the final decree. Nor could the executing Court have considered an application to execute the preliminary decree alone in a case in which both a preliminary and a final decree had been passed.

19. The second point urged is, that even assuming that the decree which was to be executed was the final decree, it was saved from being a nullity by the provisions of Order XXII, rule 6, of the Civil Procedure Code, the contention being that the hearing referred to in that rule in cases such as the present is the hearing before the passing of the preliminary decree. This contention cannot be accepted. It is clear that the cases contemplated by the rule are cases in which, after the hearing is complete, judgment is reserved and a party dies before the judgment can be delivered. It was not intended to provide for a case such as the one now before us where the party has died after the preliminary decree and before the passing of the final decree. Although the basis of the final decree is the preliminary decree, it does not conclude the matter, for there are certain matters which it is necessary to consider before the final decree can be passed, the most important being whether the whole or any part of the debt has been paid and whether any sale of the property is necessary. To decide this a hearing is necessary and in the present case, as would appear from the final decree, there was such a hearing. After this hearing the order or judgment on which the final decree is based was passed, and it is this hearing which, in my opinion, is referred to in Order XXII, rule 6, of the Code of Civil Procedure. In this case, then, the defendant did not die between the hearing and the judgment but more than a year before the hearing. The case, therefore, is not covered by Order XXII, rule 6, Civil Procedure Code, and is not saved by this rule. From another point of view also it appears that the final decree was a nullity. Raghu Lall died on the 16th of March 1914, but the final decree was not passed until the 12th of May 1915. The suit, therefore, so far as he was concerned, had abated and no decree could be passed against him. That a decree against a dead person, except in the peculiar circumstances of Order XXII, rule 6, Civil Procedure Code, is a nullity, has also been held in a series of rulings,--

Representatives of Girendranath Tagore v. Huronath Roy 10 W.R. 455, Roop Narain Singh v. Ramayee Singh 3 C.L.R. 192, Janardhan Krishna Padhye v. Ramchandra Vithal Ranade 26 B. 317 : 4 Bom. L.R. 23, Vishvanath Dnyanoba v. Lallu Kabla MANU/MH/0078/1909 : 4 Ind. Cas. 137 : 11 Bom. L.R. 1070, Imdad Ali v. Jagan Lal MANU/UP/0045/1895 : 17 A. 478 : A.W.N. (1895) : 109 : 8 Ind. Dec. (N.S.) 632, Subramania Aiyar v. Vaithinatha Aiyar MANU/TN/0252/1913 : 31 Ind. Cas. 198 : 38 M. 682, Topanram Nathuram v. Tekchand 15 Ind. Cas. 832 : 5 S.L.R. 260, Narendra Bahadur Chand v. Gopal

Sah MANU/WB/0680/1912 : 20 Ind. Cas. 506 : 17 C.L.J. 634.

20. The question now remains whether the decree being a nullity, the executing Court can refuse to execute it. On the face of it, it would appear that it not only can, but that it must so refuse, because the decree is not in fact a decree at all and there is nothing which can be executed. This was the view taken in the rulings,-- Representative of Girendranath Tagore v. Huronath Roy 10 W.R. 455, Roop Narain Singh v. Ramayee Singh 3 C.L.R. 192, Imdad Ali v. Jagan Lal MANU/UP/0045/1895 : 17 A. 478 : A.W.N. (1895) : 109 : 8 Ind. Dec. (N.S.) 632, Subramania Aiyar v. Vaithinatha Aiyar MANU/TN/0252/1913 : 31 Ind. Cas. 198 : 38 M. 682, Topanram Nathuram v. Tekchand 15 Ind. Cas. 832 : 5 S.L.R. 260 and Narendra Bahadur Chand v. Gopal Sah MANU/WB/0680/1912 : 20 Ind. Cas. 506 : 17 C.L.J. 634.

21. The learned District Judge has relied on Kalipada Sirkar v. Harimohan Dalal MANU/WB/0055/1916 : 35 Ind. Cas. 856 : 44 C. 627 : 24 C.L.J. 375 : 21 C.W.N. 1104 decided by Mookerji and Cuming, JJ. This case is, however clearly distinguishable from the present case and does not, in fact, support his view. The decision in this case was based on the Privy Council decision in Rashid-un-nissa v. Muhammad Ismail Khan MANU/PR/0010/1909 : 3 Ind. Cas. 864 : 31 A. 572 : 13 C.W.N. 1182 : 10 C.L.J. 318 : 6 A.L.J. 822 : 11 Bom. L.R. 1225 : 6 M.L.T. 279 : 19 M.L.J. 631 : 36 I.A. 168 (P.C.). In that case the plaintiff, a minor girl, sued for a declaration that certain decrees and sales in execution were invalid so far as she was concerned, chiefly because her sister, who was a married woman, had, in the suits in which those decrees were made, been improperly appointed her guardian ad litem. It was contended by the defendants that the suit was barred by section 244 of the Code of Civil Procedure, 1882. It was held by the Subordinate Judge that the suit was not barred and the plaintiff's suit was decreed. The High Court set aside this decision holding that the suit was barred, but on appeal to the Privy Council this decision of the High Court was set aside, their Lordships observing that,--

"Section 244 of the Civil Procedure Code applies to the questions arising between parties to the suit in which the decree was passed, that is to say between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term. Her sister was a married woman, and, therefore, was disqualified under section 467 of the Code from being appointed guardian for the suit."

22. In Kalipada Sirkar v. Harimohan Dalal MANU/WB/0055/1916 : 35 Ind. Cas. 856 : 44 C. 627 : 24 C.L.J. 375 : 21 C.W.N. 1104 the plaintiff was a lunatic who was represented by his wife. The suit was dismissed and costs were allowed to the defendant. Execution was sought for against the plaintiff's son, the plaintiff having died in the interval. In the execution proceedings the lunatic's widow was appointed guardian ad litem of her infant son and she objected that when she was appointed guardian for the lunatic in the suit she was a minor. The executing Court overruled this objection and on appeal to the High Court the decision was affirmed. The case, as I have already said, was decided on the authority of Rashid-un-nissa v. Muhammad Ismail Khan MANU/PR/0010/1909 : 3 Ind. Cas. 864 : 31 A. 572 : 13 C.W.N. 1182 : 10 C.L.J. 318 : 6 A.L.J. 822 : 11 Bom. L.R. 1225 : 6 M.L.T. 279 : 19 M.L.J. 631 : 36 I.A. 168 (P.C.). The case now before, us, however, is an entirely different one. In the cases Kalipada Sirkar v. Harimohan Dalal MANU/WB/0055/1916 : 35 Ind. Cas. 856 : 44 C. 627 : 24 C.L.J. 375 : 21 C.W.N. 1104 and Rashid-un-nissa v. Muhammad Ismail Khan MANU/PR/0010/1909 : 3 Ind. Cas. 864 : 31 A. 572 : 13

C.W.N. 1182 : 10 C.L.J. 318 : 6 A.L.J. 822 : 11 Bom. L.R. 1225 : 6 M.L.T. 279 : 19 M.L.J. 631 : 36 I.A. 168 (P.C.) there was, at the time of passing the decree, a person in existence against whom a decree could be passed. That person was improperly represented and the decree was liable to be set aside, but until it was set aside, it was valid and operative and this being so, the executing Court was not entitled to go behind it and question its legality or validity. In the case now before us there was no person in existence against whom a decree could be passed, the decree was a nullity, it was incapable of execution and the Court, so far as the deceased defendant was concerned, had before it no decree which could be executed. It is true there are several observations in the judgment of Mookerji and Cuming, JJ., which would seem to cover a case as the one before us, but from the concluding words of their judgment it is clear that it was not the intention of the learned Judges that they should do so, because after quoting the words of Lord Cottenham in *Chuck v. Cremer* (1846) 2 Phil. 113 : 1 Coop. C.C. 338 : 16 L.J. Ch. 92 : 41 E.R. 884 : 78 R.R. 45, they say--

This no doubt assumes that there is a valid decree in existence, that is, an adjudication by a Court of justice, a decree or order which has not ceased to be operative and is capable of execution."

23. The decision does not cover the case now before us and neither this decision nor the decision in *Rashid-un-nissa v. Muhammad Ismail Khan* MANU/PR/0010/1909 : 3 Ind. Cas. 864 : 31 A. 572 : 13 C.W.N. 1182 : 10 C.L.J. 318 : 6 A.L.J. 822 : 11 Bom. L.R. 1225 : 6 M.L.T. 279 : 19 M.L.J. 631 : 36 I.A. 168 (P.C.) is any authority for the proposition that when a decree is a nullity by reason of having been passed against a dead defendant, the executing Court cannot refuse to execute it.

Manuk, J.

24. This miscellaneous appeal comes before us on a reference made by the Divisional Bench. In order to understand the precise question for our decision it is necessary to set out the facts.

25. The respondent instituted a suit on a mortgage against two persons, Bangli Lall Sahu and Raghu Lall Sahu. On the 2nd March 1914, he obtained a preliminary decree which is not before us. On the 12th May 1915 the decree-holder applied under Order XXXIV, rule 5(2), for a final decree against both the above-named defendants. On this application notices were apparently directed to issue on them and the 22nd May 1915 was fixed for hearing. There, being no appearance on that date on behalf of the defendant Raghu Lall Sahu, a decree was passed against both the defendants in the following terms:--

"Upon reading the preliminary decree for sale made in the above suit on the 2nd day of March and the petition of the plaintiff named above-dated 12th of May 1915 and the affidavit of Chandi Prasad Karpardaz of the plaintiff, affirmed on the 11th May 1915, and after hearing Babu Dharendra Nath Sen, Pleader for the plaintiff and none for the defendant and it appearing that the amount declared due by the said preliminary decree has not been paid, it is ordered that the immoveable properties mentioned in the said decree and specified at the foot thereof..... be sold by public auction, etc." This decree is dated the 26th May 1915.

26. On the 15th July 1916, the decree-holder applied for execution by sale of the mortgaged properties, but this application proved infractions for reasons with which

we are not concerned. On the 4th April 1917, he again applied for execution by sale of the mortgaged properties. In this application in the appropriate column he stated the date of the decree to be the 2nd March 1914, which is in fact the date of the preliminary decrees, With his application, however, he filed a copy of the final decree of the 26th May 1915 as the decree which he sought to execute. The appellants who are sons of Raghu Lall then objected to the execution on the ground that their father Raghu Lall had, in fact died on the 16th March 1914, and that, therefore, the decree of the 22nd May 1915 was incapable of execution as being passed against a dead person. The learned Subordinate Judge after hearing the parties passed the following order on the 30th June 1917:--

"This is a case under section 47. There are two main objections in this case. One is that the decree is not valid inasmuch as it was passed against a dead person. This objection is not tenable at this stage and the executing Court cannot go beyond the decree. This objection, therefore, fails." It may be convenient to add that we are not concerned with the second ground of objection which was also disallowed.

27. An appeal against this order was preferred to the District Judge, who on the 28th August 1917 dismissed the appeal in the following terms:--

"it is correctly laid down by the Munsif that the executing Court cannot go beyond the decree. The latest ruling in Kalipada Sirkar v. Harimohan Dalal MANU/WB/0055/1916 : 35 Ind. Cas. 856 : 44 C. 627 : 24 C.L.J. 375 : 21 C.W.N. 1104 is conclusive on the point."

28. The respondents then appealed to this Court, when it appeared that this Court had held in Musammat Muna Koer v. Durga Prasad MANU/BH/0083/1917 : 39 Ind. Cas. 172 : 1 P.L.W. 282 : 2 P.L.J. 192 that an objection such as theirs may be preferred under section 47 of the Civil Procedure Code. It also appearing that there was a conflict of authority on the question in other High Courts; the appeal was referred to a Full Bench and thus comes before us.

29. The learned Vakil for the appellants concedes that it is now settled law that the correctness or validity of a decree cannot be questioned in execution proceedings, but contends that the decree passed against Raghu Lall on the 26th May 1915, some 14 months after Raghu had died, was a nullity, that is, it was only something which purported to be a decree and incapable of execution at all, and that, therefore, such an objection may be maintained under section 47 by Raghu Lall's representatives. His argument in support of this contention proceeds on two main lines:--

(1) Section 50 of the Civil Procedure Code is the only provision in the law with respect to the execution of decrees against a deceased judgment-debtor, and this section is conversant only with cases in which the judgment-debtor was alive when the decree was passed. The decree in section 50 must mean a decree which is not a nullity and there is no provision referable to a decree against a man already dead, other than the provisions of Order XXII.

(2) Under Order XXII, rule 4, the right of the plaintiff to sue did not survive against Bangli Lall alone but against the sons of Raghu Lal as well. Consequently under that rule, read with section 177 of the Limitation Act, the legal representatives of Raghu Lall had to be made parties within six months from the date of Raghu Lall's death. No such substitution having been made, the suit as against Raghu Lall abated, and once abatement has taken place no

order can be passed in the suit till that abatement is set aside under Order XXII, rule 9, on an application to be made within 60 days from the date of abatement (Article 171 of the Limitation Act). There having been no such application there was in fact no suit pending as against Raghu Lal on the 26th May 1915 and so no decree could have been passed against him.

30. In support of his contentions the learned Vakil cites the following cases:--

Representatives of Girendranath Tagore v. Huronath Roy 10 W.R. 455, in which it was held that when a suit is instituted and a decree passed against a person who was dead at the time the suit was instituted, the decree cannot be executed against his legal representatives, and that section 210 (Act VIII of 1859) contemplates only the case of a person who being alive when the decree is passed dies before execution has been fully had. It may be noticed that section 210 of Act VIII of 1859 ran as follows:--

"If any person against whom a decree has been made shall die before execution has been fully had thereof an application for execution thereat may be made against the legal representative of the estate of the person so dying as aforesaid." The language of that section is substantially similar to that of section 50 of the present Code and I am of opinion that section 50, like the old section 210, does not include or provide for the case of a person against whom a decree is made having died before the decree is made. As was pointed out by Macpherson, J., in that case, "It is little to be wondered at that the Code does not provide for such a contingency, for it would not readily occur to ordinary minds that decrees would ever be asked for or made against dead men." It was held that the decree could not be executed against the legal representatives of the deceased, and the entire execution proceedings were quashed.

31. In Roop Narain Singh v. Ramayee Singh 3 C.L.R. 192 the sole defendant to a suit died before the decree was passed against him on the supposition of his being still alive and nobody was substituted in his place. On these assumptions the Calcutta High Court held that "when the decree purporting to be a decree against Sheo Narain was made, there was no one in being against whom it was made and that as a consequence the decree was void" and the decree holder could not be allowed to proceed with the execution which was objected to by the heirs of the deceased judgment debtor.

32. In Imdad Ali v. Jagan Lal MANU/UP/0045/1895 : 17 A. 478 : A.W.N. (1895) : 109 : 8 Ind. Dec. (N.S.) 632 the suit had been instituted against two persons; one of them died before the decree was made, but a decree was made as against both without any representative of the deceased defendant being brought on the record. An appeal from that decree by the latter defendant's representative was dismissed on the ground that he had up locus standi to appeal as he had not been made a party to the record of the suit. The decree-holders then took out execution and, without any notice to the legal representative of the deceased defendant, were put in possession of the property. The deceased's legal representative then applied to the Court to hold that the decree was null and void and incapable of execution and to restore him to possession. The Munsif dismissed his application. The High Court (Sir John Edge, C.J., and Banerji, J.) held that the decree was, so far as the deceased defendant's representative and her interest in the property are concerned, a void decree and

incapable of execution and that the proceedings in execution were ultra vires and without jurisdiction and the application of the objector was one to be dealt with under section 244. The proceedings in execution, so far as the deceased defendant's property was concerned, were set aside and the objector was directed to be restored to possession.

33. In *Janardhan Krishna Padhye v. Ramchandra Vithal Ranade* 26 B. 317 : 4 Bom. L.R. 23 at the date of the hearing of an appeal the appellant was dead, but neither his Pleader nor the Court were aware of the fact, so the appeal was heard without any substitution and the decree of the lower Court against the appellant confirmed. The appellant's son then applied to have his name placed on the record and the appeal re-argued on the ground that his father had died before the appeal had been heard. In these circumstances the High Court held that the decree of the Appellate Court was a nullity.

34. In *Vishvanath Dnyanoba v. Lallu Kabla* MANU/MH/0078/1909 : 4 Ind. Cas. 137 : 11 Bom. L.R. 1070 after the conclusion of the evidence but before the arguments the plaintiff died and the Court passed a decree in his favour, though his sons had not been brought on the record as his representatives. It was held by the Bombay High Court on a construction of Order XXII, rule 6, that the hearing had not concluded when the plaintiff died and that the decree was "absolutely a nullity." It is noteworthy that the legal representative in that case had preferred an appeal against the decree but had withdrawn it, and then resisted, on the ground before mentioned, the application of the decree-holder to execute the decree. The Courts below had allowed execution, but the High Court held that there was nothing that could be executed and the application to execute must be rejected.

35. The facts in *Narendra Bahadur Chand v. Gopal Sah* MANU/WB/0680/1912 : 20 Ind. Cas. 506 : 17 C.L.J. 634 were that the decree-holder sought to execute a decree against the objector as being the legal representative of one Kishen Dayal, who died on the 13th of February 1905 before the decree-holder's appeal to the High Court was heard, decided and eventually decreed on the 26th April 1905, though the appeal had been pled in Kishen Dayal's lifetime against him as a respondent, One of the main objections of the objector was that the decree was a nullity inasmuch as it was passed after the death of Kishen Dayal and so could not be executed. It was argued on his behalf that the decree being a nullity it was not necessary to have it set aside. From the report it appears that the decisions in *Imdad Ali v. Jagan Lal* MANU/UP/0045/1895 : 17 A. 478 : A.W.N. (1895) :109 : 8 Ind. Dec. (N.S.) 632 and *Janardhan Krishna Padhye v. Ramchandra Vithal Ranade* 26 B. 317 : 4 Bom. L.R. 23 were cited in argument in support of the objector's contentions. The decision in *Brojo Lal Rai Chowdhury v. Tara Prasanna Bhattacharji* 3 C.L.J. 188 was also referred to at the Bar. The contentions on the other side were that the executing Court could not go behind the decree and that so long as the decree subsisted; the decree-holder was entitled to have it executed against the judgment-debtor's legal representative. The learned Chief Justice, Sir Lawrence Jenkins, held that the application to execute was not tenable, having regard more particularly to section 50 of the Code of Civil Procedure. It is noteworthy that in framing the question for the Court's decision the learned Chief Justice refers to the judgment-debtor on the decree record as "a person against whom the decree purports to have been passed."

36. The decision in *Subramania Aiyar v. Vaithinatha Aiyar* MANU/TN/0252/1913 : 31 Ind. Cas. 198 : 38 M. 682 is to the same effect. There it was contended that the decree in execution, although passed after the death of the defendant and before his

legal representatives were impleaded, was not void, but must be set aside under separate proceedings before it can be treated as a nullity. Oldfield, J., held that the decree under execution was null and void, that proceedings to avoid it were unnecessary and that as the objection was to the jurisdiction of the Court to pass the decree the objection was rightly considered and allowed in execution proceedings, *Goda Coopuramier v. Sundarammal* MANU/TN/0121/1909 : 3 Ind. Cas. 739 : 33 M. 167 : 6 M.L.T. 271 was distinguished as referable to the case of a deceased plaintiff and the Bombay and Allahabad decisions alluded to above were followed.

37. In *Musammat Muna Koer v. Durga Prasad* MANU/BH/0083/1917 : 39 Ind. Cas. 172 : 1 P.L.W. 282 : 2 P.L.J. 192 on facts precisely similar to those in *Narendra Bahadur Chand v. Gopal sah* MANU/WB/0680/1912 : 20 Ind. Cas. 506 : 17 C.L.J. 634 referred to above, *Mullick and Jwala Prasad, JJ.*, held in this Court that as the objection was that the deceased was not a party to the suit at the time it was decreed on appeal, the question as to whether execution could proceed against his widow fell within section 47 of the Code of Civil Procedure.

38. We were also referred on behalf of the appellants to *Arjun Das v. Gunendra Nath Basil Mullik* MANU/WB/0486/1914 : 27 Ind. Cas. 294 : 20 C.L.J. 341 : 18 C.W.N. 1266, in which a sale held after the death of a judgment debtor in execution of a decree against him was set aside; and to the dictum in *Gulab Sao v. Chowdhury Madho Lal* MANU/WB/0295/1905 : 2 C.L.J. 384 : 9 C.W.N. 950 that an order without jurisdiction must be regarded as a nullity and need not be judged to be such by formal and direct proceedings to have it vacated or reversed. But these two cases do not really touch the questions which we have to decide, namely, whether the decree itself can be regarded as a nullity and can be attacked on that ground in execution proceedings.

39. Mr. D.N. Sarkar on behalf of the respondent, while admitting the broad proposition that a decree passed against a dead person may under certain circumstances be a nullity, contends that this is not universally true since Order XXII, rule 6, was introduced into the new Code of Civil Procedure of 1908. As I understand his argument it comes to this: that in the case before us there was in fact no abatement inasmuch as the preliminary decree must be taken as the concluding point of the suit both as to hearing and pronouncing of judgment (Order XXII, rule 6) and that as *Raghu Lall* was admittedly alive on that date, the provisions of Order XXII, rules 4 and 9, have no application to the case. To support this contention the learned *Vakil* first pressed upon us the fact that the decree-holder had really applied to execute the preliminary decree; but when the learned *Vakil's* attention was drawn to the record itself be abandoned this position. He maintains, however, that the order absolute which used to be passed on such suits under section 89 of the Transfer of Property Act, now equivalent to the decree for sale under Order XXXIV, clause (2) of the Civil Procedure Code, was really a step in execution, and not a continuation of the suit itself.

40. In *Munna Lal Parruck v. Sarat Chunder Mukerji* MANU/PR/0026/1914 : 27 Ind. Cas. 683 : 19 C.W.N. 561 : 42 C. 776 : 28 M.L.J. 470 : 2 L.W. 282 : 17 Bom. L.R. 408 : 21 C.L.J. 118 : 17 M.L.T. 120 : 42 I.A. 88 (P.C.) the Calcutta High Court very clearly pointed out the reasons for the repeal of section 89 of the Transfer of Property Act and the substitution therefore of Order XXXIV, rule 5(2), the first of which reasons was the conflict of decisions as to whether an application for an order under section 89 of the Transfer of Property Act was an application in execution or not. Sir *Lawrence Jenkins, C.J.*, observed that the scheme, whereby this conflict was to be

composed, was by making it clear that an application which is to follow on a preliminary decree for sale was not to be an application in execution inasmuch as the next step under Order XXXIV, rule 5, is not for an order for sale but for a decree for sale. In my opinion, it is clear that under the previous law no supplemental decree but only an order was required; while under the present law the preliminary decree is an incomplete decree and requires a further decree before the execution stage can be entered upon. That being so, the proceedings between the preliminary decree and the final decree must be proceedings in the suit itself and there must be a further hearing before pronouncing of the final judgment on which is based the final decree. In the nature of things, many questions may arise between the parties to the suit requiring the consideration of the Court before passing a final decree for sale [see *Hiramony Biswas v. Musa Khan* MANU/WB/0212/1910 : 7 Ind. Cas. 625 : 16 C.L.J. 169]. The occasions on which the Court applies its mind to such questions in the presence of the parties or one of the parties are undoubtedly hearings within the meaning of Order XXII, rule 6. If necessary, the appellants can also call in aid the definition of a "judgment" in section 2(9) and the explanation to the definition of a decree in section 2(2) of the Civil Procedure Code. Applying these tests to the present case, it is obvious, on the face of the final decree of 26th May 1915 that the preliminary decree of the 2nd March 1914, the petition of the plaintiff of the 12th May, the affidavit of his Karpardaz of the 11th May, and the arguments of his Vakil were considered and heard, and this hearing was 14 months after the death of Raghu Lall without any representative of his having been brought on the record. In my judgment, therefore, Order XXII, rule 6, has no application to the facts of the case and the respondent's contention on this head must fail.

41. It is next argued, however, on behalf of the respondent that the appellants in any case are not entitled to take this objection in execution proceedings and he relies on *Kalipada Sirkar v. Harimohan Dalal* MANU/WB/0055/1916 : 35 Ind. Cas. 856 : 44 C. 627 : 24 C.L.J. 375 : 21 C.W.N. 1104. Now that was a case in which a suit was instituted by one Mohamaya Dasi as manager of her lunatic husband and the defendant objected to the suit on the ground that Mohamaya Dasi was a minor when she was appointed guardian under Act XXXV of 1858. The Subordinate Judge finding that she was a minor dismissed the suit and allowed costs. The defendant applied for execution with respect to those costs against the infant son of the lunatic under the guardianship of his mother, the lunatic having died in the interval. With her consent she was appointed guardian ad litem and on the merits objected that when the decree for costs was made in the original suit she was herself a minor incompetent to act as next friend of the lunatic and that the decree was consequently illegal and ultra vires and incapable of execution against the estate of her husband in the hands of his minor son. The question for determination was to quote the words of the judgment of the High Court, "Whether the validity of the decree can be questioned an execution proceedings, on the ground that as the lunatic plaintiff was not properly represented by a competent next friend in the suit, any operative decree for costs could not have been made against him." The question was answered in the negative, the real ground for which apparently was that the point was concluded by the decision of the Judicial Committee in *Rashid-un-nissa v. Muhammad Ismail Khan* MANU/PR/0010/1909 : 3 Ind. Cas. 864 : 31 A. 572 : 13 C.W.N. 1182 : 10 C.L.J. 318 : 6 A.L.J. 822 : 11 Bom. L.R. 1225 : 6 M.L.T. 279 : 19 M.L.J. 631 : 36 I.A. 168 (P.C.) as the lunatic was never a party to the suit in the proper sense of the term. This was sufficient for the decision of the case before the Court. There are, however certain general observations and particularly the observation that the decision in *Imdad Ali v. Jagan Lal* 17 A. 478 : A.W.N. (1895) : 109 : 8 Ind. Dec. (n. s.) 632 was clearly opposed to the decision of the Judicial Committee in *Rashid-un-nissa v. Muhammad Ismail Khan*

MANU/PR/0010/1909 : 3 Ind. Cas. 864 : 31 A. 572 : 13 C.W.N. 1182 : 10 C.L.J. 318 : 6 A.L.J. 822 : 11 Bom. L.R. 1225 : 6 M.L.T. 279 : 19 M.L.J. 631 : 36 I.A. 168 (P.C.), which were not necessary for the decision of the case before the Calcutta High Court and are therefore, really obiter. It is noteworthy, however, that the learned Judges in concluding their judgment observed: "This no doubt assumes that there is a valid decree in existence, that is, an adjudication by a Court of Justice, a decree or order which has not ceased to be operative and is capable of execution."

42. The decision of their Lordships of the Privy Council in *Rashid-un-nissa v. Muhammad Ismail Khan* MANU/PR/0010/1909 : 3 Ind. Cas. 864 : 31 A. 572 : 13 C.W.N. 1182 : 10 C.L.J. 318 : 6 A.L.J. 822 : 11 Bom. L.R. 1225 : 6 M.L.T. 279 : 19 M.L.J. 631 : 36 I.A. 168 (P.C.) referred to a case where contrary to the provisions of section 457 of the Code of 1882, a minor had been represented throughout certain litigation by a married woman, her sister and guardian of her person and their Lordships held that a suit by her to set aside the decrees (and sales which had taken place in execution of them) was not barred by section 244 of the then Code of Civil Procedure. The Calcutta High Court had dismissed the suit upon the ground that the decrees upon which the execution proceedings were founded, were not in any way impeached in the suit, which in fact impeached the proceedings in execution of those decrees, and, therefore, objection should have been made under section 244 of the Code of Civil Procedure, and not by a separate suit. Their Lordships of the Judicial Committee in reversing the decision of the High Court observed "Section 244 of the Code of Civil Procedure applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agreed with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term."

43. I am, therefore, of opinion that that case as well as the case in *Kalipada Sirka v. Harimohan Dalal* MANU/WB/0055/1916 : 35 Ind. Cas. 856 : 44 C. 627 : 24 C.L.J. 375 : 21 C.W.N. 1104 are both clearly distinguishable from the present case. In the case before us it cannot be said that Raghu Lall was never a party to the suit in the proper sense of the term. It is common ground that he was till his death a proper party to the suit in the full sense of the term. The point here, however, is that when he died, so far as his interests were concerned, there was no party to the suit left, against whom a decree of any sort or kind could be passed 14 months later without proceedings under Order XXII, rule 4, being first taken. It follows from the hypothesis that there is a distinct line of cleavage between the two sets of cases referred to above, in the first set of which there is no entity left on the record against whom a decree can be passed and in the second set of which there are persons in being against whom a decree, though an irregular or voidable or invalid decree, may be passed. The present case falls within the former category. The language of the decisions varies in classifying the two kinds of decrees as void or voidable, as with or without jurisdiction, and as a decree or that which only purports to be a decree; but the principle remains ever the same. In cases like the one before us that which purports to be a decree was really passed only against a name on the record, the person behind that name having passed beyond the jurisdiction of all Courts. There remained on the record at the time of the decree, so far as Raghu Lall's property was concerned, no person who could be rendered amenable to the mandate of the Court in what purported to be its decree.

44. For the above reasons I hold that the appellants contentions are well founded and would remand the case for a finding by the learned Subordinate Judge as to the

objector's allegations of fact with respect to which there has so far been no enquiry.

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