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MANU/BH/0113/1944

Equivalent Citation: AIR1945Pat1

IN THE HIGH COURT OF PATNA

Decided On: 03.05.1944

Appellants:**Ajab Lal Dubey and Ors.**
Vs.
Respondent:**Hari Charan Tewari and Ors.**

Hon'ble Judges/Coram:
Chatterji, Sinha and Herbert Ribton Meredith, JJ.

JUDGMENT

Chatterji, J.

1. The question which has been referred to a Full Bench in this case is whether a sale held in execution of a mortgage decree after the death of the judgment-debtor but after the service of all necessary processes including the sale proclamation, without any notice to his legal representative, is void or voidable. As the whole appeal is not before us it is unnecessary to state the facts of the case except that the sale in question took place on 1st July 1938, while the judgment-debtor, Bidoo Dubey, who was the only judgment-debtor interested in the equity of redemption in the property now in suit died just on the preceding day, that is, 30th June 1938. The plaintiffs who are the appellants and impugn the sale as void, are among the legal representatives of Bidoo Dubey. It is contended by Dr. D. N. Mitter on behalf of the appellants that the question under reference should be decided with reference to the provisions of Section 50 and Order 21, Rule 22, Civil P.C., and to the general principle that the Court has no jurisdiction to sell a dead man's estate, unless it is represented by somebody on the record of the proceeding in which it is sold. Section 50 provides:

> (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to excute the same against the legal representative of the deceased.
>
> (2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

2. Order 21, Rule 22, as it stands after the amendment of Sub-rule (1) by our High Court made on 1st April 1936, runs as follows:

> (1) Where an application for execution is made in writing under Rule 11(2) the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.
>
> (2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court

from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

3. The original Sub-rule (1) of this rule is as follows:

(1) Where an application for execution is made -

(a) more than one year after the date of the decree, or,

(b) against the legal representative of a party to the decree, the Court executing the decree shall issue a notice to the -person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

4. Thus according to the original Sub-rule (1), notice is required in two specified cases referred to in cls. (a) and (b), whereas according to the amended Sub-rule (1), notice is required in every case where there is an application for execution in writing under S. 11(2). Except this difference, the effect of both these Sub-rules is the same. The addition of the words "in writing under Rule 11(2)" in the amended sub-rule makes no difference, because the application for execution referred to in the original sub-rule must be an application in writing under Rule 11(2), as the context shows. R. 11(2) provides that save as otherwise provided by Sub-rule (1), every application for the execution of a decree shall be in writing. Sub-rule (1) of Rule 11 refers to oral application which can be made at the time of the passing of a money decree for immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court. The original Sub-rule (1) of Rule 22 could not obviously refer to such oral application. According to Dr. Mitter's contention, the combined effect of Section 50 (1) and Order 21, Rule 22 (1) is that where a judgment-debtor dies in the course of an execution proceeding, the decree-holder, if he chooses to continue the proceeding, is bound to proceed against his legal representative, and for that purpose he must serve the legal representative with notice under Order 21, Rule 22 (1). And if no such notice is served, further proceedings in execution will be without jurisdiction. Consequently, if a sale is held after the death of the judgment-debtor without any notice to his legal representative, the sale will be void.

5. In support of this contention reliance is placed on Kanchamalai Pathar v. Shahaji rajah Sahib A.I.R. 1936 Mad. 205, Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129, Rajagopala Ayyar v. Bamanuja-chariar , A.I.R. 1924 Mad. 431, Raghunathasami Ayyangar v. S. Gopauj Rao A. I. R. 1922 Mad. 307, Smith v. Kailash Chandra, A. I. R. 1932 Pat. 199, Mazharul Huq v. Raghubir Singh A.I.R. 1940 Pat.

142, Durga Singh v. Sugambar Singh A.I.R. 1941 Pat. 481, Faizaddi Taluqdar v. Rezia Begum MANU/WB/0138/1942 : AIR1942Cal436 , Manindra Chandra Nandi v. Rahatannesa Bibi MANU/WB/0302/1930 : AIR1931Cal555 , Monmotha Nath v. Laohmi Debi MANU/WB/0015/1927 : AIR1928Cal60 , Shyam Mandal v. Satinath Bannerjee A. I. R 1917 Cal. 728, Chandi Prasad v. Mt. Jamna MANU/UP/0339/1927 : AIR1928All74 and Shankar Daji v. Dattatraya Vinayak A.I.R. 1921 Bom. 385. Reliance is also placed on certain observations of Cotton L. J. In re Shephard ; Atkins v. Shephard (1890) 43 Ch. D. 131 in Kanchamalai Pathar v. Shahaji rajah Sahib A.I.R. 1936 Mad. 205 which was decided by a Full Bench of five Judges, the impugned sale was held in execution of a money decree eight days after the death of the sole judgment-debtor. By the time of his death all the processes including the sale proclamation were served and the order for sale was passed. The decree-holder, though aware of his death, proceeded with the execution and brought the attached property to sale, without making any application under Section 50 for leave to execute the decree against his legal representatives and without taking out any notice on the legal representatives under Order 21, Rule 22 (1). At the sale the property was purchased by a stranger. Within 30 days of the sale, the deceased judgment-debtor's sons made an application under Section 47 and Order 21, Rule 90, Civil P. C, for setting aside the sale. The lower Court set aside the sale on the ground that it was void. On appeal to the High Court, the only question debated was whether the sale was void or merely voidable. It was unanimously held by all the five learned Judges that the sale was void. Pour of them, namely Cornish, Varadachariar, Venkataramana Rao and Lakshmana Rao JJ. delivered separate judgments, all basing their decision on Section 50 and Order 21, Rule 22 and also on the general principle that on the death of a judgment-debtor the decree cannot be executed against him, for there is no such thing as execution against a dead man. The matter was elaborately discussed by their Lordships, particularly by Varadachariar J. who went into the history of the law and exhaustively reviewed the case-law on the subject. In dealing with the effect of Section 50 and Order 21, Rule 22 their Lordships chiefly relied on the Privy Council decision in 41 I. A. 251 which I shall presently deal with. Referring to this case, Cornish J. said:

> On this authority, I think, there can be no doubt that, where there has been no application under Section 50, and consequently no issue of notice under Order 21, Rule 22 (1), the foundations of the Court's jurisdiction to execute a decree against the legal representative are entirely wanting. And a sale held without this jurisdiction would be void.

6 . As to the effect of the judgment-debtor's death on a pending execution, proceeding his Lordship said:

> On the death of a judgment-debtor the decree cannot be executed against him, for there is no such thing as execution against a dead man.

7. Varadachariar J. said : "The Court has no jurisdiction to sell a dead man's estate." Venkataramana Rao J. said:

> Therefore, as soon as a man dies, he disappears from the record and there is no party over whom the Court can exercise jurisdiction and it loses jurisdiction in one of its essentials.

8 . No doubt in this case their Lordships had to deal with the effect of a sale in execution of a money decree, but on principle I find no difference between such sale and a sale in execution of a mortgage decree. In Raghunath Das v. Sundar Das Khetri

A.I.R. 1914 P.C. 129 the facts were briefly these: In execution of a money decree certain property of the judgment-debtor was attached and an order for sale made. Shortly after, the judgment-debtor became insolvent, and by an order of the Insolvency Court his property vested in the Official Assignee. Thereupon the Court in the execution proceeding stayed the sale until further order. The decree-holder then applied to the executing Court and obtained an order for the issue of a notice on the Official Assignee, not under Section 248, Civil P. C, 1882 (now Order 21, Rule 22), but merely calling upon him to show cause why he should not be substituted for the judgment-debtor. This notice was served on the Official Assignee, but he did not appear. After the expiry of the time fixed by the notice, the decree-holder without further notice to the Official Assignee, applied for and obtained an order not only substituting the Official Assignee as a party in the place of the judgment-debtor but directing the sale to proceed. A fresh sale proclamation was issued and served, and the attached property was sold. The decree-holder became the purchaser. Subsequently the Official Assignee under an order of the Insolvency Court sold the same property to a certain person who again sold it to the plaintiffs who brought the suit which gave rise to the appeal before the Privy Council. Their Lordships of the Privy Council upheld the plaintiffs' title, being of opinion that the prior execution sale was altogether irregular and inoperative. Their Lordships said:

> In the first place the property having passed to the Official Assignee, it was wrong to allow the sale to proceed at all. The judgment-creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvent. In the second place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which was done. In the third place the judgment-debtors had at the time of the sale no right, title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property.

9. Then their Lordships, while dealing with the respondents' contention based on Malkarjan v. Narhari (01) 25 Bom. 337 which I shall discuss later, proceeded to observe:

> As laid down in Gopal Chandra Chatterjee v. Gunamani Dasi (93) 20 Cal. 37 a notice under Section 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor.

10. This observation of their Lordships has always been, as it must be, regarded by the Courts in India as an authority for the view that the absence of notice under Order 21, Rule 22 renders the execution sale void. But it is to be observed that in Section 248 of the Code of 1882 which their Lordships had to consider there was no provision corresponding to Sub-rule (2) of Order 21, Rule 22 of the present Code. This sub-rule gives the Court a discretion, in the circumstances mentioned therein, to dispense with the notice required by Sub-rule (1) which corresponds to Section 248 of the old Code. The question naturally arises whether a notice which the Court may in its discretion dispense with, if occasion arises, can be regarded as the foundation of the Court's jurisdiction to execute the decree. The provision in Sub-rule (1) of Order 21, Rule 22 for if he issue of notice is no doubt mandatory, because there is the word "shall", but as pointed out by Mookerjee'J. in Levenia Ashton v. Madhabmoni Dasi (10) 11 C. L. J. 489 the mandatory language of the provision is by

no means conclusive, and one test of its real character is whether the notice can in any circumstances be dispensed with. However, notwithstanding Sub-rule (2), the notice required by Sub-rule (1) of Order 21, Rule 22 has been held by different High Courts, on the authority of Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 to be the foundation of the Court's jurisdiction to execute the decree, Sub-rule (2) being interpreted to mean that it only gives the Court jurisdiction in certain cases in which without it the Court would have none. This is also the view taken by the Full Bench of five Judges in 59 Mad. 461, I already referred to. Speaking for myself, I feel inclined to think that the addition of Sub-rule (2) in Order 21, Rule 22 can hardly be reconciled with the view that the notice required by Sub-rule (1) goes to the jurisdiction of the Court. But having regard to the long course of decisions in which different High Courts including our own have accepted the rule laid down in 41. I. A. 2512 as applicable to Order 21,R. 22 of the new Code, in spite of the addition of Sub-rule (2), I am not prepared to depart from those decisions, particularly when Sub-rule (1) as it stands after the amendment by our High Court requires the notice to be given in all cases. Now that the notice is necessary in all cases, it is possible to regard Sub-rule (1) as laying down the general rule to which Sub-rule (2) provides an exception.

11. In Rajagopala Ayyar v. Bamanujachariar A.I.R. 1924 Mad. 431 which was decided by a Full Bench of throe Judges, Schwabe C. J., Ramesam and Waller JJ., it was held that in' a case where notice under Order 21, Rule 22 has not been issued and the omission is due, not to the fact that Sub-rule (2) of the rule has been applied, but to the fact that notice was not asked for, a sale held in execution is a nullity and not merely voidable but is void as against the person to whom notice should have been, but was not, issued. In that case the notice required came under Clause (a) and not Clause (b) of O. 21, Rule 22 (1), but Schwabe C. J., with whom Ramesam and Waller JJ. agreed, held in view of the Privy Council decision in 41. I. A. 251 that the provision for notice in the two cases, of legal representatives, and of parties when more than one year has elapsed, being in the same rule, Order 21, Rule 22 (1), which is in the same terms as Section 248 of the Code of 1882, it could not be said that in one case failure to, give notice would be a mere irregularity while in the other it would result in the Court having no jurisdiction to sell at all. Schwabe C. J., however, commenced his judgment with this observation:

> If this matter were free from authority I should incline to the view that non-compliance with the provisions of Order 21, Rule 22 was a material irregularity, and not an illegality which would make the subsequent sale a nullity.

12. He felt himself bound by the authority in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 As regards Sub-rule (2) of Order 21, Rule 22, he said:

> In my judgment the only effect of this Sub-section is to give the Court jurisdiction in certain cases in which without it the Court would "have none.

13. Raghunathasami Ayyangar v. S. Gopauj Rao A. I. R. 1922 Mad. 307 relates to a sale in execution of a mortgage decree held after the death of one of the judgment-debtors, who was a subsequent mortgagee, and was a party to the execution proceeding, without his legal representatives being brought on the record. Subsequent to the confirmation of the sale, an assignee of the subsequent mortgage from the heir of the deceased judgment-debtor brought a suit to enforce the mortgage. The main defence in the suit was that the subsequent mortgage was

extinguished by the sale under the prior mortgagee's decree. This defence was negatived by the High Court on the ground that as the procedure laid down in Section 50, Civil P. C, had not been followed, the sale was a nullity. Bamesam J. who delivered the judgment (Oldfield J. agreeing), after referring to the provision of Section 50, said:

> As it is opposed to all notions of justice to allow legal proceedings to be taken against an estate without there being some person on the record to represent the estate, one would suppose that such proceedings in execution taken without having the legal representative of a deceased judgment-debtor on the record are void and do not amount to a mere irregularity. It is difficult to see how, for this purpose, any distinction can be drawn between the case of a judgment-debtor's death before the order for sale is passed and the case of a death after the order. The estate has to be represented on the record by some one interested in watching the proceedings until the sale is confirmed.

14. It may be mentioned that the view taken by Bamesam J. in this case was dissented from by Spencer J. with whom Krishnan J. agreed, in Doraiswami v. Chidambaram Pillai A.I.R. 1924 Mad. 130 but was approved in the subsequent Full Bench case in 59 Mad. 4611 which overruled 47 Mad. 63 In 11 Pat. 24i5 the judgment-debtor died after the execution proceeding was started against him. After his death the decree-holder filed a petition for substitution of his legal representatives in his place. Notice of this petition for substitution was said to have been served on the' legal representatives, and thereafter an order was recorded allowing substitution, as prayed for. There was no appearance on behalf of those legal representatives. The execution proceeded, and eventually the judgment-debtor's property was sold. One of his legal representatives who were substituted made an application under Order 21, Rule 90 for setting aside the sale, alleging, inter alia, that no notice under Order 21, Rule 22' had been served on him. The lower Court dismissed the application, holding that notice had been served and also that there was no evidence that the price fetched at the sale was inadequate. On appeal to this Court, the points that were seriously pressed on behalf of the appellant were (1) that there was no notice under Order 21, Rule 22, and (2) that such notice as was issued was not properly served. On behalf of the respondent the main contention raised was that Order 21, Rule 22 applied only to those where execution was taken out against the legal representative of the judgment-debtor in the first instance and not wher8, as in that case, execution had been taken out against the judgment-debtor, but the judgment-debtor subsequently died, and on his death the execution proceeding was sought to be continued against his legal representatives. As regards the first point raised on behalf of the appellant, both Wort J. and Fazl Ali J. (as he then was), who heard the appeal, held that the notice that was issued was merely for substitution of the legal representatives and was, therefore, not a proper notice as contemplated by Order 21, Rule 22. On the question of service of the notice, "Wort J. said that it did not arise in view of his finding on the first point, but in his opinion the evidence adduced in proof of the service was sufficient. Fazl Ali J., however, held that even assuming that the notice that was issued could be treated as a valid notice under Order 21, Rule 22, it was not proved to have been properly served. As to the main question in the appeal raised on behalf of the respondent, Wort J. held that the decision in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 was a complete x answer to it. In the opinion of both the learned Judges, the sale was invalid for want of a proper notice under Order 21, Rule 22. The appeal was accordingly allowed, and the sale was set aside. The decision was based entirely on Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129

15. The case in Mazharul Huq v. Raghubir Singh A.I.R. 1940 Pat. 142 which was decided by Rowland J., and myself, is not of much assistance, because there the objection was taken by the legal representatives of the deceased judgment-debtor in the execution proceeding itself before the sale could be held, though the sale proclamation had been issued. The objection taken was that the execution proceeding could not be continued without substituting the legal representatives of the deceased judgment-debtor. We held that the decree-holder, in order that he could continue the execution proceeding, should substitute the legal representatives of the deceased judgment-debtor in his Place and serve them with notice under Order 21, Rule 22. We, however, referred to the Full Bench decision of the Madras High Court in Kanchamalai Pathar v. Shahaji rajah Sahib A.I.R. 1936 Mad. 205 and pointed out that the sale, if held without substituting the legal representative of the deceased judgment-debtor, would be void, as held in that case.

16. In Durga Singh v. Sugambar Singh A.I.R. 1941 Pat. 481 which was decided on Letters Patent appeal by Harries C. J. and Fazl Ali J. (as he then was), an execution sale was impeached by the judgment-debtor himself by a separate suit on the ground that in the execution proceeding no notice under Order 21, Rule 22 was served on him and that, therefore, the sale was wholly without jurisdiction. It was found as a fact by the first appellate Court that no notice under Order 21, Rule 22 was served. Harries C. J., who delivered the judgment (Fazl Ali J. agreeing), held, relying on 41. I. A. 251 that the sale was wholly ineffective against the plaintiff. On behalf of the defendant, who was the appellant, it was contended that the failure to serve notice under Order 21, Rule 22 was a material irregularity and might be a ground for setting aside the sale by an application under Order 21, Rule 90. In repelling this contention, his Lordship said:

> In my view there can be no sale at all unless the notice under Order 21, Rule 22 is served, and this is not a case Of irregularity or fraud in the publication or conduct of a sale but rather a case where no sale at all has been held.

17. One noticeable feature about this case is that no objection appears to have been raised to the maintainability of the suit on the ground that it was barred under Section 47, Civil P. C. Nor does it appear that their Lordships' attention was drawn to the earlier decisions of this Court or the decisions of other High Courts. In Faizaddi Taluqdar v. Rezia Begum MANU/WB/0138/1942 : AIR1942Cal436 which appears to be the latest decision of the Calcutta High Court on the point, the facts were briefly these: In execution of a rent decree the holding concerned was brought to sale. In the course of execution proceeding, but before the publication of the sale proclamation, the tenant judgment-debtor died. The' decree-holder, apparently not being aware of his death, proceeded with the execution without taking any steps to bring his legal representatives on the record, and eventually the holding was sold. The sale was confirmed, and the auction-purchaser took symbolical possession. He then made a gift of the holding to his daughter. The latter, when she attempted to take actual possession, was resisted by the heirs of the deceased tenant judgment-debtor. Consequently she brought a suit against them for recovery of possession of the purchased holding. The defence taken was that the execution sale was a nullity, inasmuch as the heirs of the deceased judgment-debtor had not been brought on the record of the execution proceeding after his death. This defence, though negatived by the lower Courts, was upheld by the High Court in second appeal. Edgley J., who delivered the judgment (Akram J. agreeing) said

> it is clear from Section 50 of the Code, that if the holder of an unsatisfied

> decree wishes to continue the execution proceedings or wishes to execute the decree against the legal representatives of a deceased judgment-debtor, he must make an application to this effect to the Court. Further, the language of Order 21, Rule 22 of the Code implies that, when an application is made under Section 50 of the Code, the legal representative of the deceased person must be called upon to show cause why the decree should not be executed against him.

18. In coming to his decision the learned Judge relied on Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 and also on the Full Bench case of the Madras High Court in Kanchamalai Pathar v. Shahaji rajah Sahib A.I.R. 1936 Mad. 205 Referring to this Madras case, he said:

> We entirely agree with the view which has been adopted with regard to this matter by the Madras High Court in Monmotha Nath v. Laohmi Debi MANU/WB/0015/1927 : AIR1928Cal60 .

19. The case in Manindra Chandra Nandi v. Rahatannesa Bibi MANU/WB/0302/1930 : AIR1931Cal555 arose out of an application filed by one of the judgment-debtors under Section 47 and Order 21, Rule 90 to set aside a sale held in execution of a mortgage decree. The lower Court held that the conditions of Order 21, R 90 were not satisfied. But so far as the application under Section 47 was concerned, it was found that no notice under Order 21, Rule 22 had been served on the applicant. The Court accordingly set aside the sale in its entirety, though the applicant, being one of the heirs of one of the mortgagors, had only 5 pies share in the mortgaged property. On appeal by the auction-purchaser to the High Court, the question raised was whether the entire sale should be set aside or it should be set aside only to the extent of the applicant's share. Mukherji J. who delivered the judgment (Mitter J. agreeing), held, relying chiefly on Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 and Rajagopala Ayyar v. Bamanuja-chariar A.I.R. 1924 Mad. 431 that the sale was not void in its entirety, but was void to the extent of the share of the applicant against whom the notice under Order 21, Rule 22 had not been served. The learned Judge, while dealing with Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 applied his mind to the question whether the view expressed by their Lordships of the Privy Council in that case as to the effect of Section 248 of the Code of 1882 was in any way affected by the addition of Sub-rule (2) in Order 21, Rule 22, and he answered this question in these words: "This interpretation of the law has been applied to Order 21, Rule 22, Sub-rule (1), Civil P. C, since the Code of 1908, came into being and it is perhaps too late to contend that, in view of the insertion of Sub-rule (2), nothing corresponding to which there was in Section 248 of the Code of 1882, what was under the Code of 1882 regarded as want of jurisdiction should now only be regarded as an irregularity, the effect of which would depend upon the circumstances of each particular case. In any event no Court will perhaps have the courage to say so until the Judicial Committee have another opportunity of considering the matter in the light of the sub-rule and of pronouncing an opinion in favour of this view. But I find that whenever any Judge has expressed such a view it has been firmly negatived: see 45 Mad. 87519 and 47 Mad. 6318 Which were overruled by 47 Mad. 288.3 I have ventured to refer to this view merely because I find it very difficult to reconcile the view as to absolute want of jurisdiction with what the sub-rule says." In 55 Cal. 96 which arose out of an application to set aside a sale under Section 47 and Order 21, Rule 90, the question for consideration, so far as it is material to the present case, was as to the effect of failure to take out notice under Order 21, Rule 22 (1), Clause (a). Page J., who delivered the judgment (Graham J. agreeing), held, relying on

Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 that the effect was that the sale was void. On behalf of the auction-purchaser it was strenuously contended that the effect of the addition of Sub-rule (2) in Order 21, Rule 22 was fundamentally to alter the whole complexion of the rule. His Lordship rejected this contention, saying

> it was not intended by enacting Sub-rule (2) that the mandatory nature of the provisions of Sub-rule (1) should be abrogated, and as we read the amended rule, the Legislature intended that the status quo ante of Sub-rule (1) should be maintained except under special circumstances in which 'for reasons to be recorded' the Court should think in order that justice should be done that it ought to issue execution without notice under Sub-rule (1).

20. In Shyam Mandal v. Satinath Bannerjee. A. I. R 1917 Cal. 728 the landlord who had obtained a decree for ejectment under Section 155(1)(a), Ben. Ten. Act, applied for execution more than one year after the date of the decree and, without taking out notice under Order 21, Rule 22 (1), Clause (a), obtained the writ forthwith and, two / days later, took symbolical delivery of possession. The tenants thereupon made an application to the Court praying that the ex parte proceedings for delivery of possession should be cancelled. They also asked for extension of time for performance of the decree under Section 155 (3). The Court rejected their application. They then applied in revision to the, High Court. Mookerjee and Cuming JJ., allowed their application and set aside the ex parte order for delivery of possession, holding, on the authority of Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 that the notice prescribed by Order 21, Rule 22 is necessary in order that the Court should obtain jurisdiction to proceed against the property of the judgment-debtor by way of execution and that the omission to give such notice is not a mere irregularity which makes the proceeding voidable, but is a defect which goes to the root of the proceeding, and renders it void for want of jurisdiction.

21. In Chandi Prasad v. Mt. Jamna MANU/UP/0339/1927 : AIR1928All74 which was decided by Boys and Kendall JJ., the facts were briefly these: One Parbhu Lal executed a mortgage in respect of his house in favour of Chandi Prasad. One Ram Dayal who obtained a money decree against Parbhu took out execution of his decree and attached the house. Subsequent to the attachment but before the issue of sale proclamation Parbhu died, leaving his widow Mt. Sibo and daughter Mt. Jamna. Earn Dayal proceeded with his execution without giving notice to Parbhu's legal representative.. The house was eventually sold and was purchased by one Manni Lal. After his purchase Manni pal tried to get possession of the house, but failed. Subsequently, Chandi Prasad brought a suit to enforce his mortgage, impleading Mt. Sibo and Manni Lal as defendants. Chandi Prasad obtained a mortgage decree, but before it was made final Mt. Sibo died. No substitution was made in her place, and her name was shown in the final decree that was prepared. The mortgage decree was put to execution, the deceased Mt. Sibo being still shown as a judgment-debtor. At a later stage, however, Mt. Jamna was substituted in her place. But on objection being taken by her, she was ultimately given up. So the execution proceeded against Manni Lal alone and the mortgaged property was sold, Chandi Prasad himself becoming the purchaser. Chandi Prasad then applied for delivery of possession. Thereupon, Mt. Jamna brought a suit against Chandi Prasad to have it declared that the mortgage decree and the sale in execution thereof were not binding on her and that she was the owner of the house. The suit was decreed by both the Courts below. Chandi Prasad appealed to the High Court. The question for consideration before the High Court was whether the sale in execution of the decree of Ram Dayal at which Manni Lal purchased-the house was a nullity by reason of the execution proceeding being

continued against the deceased Parbbu Lal without notice to his legal representative. It was conceded on behalf of the appellant Chandi Prasad that if the sale was a nullity, the title to the house would be with Mt. Jamna. Their Lordships, on the authority of Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 held that the sale was a nullity.

22. In Shankar Daji v. Dattatraya Vinayak A.I.R. 1921 Bom. 385 the decree-holder, who had obtained a money decree, applied for execution after the judgment-debtor's death against his brother's widow as his legal representative, though the decree-holder knew that the judgment-debtor had bequeathed his property by a will to his mistress. Notice under Order 21, Rule 22 was issued to the brother's widow, but she did not appear. Execution proceeded and the judgment-debtor's property was attached and eventually sold. In the meantime the judgment-debtor's mistress obtained a probate of the will. The auction-purchaser, having failed to obtain actual possession, brought a suit against the mistress. Her defence was that the sale was not valid as she had not been served with notice under Order 21, Rule 22. The trial Court dismissed the suit, but it was decreed by the lower appellate -Court. On second appeal, Macleod C. J. and Shah J. held that the true legal representative of the deceased judgment-debtor not having been brought on the record of the execution proceeding or served with notice under Order 21, Rule 22, the sale was not valid and the auction-purchaser acquired no title. This decision is apparently opposed to that of the Privy Council in 27 I. A. 216 but their Lordships distinguished this Privy Council case on the ground that in that case the,question who was the legal representative of the deceased judgment-debtor had actually been adjudicated upon by the executing Court.

23. In In re Shephard ; Atkins v. Shephard (1890) 43 Ch. D. 131 a judgment-creditor who had obtained a judgment for a sum of money applied for the appointment of a receiver of the rents and profits of a freehold estate to which the judgment-debtor was entitled. While the application was pending, the judgment-debtor died. Two days after the judgment-debtor's death, the decree-holder obtained on his application an ex parte order appointing a Receiver. Subsequently however the order was held to be ineffectual as the Receiver had not given security. The decree-holder then took the matter to the Court of appeal. The Lord Justices of the Court of appeal held that the order appointing Receiver was without jurisdiction as it was made in respect of a dead man's estate when no person interested in it was before the Court Cotton L. J. said:

> It cannot be made against the estate which formerly belonged to a dead man, but which as he is dead is no longer his, it must be made against his heir or devisee, and under such circumstances that the Court has jurisdiction over the heir or devisee." Again his Lordship said:
>
> > It is quite new to me to hear it alleged that there is anything in the rules to enable the Court to make an order against a person who is not a party to the action.

24. These passages are relied upon by Dr. Mitter. But his Lordship was speaking of such an order being passed in an "action". Elsewhere his Lordship clearly said that the "obtaining a receivership order is not taking out execution." It appears that on behalf of the decree-holder the receivership order was sought to be supported on the ground that it was made by way of equitable execution as distinguished from legal execution. This was refuted by his Lordship in these words:

> It was urged that there was jurisdiction, for that this was equitable execution and must follow the analogy of legal execution; that legal execution could be issued ex parte after the death of the judgment-debtor, and that therefore there was no reason why equitable execution should not. But is this to be considered as equitable execution and as subject to the same objections only as legal execution, and, assuming that legal execution can be issued against the estate of a dead person without taking any intermediate step, a proposition to which I am not disposed to assent, does it follow that equitable execution can be so issued ? In my opinion it does not.

25. This last observation, however, suggests that in his Lordship's opinion legal execution cannot be issued against the estate of a dead person without taking any intermediate step. Bowen L. J. also was apparently of the same opinion, because he said:

> I doubt whether at common law execution can be issued Without notice after the judgment-debtor's death against the goods of his executor.

26. On this point Fry L. J. expressed himself in these words:

> Then, as regards the proposition that execution can be issued after the death of the judgment-debtor against his estate without any notice, I confine myself to expressing great doubt whether it is correct.

27. These observations are certainly pertinent to the question now under consideration. There is another case of our High Court relied on by Dr. Mitter which I forgot to notice. It is Brajobala Debi v. Madhusudan Singh A. I. R. 1938 Pat. 162 decided by Fazl All J. (as he then was) and Eowland J. In this case execution of a decree was applied for more than one year after it was passed. The Court, owing to an erroneous report of the office that the application was filed within one year from the date of the last order passed in the previous execution case, did not issue any notice under-Order 21, Rule 22 (1), Clause (a). Execution proceeded, and after service of the necessary processes, the judgment-debtor's property was sold. The judgment-debtor then filed an application to set aside the sale, one of the grounds taken being that no notice under Order 21, Rule 22 had been served. The Court set aside the sale. On appeal to this Court by the decree-holder, who was also the auction-purchaser, it was contended on his behalf that even though the Court might have dispensed with the notice under Order 21, Rule 22 under a misapprehension, the matter could not be reopened. This contention was overruled by Fazl Ali J. with whom Rowland J. agreed. His Lordship said:

> As to the contention that the order cannot be attacked in the present proceeding, I would only point out that as the absence of notice under Order 21, Rule 22 goes to the root of the jurisdiction of the executing Court, the objection could be taken at any time.

28. On the other hand, Mr. P. R. Das on behalf of the respondents contends, in the first place, that neither Section 50 nor Order 21, Rule 22 applies to the present case. The reason' why, it is said, Section 50 does not apply is that by its terms it applies only to a money decree. So far as Sub-section (1) goes, there is nothing in it to warrant this view. Its language is wide enough to cover any decree capable of execution. Can it be said that a decree for possession of immovable property is excluded from its operation ? If this section were to be restricted only to money decrees, it must follow that the Code makes no provision for execution of other

decrees when the judgment-debtor dies before the decree is executed. There is no justification for such assumption. It is said that Order 21, Rule 11(2) authorizes such execution. But that rule merely provides how the application for execution is to be made and what particulars it should contain. Sub-section (2) of Section 50, no doubt, uses language which may suggest that it refers to execution of a money decree. But this Sub-section does no more than indicate the measure of the liability of the legal representative. That is no valid reason for restricting the operation of Sub-section (1) to money decrees only. It will be recalled that in Raghunathasami Ayyangar v. S. Gopauj Rao A.I.R. 1922 Mad. 307 cited above, Section 50 was applied to a mortgage decree. I do not see why a mortgage decree should be excluded from the operation of this section.

29. The reason why, it is said Order 21, Rule 22 does not apply to the present case is that this rule, by its terms, applies only where a fresh application for execution is made, and here no fresh application for execution was made after the death of the judgment-debtor. But if after the death of the judgment-debtor the execution proceeding could not be continued and the decree-holder was bound to proceed against his legal representative, he could proceed either by presenting a fresh application for execution or asking for leave to continue the same proceeding after substituting the legal representative. In either case notice would be required under Order 21, Rule 22. It is to be remembered that in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 the Official Assignee was substituted after an order for sale had been made in the pending execution proceeding and still their Lordships held that notice on him under Section 248 was necessary. This is why Wort J. in Smith v. Kailash Chandra A. I. R. 1932 Pat. 199 held that Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 was a complete answer to the respondents' contention that Order 21, Rule 22 applied only where there was-a fresh application for execution. In the next place, Mr. Das contends that the omission to apply for execution against the legal representative and to take out notice against him under Order 21, Rule 22 would at best amount to a. material irregularity in which case the sale would be voidable and not void. In support of this contention he relies on Malkarjan v. Narhari (01) 25 Bom. 337 : 27 I. A. 216, Barhamdeo Narain v. Saligrara Sahay A. I. R. 1925 Pat. 384 Fakhrul Islam v. Bhubneshwari Kuer A. I. R. 1929 Pat. 79, F. E. Christian v. Jaideo Prasad A. I. R. 1934 Pat. 274, Hari Prasad Singh v. Lal Bihari Saran Singh A. I. R. 1940 Pat. 328, Levenia Ashton v. Madhabmoni Dasi (10) 11 C. L. J. 489, Bepin Behary Bera v. Sasi Bhusaa. Datta A. I. R. 1914 Cal. 554, Hari Prasad v. Gopal Chandra MANU/WB/0129/1926 : AIR1927Cal315 , Tarangini Debi v. Raj Krishna Mondal (28) 115 I. C. 520, Chandra Nath v. Nabadwip Chandra MANU/WB/0276/1930 : AIR1931Cal476 , Sheo Prasad v. Hira La(90) 12 All. 440 Gulabdas v. Lakshman Narhar (78) 3 Bom. 221 and on Halsbury's Laws of England, Edn. 2, Vol. 14 page 8, para. 14.

30. In Malkarjan v. Narhari (01) 25 Bom. 337 the facts were briefly these : One Vithal obtained a money decree against Nagappa as principal debtor and Wyankappa as surety. After Nagappa's death, execution of the decree was taken out against "the estate of the deceased Nagappa," the names of the parties mentioned in the application being first, Nagappa, deceased, by his heir Ramlingappa, and secondly, Wyankappa. Ramlingappa was the nephew of Nagappa but was not his heir, the family having been divided, as found by the Court. Notices were served upon Ramlingappa and Wyankappa. Ramlingappa appeared and showed cause, stating that he was not the heir of Nagappa who left daughters as his heirs. The Court, however, passed the following order:

> The plaintiffs' application for execution is not against other property; it is against the 'estate' of the deceased. If (any) property belonging to you is included in that (estate), you should take legal steps after the attachment is levied.

31. After that the execution proceedings went on, with the result that Nagappa's equity of redemption in certain property was sold. At the sale the mortgagee became the auction-purchaser. Subsequently, Nagappa's daughters brought a suit for redemption of the mortgage. The defence taken was that the mortgagee having already purchased the equity of redemption at the execution sale, the plaintiffs had no right to maintain the suit. The trial Court dismissed the suit, but on appeal, the High Court passed a decree for redemption on the footing that the sale was a nullity. On appeal to the Privy Council, their Lordships dismissed the suit, holding that the plaintiffs could not claim redemption unless the sale was set aside. Their Lordships held that unquestionably omission to serve notice on the legal representative was a serious irregularity, but it did not render the sale void. Lord Hob-house, who delivered the judgment, said:

> If a judgment-debtor dies before full execution of a decree the creditor may apply for execution against his legal representative. To receive that application is part of the Court's jurisdiction. In point of fact, the application made was against 'the estate of Nagappa,' and in another column Ramlingappa is named as his heir. The Court had jurisdiction to receive such an application, and either to reject it as defective or to order some further proceeding.

32. His Lordship further said:

> The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramlingappa. He contended that he was not the right person, but the Court, having received his protest, decided that he was the right person, and so proceeded with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken the decision however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law.

33. On the authority of this decision it is argued that the omission to give notice under Order 21, Rule 22 amounts to no more than a material irregularity. But this case was explained by their Lordships of the Privy Council themselves in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 in which their Lordships said:

> In the case in Malkarjan v. Narhari (01) 25 Bom. 337 : 27 I. A. 216 such a notice had been served, and the Court had determined, as it had power to do for the purpose of the execution proceedings, that the party served with the notice was in fact the legal representative. It had therefore jurisdiction to

sell, though the decision as to who was the legal representative was erroneous. There being jurisdiction to sell, and the purchasers having no notice of any irregularity, the sale held good unless or until it was set aside by appropriate proceedings for the purpose.

34. In Barhamdeo Narain v. Saligrara Sahay A. I. R. 1925 Pat. 384 which was decided by Ross and Kulwant Sahay JJ., it was held that

> Where the judgment-debtor dies after attachment and issue of sale proclamation and his legal representatives are not brought on the record, the auction-sale is not null and void but is merely irregular and can only be. set aside upon appropriate proceedings being taken within the period of limitation.

35. There the sale was impeached by the legal representatives of the deceased judgment-debtor by a separate, suit. Their Lordships chiefly relied on Malkarjan v. Narhari (01) 25 Bom. 337 : 27 I. A. 216. Their Lordships however did not refer to Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129. In Fakhrul Islam v. Bhubneshwari Kuer A. I. R. 1929 Pat. 79 decided by Kulwant Sahay and Macpherson JJ., the question arose on an application to set aside a sale under Order 21, Rule 90. It was contended on behalf of the judgment-debtor that no notice under Order 21, Rule 22 having been served, the sale was without jurisdiction. Dealing with this contention, Kulwant Sahay J. with whom , Macpherson J. agreed, said:

> In ordinary circumstances it would be so and there are authorities to the effect that a sale held without the service of the notice under Order 21, Rule 22, is a sale held without jurisdiction. In the present case however the facts are that a notice was issued but suppressed. Thereafter the judgment-debtors appeared and raised objections to the execution of the decree as well as to the validity of the sale. Those objections were heard and disposed of by the Subordinate Judge and thereafter he directed the decree-holder to take further steps. Under the circumstances there is no sense in insisting on the issue of a fresh notice under Order 21, Rule 22, and the service thereof, requiring the judgment-debtors to show cause why execution should not proceed. The judgment-debtors had appeared in Court and such objections had been taken by them.

36. Their Lordships, therefore, dismissed the application under Order 21, Rule 90. In F.E. Christian v. Jaideo Prasad A. I. R. 1934 Pat. 274 decided by Macpherson and Dhavle JJ., the question arose on an application under Section 47 and Order 21, Rule 90 to set aside a sale held in execution of a mortgage decree. There were numerous judgment-debtors and the application for setting aside the sale was made by one of them, alleging that he was not served with notice under Order 21, Rule 22. It was found as a fact that the notice under Order 21, Rule 22 was issued and served at a house where he was supposed to reside at the time the mortgage decree was passed though at the time of the execution proceeding he was living elsewhere. Their Lordships held that the notice being issued, the mere fact that the service was irregular did not vitiate the proceedings. With reference to Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 Dhavle J. said:

> Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 cannot, therefore, be regarded as an authority applicable to cases where there is no omission to take out the notice but there are irregularities in serving it." His Lordship also

distinguished Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 saying

> The jurisdiction to sell was, moreover, derived from the mortgage decree itself while the decree before the Privy Council in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 was a simple money decree, as was pointed out in Kaniz Mehdi Begam v. Rasul Beg A. I. R. 1918 Oudh 379.

37. He further observed

> If there may thus be circumstances in which even apart from Sub-rule (2) of Order 21, Rule 22, the notice under Sub-rule (1) can be dispensed with, it is obvious that a failure to issue the notice does not go to the jurisdiction, of the executing Court.

38. This observation was made with reference to Fakhrul Islam v. Bhubneshwari Kuer A. I. R. 1929 Pat. 79 Here I should observe with the utmost respect that the distinction sought to be drawn by Dhavle J. between Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 and the case of a mortgage decree on the authority of Kaniz Mehdi Begam v. Rasul Beg A. I. R. 1918 Oudh 379 does not seem to me to be well founded. In this Oudh case the learned Judges held that Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 was not applicable to a mortgage decree, because a mortgage decree directs the sale of the particular property described in it and the jurisdiction to sell is derived from the decree itself, whereas a simple money decree by itself confers no jurisdiction to sell any property whatever. It is true that a mortgage decree itself directs the sale of the mortgaged property, but that does not give jurisdiction to the Court to sell the property without execution proceeding being taken. Nor does the decree by itself give jurisdiction to the Court to sell the property when on the judgment-debtor's death it has passed into the hands of his legal representative. The, effect of the decision in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 is that the issue of notice under Order 21, Rule 22 (1) is necessary in order to give the Court jurisdiction to issue process in execution, the nature of the process to be issued depending on the nature of the decree and the relief sought. For the purpose of Order 21, Rule 22, therefore there is no distinction between a mortgage decree and a money decree. Take the analogy of a decree for ejectment. The decree itself directs that the defendant be ejected. If the notice under Section 248 (now Order 21, Rule 22) goes to the jurisdiction of the Court, as held in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 can it be said that the Court has jurisdiction to deliver possession without notice under Section 248 ? In Shyam Mandal v. Satinath Bannerjee A. I. R 1917 Cal. 728 which I have already referred to, the ex parte proceeding for delivery of possession was held to be void for want of notice under Order 21, Rule 22.

39. In Hari Prasad Singh v. Lal Bihari Saran Singh A. I. R. 1940 Pat. 328 which was decided by Harries C. J., Dhavle and Manohar Lall JJ., the question was as to what passes under a sale held under the Public Demands Recovery Act. The point also incidentally arose as to whether a sale under that Act is void by reason of the fact that the certificate judgment-debtor, though alive at the time of attachment, was dead at the time of the sale. Dhavle J. after an exhaustive review of all the cases On this last-mentioned point held that the sale in respect of the share of the deceased certificate-debtor was not void. After concluding the discussion of the cases, however, he added:

> It seems to me moreover that we are not called upon in these appeals, coming as they do under our present Public Demands Recovery Act, to decide whether the Madras view as regards Order 21, Rule 22, should be adopted.

40. In speaking of the Madras view, he was referring to the Full Bench decision in Kanchamalai Pathar v. Shahaji rajah Sahib A.I.R. 1936 Mad. 205 Harries C. J. and Manohar Lall J. did not express any final opinion on the question, as they thought that it did not arise. Harries C. J., however, observed:

> As at present advised I am not satisfied that the Certificate Officer has such jurisdiction and I prefer to refrain from expressing a definite opinion until the facts of the case make it necessary for me to do so.

41. Dhavle J. while dealing with Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 used language which would throw doubt on the correctness of that decision, or at any rate would show that the view expressed by their Lordships of the Privy Council was in the nature of obiter dictum. For instance, in one place he says: "Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 was, however, not a case under Order 21, Rule 22." In another place he says:

> Their Lordships held in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 that the sale was altogether irregular and inoperative for more than one reason unconnected with the operation of Section 248, Civil P. C, of 1882, which corresponds to Order 21, Rule 22, Sub-rule (1) of the present Code.

42. But even though the view expressed by their Lordships may be mere obiter, we are bound to follow it. In fact, Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 has always been treated by different High Courts as an authority for the proposition that the notice under Order 21, Rule 22 goes to the jurisdiction of the Court. In Levenia Ashton v. Madhabmoni Dasi (10) 11 C. L. J. 489 decided in 1910 by Mookerjee and Teunon JJ., there was an application by one of the judgment-debtors to set aside a sale held in execution of a money decree on the grounds that no notice under Section 248 had been served upon her and that the sale of the property, while it was in the hands of a Receiver, was illegal. On both these grounds, their Lordships held, the sale was liable to be set aside. Their Lordships, however, did not accept the contention raised on behalf of the judgment-debtor, that the sale was void for want of notice under Section 248. Their Lordships, on the authority of Malkarjan v. Narhari (01) 25 Bom. 337 held that the omission to serve notice under Section 248 wan a serious irregularity, but did not render the sale void. But after the decision in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 in 1914, Mookerjee J. changed his view, and in 44. oal. 95411 decided in 1917, which has already been referred to, his Lordship took just the opposite view on the authority of Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 In Bepin Behary Bera v. Sasi Bhusaa. Datta A. I. R. 1914 Cal. 554 which was decided in 1913 by Mookerjee and Beachcroft JJ. their Lordships held that a sale held under the Public Demands Recovery Act, after the death of one of the certificate-debtors without notice to his legal representative was not a nullity. Here again the decision was prior to Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 I have already shown that since the decision in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 Mookherjoe J. took just the contrary view.

43. In Hari Prasad v. Gopal Chandra MANU/WB/0129/1926 : AIR1927Cal315 decidec by Suhrawardy and Graham JJ., the sale in question was held under the Public

Demands Recovery Act of 1914. The suit was brought under the provisions of that Act to set aside the sale on various grounds one of which was that one of the certificate-debtors had died before the sale though after attachment of the property in question. It was, therefore, claimed that the share of that certificate-debtor was not affected by the sale. This claim was negatived by the High Court. Their Lordships held that the - death of a judgment-debtor after attachment of his property and before sale does not necessarily invalidate the sale. They relied on Bepin Behary Bera v. Sasi Bhusaa. Datta A. I. R. 1914 Cal. 554 which I have just dealt with, and another earlier case of the Calcutta High Court, Net Lall Sahoo v. Sheikh Kareem Bux(96) 23 Cal. 686 decided in 1896, and also on a Full Bench decision of the Allahabad High Court in Sheo Prasad v. Hira Lal (90) 12 All. 440 which I shall refer to later. It is to be observed that Section 7, Public Demands Recovery Act, which provides for issue of notice is not like Order 21, Rule 22, Civil P. C. Nor is there any provision in the Act making the Civil Procedure Code applicable to proceedings under that Act. This distinction was recognised by Dhavle J. in Hari Prasad Singh v. Lal Bihari Saran Singh A. I. R. 1940 Pat. 328 and it is for this reason that he said that in that case it was not necessary to decide whether the view taken by the Full Bench of the Madras High Court in Kanchamalai Pathar v. Shahaji rajah Sahib A.I.R. 1936 Mad. 205 should be adopted. Though his Lordship took the view that the certificate sale was not void by reason of the death of the certificate-debtor before the sale, Harries C. J. and Manohar Lall J. did not agree with him on that point, though they both concurred in the order proposed by him. It may, therefore, be taken that both of them were in doubt as to the correctness of the view taken by Dhavle J. That being so, any decision of the Calcutta High Court relating to a sale under the Public Demands Recovery Act can hardly be regarded as an authority.

44. In Tarangini Debi v. Raj Krishna Mondal (28) 115 Ind. Cas. 520 decided by Rankin C. J. and Mitter J. the sale in question was held in execution of a money decree. The judgment-debtor died before the sale but after the service of sale proclamation. His legal representatives were not brought on the record, nor was any notice served on them. Subsequently the legal representatives brought a suit to set aside the decree as well as the sale alleging fraudulent suppression of notices and all necessary processes. It was also asserted that no notice under Order 21, Rule 22 having been served on the legal representatives, the sale was invalid as against them. The trial Court decreed the suit, holding that as the legal representatives were not impleaded in the execution proceeding, the sale was void, so far as their interest was concerned. On appeal by the defendant to the High Court, their Lordships held that the omission to serve notice under Order 21, Rule 22 was a mere irregularity which might be a ground for setting aside the sale under Section 311(now Order 21, Rule 90), Civil P. C. Rankin C. J. who delivered the judgment (Mitter J. agreeing), relied upon Doraiswami v. Chidambaram Pillai A.I.R. 1924 Mad. 130 as the latest case on the point. But I have already shown that this case was overruled by the subsequent Full Bench decision in Kanchamalai Pathar v. Shahaji rajah Sahib A.I.R. 1936 Mad. 205 His Lordship also relied on Hari Prasad v. Gopal Chandra MANU/WB/0129/1926 : AIR1927Cal315 which I have just referred to, and also another earlier Calcutta case, Jagadish Bhattacharji v. Bama Sun-dari Dasya MANU/WB/0250/1919 : AIR1919Cal411 No reference was made to Raghunath Das v. Sundar Das KhetriA.I.R. 1914 P.C. 129

45. In Chandra Nath v. Nabadwip Chandra MANU/WB/0276/1930 : AIR1931Cal476 which was decided by Rankin C. J., and C. C. Ghose J., the question arose in the execution proceeding itself. Execution was taken out of a mortgage decree more than one year after it was passed. The Court, however, by mistake, instead of issuing

notice under Order 21, Rule 22, at once issued notice under Order 21, Rule 66, Civil P. C. This notice was served upon all the judgment-debtors and they appeared and objected to the valuation. After protracted proceedings, the valuation was fixed and the sale proclamation was ordered to be issued. The judgment-debtors dissatisfied with the valuation, preferred an appeal to the High Court, but the appeal was dismissed. When the case went back to the lower Court, the judgment-debtors filed an objection on the ground that the sale could not proceed because no notice under Order 21, Rule 22 had been issued. The lower Court gave effect to this objection. On appeal to the High Court by the decree-holder, their Lordships set aside the order of the lower Court and directed the execution to proceed. On behalf of the judgment-debtors, it was contended before their Lordships, on the authority of 41 I. A. 251 that notice under Order 21, Rule 22 was a condition precedent without which the Court would have no jurisdiction, and, therefore, the objection could be taken at any time. In rejecting this contention, Ban-kin C. J., who delivered the judgment (Mit-ter J. agreeing), said : "It is quite unnecessary to push the abstract logic of the case in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 to this ridiculous extreme." His Lordship further said:

> I do not in any way seek to throw doubt upon the proposition that where such a notice has not issued and the party who is entitled to notice does not in substance get notice and is not given or does not take an opportunity to object to the execution of the decree, the sale which follows will be without jurisdiction in the sense that even if the sale is to a stranger, the sale will not be binding or valid. The parties in the present case have been litigating actively with each other upon the question whether this execution should proceed.... It appears to me to be merely piling unreason upon technicality to hold upon the circumstances of this case that it is open to the judgment-debtors on these grounds, to object to the jurisdiction of the Court because they have not got a formal notice to do something, namely, to dispute the execution of the decree when in point of fact they were busy disputing about it in all the Courts for the best part of the last two years.

46. It thus appeal's that Rankin C. J., himself was of opinion that in ordinary circumstances a sale held without issue of notice under Order 21, Rule 22 would be without jurisdiction. In Sheo Prasad v. Hira Lal (90) 12 All. 440 decided by a Full Bench of five Judges including Sir John Edge C. J. and Mahmood J., the sale in question was held in execution of a money decree. One of the judgment-debtors died before the sale, and the execution proceeded without notice to his legal representative. The auction-purchaser, after taking delivery of possession, sold the property to another person. The latter, being subsequently dispossessed from the property, brought the suit which gave rise to the appeal. One of the defences taken was that no notice having been served on the legal representative of the deceased judgment-debtor, the sale was void.,This defence was negatived by the High Court. Sir John Edge, with whom the other learned Judges except Mahmood J. agreed, held that the property, having been attached during the lifetime of the deceased judgment-debtor, must be considered as in the custody of the law, and that there being no provision in the Civil Procedure Code requiring notice to be given to the deceased judgment-debtor's legal representative of the sale of property under attachment, the sale was regular and valid, notwithstanding the omission to implead the legal representative in the execution proceeding. Mahmood J., however, held that the omission to make the legal representative party to the execution proceeding was an irregularity which would not invalidate the sale without proof of substantial injury within the meaning of Section 311 of the Code. In a subsequent case, Madho Prasad

v. Kesho Prasad (97) 19 All. 337 Sir John Edge C. J. sitting with Blair J. held that

> the proceedings in execution after the death of the judgment-debtor made in the absence of and without notice to the representative of the judgment-debtor were ineffectual proceedings.

47. Their Lordships distinguished the Full Bench decision in Sheo Prasad v. Hira Lal (90) 12 All. 440 on the ground that in that case a valid attachment had been made during the lifetime of the judgment-debtor. Their Lordships, however, observed:

> There is quite sufficient irregularity in the execution of decrees in this country without our introducing the novel system that a decree can be executed against the estate of a deceased judgment-debtor without any notice to his representative and without any one to protect the property being brought upon the record.

48. It is noticeable that Sir John Edge was a party to the' decision in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 and that in that decision no reference was made to 12 ALL. 440 On the contrary, in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 their Lordships quoted with approval the decision of the Calcutta High Court in Gopal Chandra Chatterjee v. Gunamani Dasi (93) 20 Cal. 37 and said in clear and definite terms that "a notice under Section 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor." It is further to be observed that in Tarangini Debi v. Raj Krishna Mondal (28) 115 I. C. 520 Bankin C. J. referring to the view of the Allahabad High Court, said "in my judgment the old law of the Allahabad High Court which depended upon the words 'fully executed' can no longer be regarded."

49. The words "fully executed" in Section 234, Civil P. C., 1882, were substituted by the words " fully satisfied " in Section 50 of the present Code, Bankin C. J. was referring to this change.

50. In Gulabdas v. Lakshman Narhar (78) 3 Bom. 221 the question for consideration was whether an application by the legal representative of a deceased judgment-creditor to be substituted in his place in a pending execution proceeding was barred by limitation under Article 171, Limitation Act of 1877, which corresponds to Article 176 of the present Limitation Act. Their Lordships held that the article was not applicable, and they said:

> The Code of Civil Procedure does not provide that applications for execution shall, like suits, abate by the death of the judgment-creditor, nor have any cases been cited to us to show that the analogy of the sections applicable to pending suits governs pending proceedings in execution. Before execution can be had at all, a right must have been fully established; and delay is then an indulgence to the judgment-debtor.

51. This decision has no bearing on the present case. Halsbury's Laws of England, Edn. 2, Vol. 14 p. 8 para. 13 contains the following statement in the foot-note "Execution issued without a scire facias was, however, not a nullity, but voidable only." It is argued that the notice required by Order 21, Rule 22, Civil P. C., corresponds to the writ of scire facias, and therefore, if under the English law execution without a scire facias is not a nullity but only voidable, it must follow that execution proceedings taken without issue of notice under Order 21, Rule 22 are not

void but voidable. But whatever may be the position in England, we are bound by the decision of the Privy Council in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 In view of the pronouncement of their Lordships in clear and definite terms, it is not permissible for us to go behind it. It is also to be borne in mind that the Privy Council have elsewhere deprecated the practice of deciding questions arising under an Indian statute with reference to English decisions, unless one is quite sure that the provisions of the statute in question are exactly similar to those in force in England. Of course, questions of general principles stand on a different footing.

52. It will thus appear that there is a conflict of opinion not only between different High Courts but also in our own High Court. This is the reason why the question has been referred to a Full Bench. The question under reference relates to a sale in execution of a mortgage decree. To solve this question, let us first examine the situation that arises when a mortgage decree is sought to be executed after the death of the judgment-debtor. An application for execution is made against his legal representative, and suppose by some mistake the Court does not issue any notice under Order 21, Rule 22. No notice under Order 21, Rule 66 is issued, as it need not be, under the amendment made by our High Court in 1936 which omits from that rule the provision for issue of notice. This omission is rather unfortunate, because the effect of it is that in the case of execution of a mortgage decree the judgment-debtor or his legal representative, as the case may be, will have only one chance of getting notice in the execution proceeding, that is, the notice under Order 21, Rule 22. If that notice is not properly served, he may not have any chance of getting any further notice in the execution proceeding. Now in the hypothetical case I am considering, the only requisite notice is not served; the sale proclamation is issued and served, though not properly. The sale then takes place without the legal representative having any knowledge of the execution proceeding. What will be the effect of this sale ? Will it be void or voidable? On the authority in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 it will be undoubtedly void. And even on the authority of Malkarjan v. Narhari (01) 25 Bom. 337 it will be so, because this decision suggests that an application under Section 50 and the issue of notice under Order 21, Rule 22 were considered necessary to give the Court jurisdiction to issue processes against the legal representative. From the passages from their Lordships' judgment, which I have already quoted, it seems to me that if in that case Ramlingappa had not been impleaded as legal representative of the deceased Nagappa and no notice had been served on him, their Lordships' decision would have been just the contrary.

53. Next, suppose that the application for execution of the mortgage decree is made against the judgment-debtor during his life-time. Notice under Order 21, Rule 22 is served on him, but he subsequently dies before the sale proclamation is issued. His legal representative is not brought on the record and no notice under Order 21, Rule 22 is served on him. No notice under Order 21, Rule 66 is served, as it need not be, under the amendment made by our High Court. The sale proclamation is issued, but not properly served. The legal representative may not be aware of the service of the sale proclamation which is not directed to the judgment-debtor personally. The sale eventually takes place without the legal representative having any knowledge of the proceedings. What will be the effect of the sale ? Will it be void or voidable ? According to the decision in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 it will be void. Does it make any difference if the judgment-debtor dies after the service of the sale proclamation ? If the deceased judgment-debtor's legal representative is not on the record and there is nobody on the record to represent his estate, has the Court jurisdiction to sell the property ? In execution of a mortgage decree there is no attachment, and, therefore, so far as the equity of redemption of

the judgment-debtor is concerned, it cannot be considered as in the custody of the law. What is sold under the mortgage decree is the mortgagee's security as well as the judgment-debtor's equity of redemption. The judgment-debtor being dead and there being nobody on the record to represent his estate the Court has no jurisdiction to sell it: consequently the sale will be void.

54. It is argued that the provisions of Order 22, Rule 4 do not apply to execution proceedings and, therefore, when a judgment-debtor dies in the course of an execution proceeding, the decree-holder is not bound to substitute his legal representative. This is true, but can an execution proceeding be continued against a deceased judgment-debtor ? Section 50 requires the decree-holder to apply for execution against his legal representative. By its terms it contemplates a fresh application for execution. But it is well-settled that when a judgment-debtor dies in the course of an execution proceeding the decree-holder may either file a fresh application for execution against his legal representative or may continue the same proceeding after substituting him in the place of the deceased judgment-debtor. If the decree-holder wants to continue the same execution proceeding, he is bound to bring the legal representative on the record. If the execution is for realization of money by attachment and sale of the judgment-debtor's property, it cannot be disputed in view of the authorities cited by Mr. P. R. Das himself, particularly Sheo Prasad v. Hira Lal (90) 12 All. 440 as explained by Sir John Edge in Madho Prasad v. Kesho Prasad (97) 19 All. 337 that where the judgment-debtor dies before the attachment, the execution proceeding cannot be validly continued without bringing his legal representative on the record. In the case of execution of a mortgage decree, there is no attachment, but it may be suggested that if the judgment-debtor dies after an order for sale has been made under Order 21, Rule 66, the execution proceeding can be continued against him without bringing his legal representative on the record. But as pointed out by Cornish J. in Kanchamalai Pathar v. Shahaji rajah Sahib A.I.R. 1936 Mad. 205 there is no such thing as execution against a dead man. If the execution proceeding is to be continued so as to bring the mortgaged property to sale, the legal representative must be brought on the record. I have already pointed out that in Madho Prasad v. Kesho Prasad (97) 19 All. 337 Sir John Edge regarded it a "novel system" that a decree can be executed against the estate of a deceased judgment-debtor without any notice to his representative and without any one to protect the property being brought upon the record. In this connexion I may also refer to Lakhraj-Roy v. Becha Bam misser (67) 7 W. R. 52 in which the Calcutta High Court laid down the rule that execution cannot issue against the estate of a deceased person if there is no one on the record as representing the estate. Of course the facts of that case were quite different.

55. In the Full Bench decision of this Court in Jungli Lall v. Laddu BamA. I. R. 1919 Pat. 430 it was held that a final decree in a mortgage suit passed against the defendant who dies between the preliminary decree and the final decree is a nullity. Suppose the defendant dies after the service of notice of the application for final decree, and just a day before the final decree in passed. The final decree will still be a nullity according to the said Full Bench decision. Why? Because, the Court has no jurisdiction over a dead man. Why will not the same principle apply when a sale is held after the judgment-debtor's death ? It is said that the holding of a sale is an administrative, and not a judicial, act, because in the first place, the sale is conducted by an officer of the Court or by such other person as the Court may appoint in this behalf as provided in Order 21, Rule 65 and in the second place, it does not decide any rights or liabilities of the parties. But the sale is followed by an order of the Court confirming it. The Court is bound to confirm it, unless it is set

aside on an application under Order 21, Rule 89, Rule 90 or Rule 91. When it is confirmed, it becomes absolute. And when it becomes absolute, the title to the property sold shall be deemed to have vested in the purchaser from the time of the sale (Section 65, Civil P. C). In other words, the confirmation relates back to the date of the sale. If the sale is to be deemed to be effective from the moment it takes place, it must be deemed to be an act of the Court, though it may have been actually conducted by an officer of the Court. The effect of the sale is to extinguish the judgment-debtor's title to the property. Can an act of the Court which extinguishes a party's title to property be called an administrative act ? The consequences of a sale held after a judgment-debtor's death are more serious than of a decree passed against a dead man. Such decree is a nullity and cannot be enforced against the deceased defendant's legal representative. His rights remain wholly unaffected by it. Why should the sale held after the judgment-debtor's death have a different result ? Order 21, Rule 92 (1) provides:

> Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

56. Sub-rule (3) of the rule provides:

> No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

57. This clearly contemplates that the order confirming the sale is made against the judgment-debtor and it cannot be doubted that this is a judicial order. If the judgment-debtor is dead, the order confirming the sale will be made against the dead man. Then turn to Order 34, Rule 5. Sub-rule (1) of this rule provides:

> (1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under Sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under Sub-rule (1) of Rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree, or if such decree has been passed, an order-
>
> (a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and if necessary,-
>
> (b) ordering him to transfer the mortgaged property as directed in the said decree, and, also if necessary-
>
> (c) ordering him to put the defendant in possession of the property.

58. According to this sub-rule, the judgment-debtor has got a right to make payment of the amount due up to the confirmation of the sale and on such payment, he will be entitled to an order indicated in the sub-rule. If the sale is held and the order confirming the sale is made against a dead man, his rights under this sub-rule an; certainly affected by that order. In the circumstances, can it be said that the order confirming the sale is not a judicial order ? Has the Court jurisdiction to pass a judicial order against a dead man ?

59. It is argued on the analogy of Order 22, Rule 6, Civil P. C, that if a decree passed against a dead man, where he dies after the hearing is concluded but before the

judgment is pronounced, is valid, there is no reason why a sale held after the death of a judgment-debtor will be void, if he dies after the order for sale was made under Order 21, Rule 66 and after the service of sale proclamation. It is said that as in a suit nothing remains to be done between the parties and the Court after the conclusion of the hearing, so in an execution proceeding, after the service of sale proclamation, nothing remains to be done except the mere formal carrying out of the order for sale. But is this correct ? In the case of a sale, the judgment-debtor may stop it by paying the decretal amount at any time before the property is knocked down. After the sale, the judgment-debtor may apply to set it aside under Order 21, Rule 89 or Rule 90. If the sale is held after the judgment-debtor's death without his legal representative being brought on the record, who will be there to stop the sale'? Who will apply under Order 21, Rule 89 or Rule 90 ? The legal representative may have no knowledge of the execution proceeding. In the case of mortgage decree, I have already shown, the judgment-debtor has the right to redeem till the confirmation of the sale, and, on redemption, to obtain an order, as mentioned in Order 34, Rule 5 (1). If the order confirming the sale is passed against the deceased judgment-debtor, the right given by Order 34, Rule 5 (1) is thereby altogether denied without his legal representative being given an opportunity to exercise that valuable right. Order 22, Rule 6 is an exception to the general rule and must be restricted to the conditions laid down therein. If a decree passed against a dead man is a nullity, there is no reason why an order passed against a deceased judgment-debtor confirming a sale under a mortgage decree and thereby denying the right conferred by Order 34, Rule 5 (1) will be regarded as valid.

60. It may be asked, how can the decree-holder be expected to bring the legal representative of the deceased judgment-debtor on the record if he dies just one day before the sale and the decree-holder has no knowledge of his death ? The same question might be asked where the defendant in the mortgage suit dies just a day before the final mortgage decree and the plaintiff has no knowledge of his death. The decree will nevertheless be a nullity. The reason is that the Court has no jurisdiction over a dead man and jurisdiction does not depend on the knowledge of his death. In Kanchamalai Pathar v. Shahaji rajah Sahib A.I.R. 1936 Mad. 205 the decree-holder was, of course, aware of the judgment-debtor's death, but that circumstance did in no way affect their Lordships' decision on the question of jurisdiction. The view I take is in no way inconsistent with the Privy Council decision in Jang Bahadur v. Bank of Upper India, Ltd. A. I. R. 1928 P. C. 162 in which the question arose whether the Court to which a decree has been transferred for execution has jurisdiction to pass an order for substitution of the legal representative of the deceased judgment-debtor. Their Lordships said:

> But before execution can proceed against the legal representative of the deceased judgment-debtor the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure and not of jurisdiction. The jurisdiction over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure the defect might be waived, and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings.

61. These observations can have no application to the present case. Here the execution is proceeded with against a dead man over whom the Court has no jurisdiction. The Court has no jurisdiction to sell a dead man's property or to pass an

order against a dead man confirming the sale. Indeed, when a sale is held after the death of the judgment-debtor, what is sold is not a dead man's property but the property of his legal representative in whom it vested immediately on his death. But, as held in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 the Court has no jurisdiction to sell the property of the legal representative without notice to him under Order 21, Rule 22. In Malkarjan v. Narhari (01) 25 Bom. 337 though the Court sold the property of the legal representative of the deceased judgment-debtor who was not on the record, it was not a case where the deceased judgment-debtor's estate was not at all represented. On the Court's own finding, the person on the record was the legal representative and as such represented the estate of the deceased judgment-debtor. This is how this decision was explained in Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 I do not think the principle of the decision in Malkarjan v. Narhari (01) 25 Bom. 337 can be applied to a case where the deceased judgment-debtor's estate is not at all represented before the Court. In this connexion the analogy of an ex parte decree is of no use. In the case of an ex parte decree the defendant against whom it is passed, being a party to the suit, is bound by it, and the Code makes a special provision in O. 9, Rule 13 for setting it aside by an application. In the case of a sale which is held after the death of a judgment-debtor without anybody being brought on the record to represent his estate, his legal representative, not being a party to the proceeding, is not bound by the sale, and Order 21, Rule 90 does not provide an effective remedy for him as Order 9, Rule 13 does in the case of an ex parte decree. I have already shown that Malkarjan v. Narhari (01) 25 Bom. 337 has no application where the deceased judgment-debtor's estate is wholly unrepresented at the time of the sale.

62. If the sale is merely voidable, it is valid and binding against the legal representative unless it is set aside by an appropriate proceeding. His only remedy is either to make an application under Order 21, Rule 90 or to bring a separate suit, if it at all lies, the period of limitation for the application being 30 days and for the suit one year. But suppose he has no knowledge of the execution proceeding or of the sale until more than a year after the sale by which time even his remedy by a suit, if it lies, may be barred. The decree-holder may have honestly conducted the execution proceeding and there may be no question of any fraud being played by him. In that case there will be no scope for the operation of Section 18, Limitation Act, in regard to the application under Order 21, Rule 90, or the suit, if any, that may be brought by the aggrieved legal representative. The result will be that his right of redemption which could be exercised till the confirmation of the sale, as provided in Order 34, Rule 5 (1), would be completely gone without any fault of his. This aspect of the case was altogether overlooked in some of the decisions in which it was said that the only remedy of the legal representative was to set aside the sale under Order 21, Rule 90, Civil P. C.

63. On the other hand, it is true that the policy of the law requires that some protection ought to be afforded to bona fide purchasers at execution sales. But where the question of jurisdiction is involved, the position is different. However, where the purchaser is a stranger and his purchase is impeached by a suit, the Court, in order to do complete justice between the parties, may in appropriate cases impose such terms, as it thinks proper, on which the legal representative should recover the property. In my opinion the true effect of a sale held, in execution of a mortgage decree, after the death of the judgment-debtor, without notice to his legal representative, is that it is not valid and operative against the legal representative. I must observe that the word "void" when used with reference to a sale, is not always used in the same sense. A sale may be void in the sense that it is a complete nullity,

in which case the purchaser acquires no title at all, even against a trespasser. Again a sale may be void in the sense that it is not valid and operative against some particular person, in which case the purchaser acquires no valid title against that particular, person, though he may acquire a title quite good and effective against a trespasser. A sale held without issue of notice under Order 21, Rule 22 is a void sale of the latter class, as will appear from the following observation of Sir George Bankin C. J. in Lakhraj-Roy v. Becha Bam (67) 7 W. R. 52 already cited,

> the sale which follows will be without jurisdiction in the sense that, even if the sale is to a stranger, the sale will not be binding or valid.

64. A sale of this class is called a "void sale" as distinguished from a "voidable sale" which means that the sale is valid and binding against the particular person concerned, unless and until it is set aside by him in an appropriate proceeding. It will be noticed that in all those cases, cited above, in which the sale was held to be void for want of notice under Order 21, Rule 22 the question arose between the auction-purchaser or persons deriving title from him on the one hand and the judgment-debtor or his legal representative on the other. In this connexion it will not be out of place to refer to the analogy of a sale in execution of a mortgage decree to which a subsequent transferee is not a party. The sale, though otherwise effective, is not valid and operative against the subsequent transferee. It is not void in the sense that it is a complete nullity. Nor is it merely voidable. I would answer the question under reference as follows : A sale held in execution of a mortgage decree after the death of the judgment-debtor but after the service of all necessary processes, including the sale proclamation, without any notice to his legal representative, is void in the sense that it is not valid and operative against the legal representative

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65. The question which has been referred to the Full Bench is,

> whether a sale held in execution of a mortgage decree after the death of the judgment-debtor, but alter the service of all necessary processes including the sale proclamation, without any notice to his legal representative, is void or voidable.

66. For the sake of simplicity I assume that we are dealing with the death of a sole judgment-debtor. The question on its terms may include four different cases:

> No notice : No knowledge-(1) where the decree-holder has applied under Section 50, Civil P. C., to execute a decree against a legal representative, or to substitute him in the execution proceedings, but for some reason the Court has omitted to issue notice to the legal representative under Order 21, Rule 22;
>
> Notice: no knowledge-(2) where notice has been issued but has not been properly served;
>
> Knowledge: no notice-(3) where despite the non-issue of notice or non-service of notice under Order 21, Rule 22, it is established that legal representative had in fact knowledge of the execution proceedings and of the death of the judgment-debtor;
>
> No substitution-(4) where the decree-holder, either through ignorance of the

death, or for some other reason, has failed to make any application for impleading the legal re, presentative of the judgment-debtor.

67. It will be necessary to consider all these cases separately. The word " void", though apparently free from ambiguity, is employed in various senses. Accurately speaking, a thing is not void unless it has no force or effect whatever, but as commonly applied in the expression "void sales" the word is not so used. The definition given in Freeman on "Void Judicial Sales", page 4, is

> void sales include all those sales which, as against the original purchaser, may, without any proceedings to set them aside, be treated as not transferring the title of the property assumed to be sold.

68. " Such sales", says Freeman (he is speaking, of course, from the point of view of an American lawyer),

> may be ratified or confirmed. Many of them give rise to important equitable rights in favour of the original purchaser or his grantee. Some of them, while conferring neither legal nor equitable rights on the original purchaser, become in the hands of his innocent vendees for value, in good faith and without notice, valid both in law and in equity.

69. On this definition it is clear a sale may be called "void" without being a complete nullity; the two words are, however, used as if synonymous in many of the Indian decisions. Then with regard to the expression "voidable", I may again quote from Freeman, p. 87,

> with respect to judicial and execution sales, the general principle to be deduced from the authorities is, that the title of a purchaser not himself in fault, cannot be impaired at law nor in equity by showing any mere error or irregularity in the proceedings. Errors and irregularities must be corrected by a direct proceeding. If not so corrected they cannot be made available by way of collateral attack on the purchaser's title.

70. That is to say, voidable sales may be set aside by a direct proceeding, but the purchaser's title cannot be attacked collaterally.

71. The question before us involves consideration of Order 21, Rule 22, Civil P. C, which corresponds to Section 248, Civil P. C, 1882. Before I go further, it is necessary to notice that there have been several important changes in the provisions. Moreover, owing to the fact that the various High Courts have been allowed each to amend the rules of the Civil Procedure Code independently, wide divergence is now found between the provisions as they exist in the Codes in force in the different High Courts.

72. Section 248 of the Code of 1882 ran as follows:

> The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by line Court, why the decree should not be executed against him -
>
> (a) if more than one year has elapsed between the date of the decree and the application for its execution, or
>
> (b) if the enforcement of the decree be applied for against the legal

representative of a party to the suit in which the decree was made:

> Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of any decree passed on appeal from the decree sought to be executed, or of the last order against the party against whom execution is applied for, passed on any previous application for execution, or in consequence of the application being against the legal representative of the judgment-debtor if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

73. As against this, in the Code of 1908, Order 21, Rule 22 was in these terms:

(1) Where an application for execution is made-

(a) more than one year after the date of the decree, or

(b) against the legal representative of a party to the decree,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in con-sequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

74. Under the Code of Civil Procedure Amendment Act (8 of 1937), Section3, the words were added in Clause (1)(b) "or where an application is made for execution of a decree filed under the provisions of Section 44A." This addition need not concern us.

75. With effect from 1st April 1936, a somewhat drastic change was made in the rule by the Patna High Court in order to give effect to the recommendations of the Civil Justice Committee. Sub-rule (1) with its proviso was deleted altogether, and in its place was substituted

> where an application for execution is made in writing under Rule 11(2) the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed,

why the decree should not be executed against him.

76. Clause (2) was, however, not touched. At the same time the provision for notice in Order 21, Rule 66 was omitted.

77. It will be well to give first a short historical summary of the decisions of the various High Courts. The history of the question is briefly summed up in Chitaley and Rao's Code of Civil Procedure as follows:

> Before the date of the Privy Council decision in Mallear jun v. Narhari Malkarjan v. Narhari (01) 25 Bom. 337 : 27 I. A. 216 : (1900) 7 Sar. 739 it was held by the High Courts of Allahabad and Calcutta that a sale in execution without giving the notice required by this rule was absolutely void and without jurisdiction. The High Court of Madras, on the other hand, held that the absence of notice was only a material irregularity and that the sale was only voidable, and not void. In this state of conflict of authorities the Privy Council decided the case of Malkarjun v. Narhari Malkarjan v. Narhari (01) 25 Bom. 337 : 27 I. A. 216 : 7 Sar. 739 .... The decision came to be regarded in India as one equally applying to a total omission to issue notice and as laying down the law that, even in the absence altogether of any notice there was only a material irregularity and not a want of jurisdiction.... Accordingly, the Calcutta High Court changed its original view and held that an omission to give notice under the rule was only a material irregularity rendering the execution sale voidable. The Allahabad and Madras High Courts also began to hold the same view. This view held the field till the Privy Council had occasion to clarify the whole position in Raghunath Das v. Sundar Das Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 (in 1914).... After this decision, all the High Courts except Madras veered rounds to their old view. The Madras High Court, however, still continued to hold that the sale was only voidable and not void .... The matter came up before a Full Bench of the Madras' High Court, which finally laid down that a sale under the circumstances mentioned above WHS void for want of jurisdiction and not merely voidable Rajagopala Ayyar v. Bamanuja-chariar A.I.R. 1924 Mad. 431 This view was affirmed by another Full Bench of the same High Court in Kanchamalai Pathar v. Shahaji Rajah Saheb Kanchamalai Pathar v. Shahaji rajah Sahib A.I.R. 1936 Mad. 205 in which it was held that even if the judgment-debtor died after the property had been attached and ordered to be sold, the absence of notice to the legal representative under this rule would render the sale void.

78. "Thus," say the learned commentators,

> it may now be taken as well settled that in cases of a total omission to issue a notice under the rule the sale is absolutely void and not merely voidable.

79. This summary seems to me to be an oversimplification of the position. The real position has, to my mind, been more accurately put by Macpherson J. in F.E. Chrestien v. Jaideo Prasad F. E. Christian v. Jaideo Prasad A. I. R. 1934 Pat. 274:

> There is much conflict on the point of law and no clear lead.

80. I cannot notice all the cases on the point, but it is, I think, advisable to refer to a good many of them. In 1889 it was laid down by the Chief Justice of the Madras High Court and Wilkinson J. in Biyyakka v. Fakira 12 Mad. 21l that if an order for

possession was made prior to the death of the judgment-debtor there was no necessity for the decree-holder to bring any other person on the record between the date of that order and the date on which the order was executed. The learned Judges held that Section 234 (now Section 50) had nothing to do with such a case.

81. In the same year came a most important decision of a Full Bench of five Judges of the Allahabad High Court presided over by Sir John Edge, namely, Sheo Prasad v. Hira Lal 12 ALL. 440 This was a case not of failure to issue notice on the legal representative but of failure by the decree-holder to implead him. The attachment had taken place, and the order of sale had been made in the lifetime of the judgment-debtor. Sir John Edge held that Section 234 (Section 50) had no application in such a state of affairs. He said he could find nothing in the Code of Civil Procedure to warrant the suggestion that an attachment would abate on the death of the judgment-debtor, or that his death would render it necessary for the judgment-creditor to taka any steps to keep in force an attachment of property made in the lifetime of the judgment-debtor ....

> If the judgment-debtor's property is under attachment the execution of the decree can proceed against such property, but if at the time of the death of the judgment-debtor his property is not under attachment, the judgment-creditor must, except in the case of a decree under Section 89, T. P: Act, proceed under Section 234 (Section 50), if he desires to execute his decree against property which was of the judgment-debtor in his lifetime and which came into the hands of his legal representative at his death;' or if he desires to make the legal representative personally liable by showing that property which was of the judgment-debtor came to the hands of the legal representative and was disposed of by him otherwise than 'duly' within the meaning of that section.

82. He added:

> I do not find in the Code of Civil Procedure any provision requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment .... I can find no section in the Code which provides that the legal representative, any more than a stranger whose property is sold, is to get notice of the sale of property under attachment, except as one of the public by the proclamation of the sale which is required under the Code .... To hold otherwise would be to impose upon the purchaser at an auction sale under a decree, the necessity of ascertaining before he paid the purchase-money whether the judgment-debtor was alive at the actual moment when the sale took place, or the risk of losing the purchase-money which he paid and the property in respect of the purchase of which that money was paid, and would in any event render it difficult for such a purchaser to maintain his title under his sale-certificate if subsequently challenged by the legal representative of the deceased judgment-debtor, the exact date of whose death it might be impossible for the purchaser to ascertain or prove.

83. Three of the other Judges concurred, and the fourth held the sale merely voidable.

84. It has been in several decisions sought subsequently to distinguish this case on the ground that it was based on the old Section 234 where the words used in Sub-

section (1) were "If a judgment-debtor dies before the decree has been fully executed," whereas in Section 50 of the present Code the wording is "before the decree has been fully satisfied." There were Allahabad decisions based on the view that as soon as the attachment was made the decree was fully executed, and the change may have been made to disapprove those decisions; but, in my opinion, it would be wrong to say that the reasoning of Sir John Edge depended on the wording of the old section and is inapplicable to the new. This was also, it may be noticed, the opinion of Varadachariar J. in Kanaka, malai Pathar v. Shahaji Rajah Saheb Kanchamalai Pathar v. Shahaji rajah Sahib A.I.R. 1936 Mad. 205 he says:

> I am not persuaded that the reasoning in Sheo Prasad v. Hira Lal (90) 12 All. 440 is necessarily precluded by the substitution of the word 'satisfied' in Section 50 of the new Code for the word 'executed' in the old Code.

85. It is true that the learned Judge went on to dissent from the view taken in Sheo Prasad v. Hira Lal (90) 12 All. 440 upon other grounds.

86. Soon after this, in 1892, came the Calcutta case, which was later referred to by the Privy Council in Raghunath Das's case, A.I.R. 1914 P.C. 129 namely, Oopal Ghunder Ghatterjee v. Gunamoni Dasi (93) 20 Cal. 37 in which it was held that the issuing of the notice required by Section 248 (Order 21, Rule 22), Civil P. C, is a condition precedent to the execution of a decree against the legal representative of a deceased judgment-debtor. It is interesting to notice that Norris J. says in the course of his judgment:

> I suppose I may fairly say all the cases have been brought to our notice. I confess that there appears to me to be an apparent contradiction between some of them.

87. Divergence had made its appearance even then.

88. In 1897, in another Allahabad case, Madho Prasad v. Kesho Prasad (97) 19 All. 337 Sir John Edge and Blair J. held that applications for the execution of a decree made after the death of the judgment-debtor and without either any representative of the judgment-debtor being brought upon the record, or there being any subsisting attachment of the property against which execution is sought, are not good applications for the purpose of saving limitation. Sir John Edge said that this was a case to which Sections 234 and 248 of the Code applied, and the proceedings were ineffectual.

> There is quite sufficient irregularity in the execution of decrees in this country without our introducing the novel system that a decree can be executed against the estate of a deceased judgment-debtor without any notice to his representative and without any one to protect the property being brought upon the record.

89. It is thus apparent that Sir John Edge was in favour of making a clear distinction between cases where fresh execution is applied for against the legal representative and cases like Sheo Prasad v. Hira Lal (90) 12 All. 440 where all that was done was to carry out the sale without notice, which had already been ordered before the judgment-debtor's death.

90. In 1900 came Malharjun's case (01) 25 Bom. 337 where it was held by the Privy Council that when execution was applied for against a wrong person as legal

representative and notice was issued on that person instead of on the real legal representative the sale nevertheless was only irregular, and not void in the sense of being without jurisdiction. This, it should be noticed, was a case of an application for execution against the legal representative, and not a case of death without substitution in the course of the execution proceedings. The Privy Council held that an error of the Court in deciding who was the legal representative could not destroy the Court's jurisdiction. In the course of the judgment, Lord Hobhouse observed that to treat such an error as destroying the jurisdiction of the Court would be calculated to introduce a great confusion into the administration of the law, that a purchaser could not possibly judge of such matters even if he knew the facts, and if he was held to be bound to inquire into the accuracy of the Court's conduct of its own business no purchaser at a court sale would be safe. He distinguished this case from the case where neither the debtor nor his estate had been ever made subject to the decree of the Court, where the liability had never been established and the process of execution had nothing to rest upon. "In such a case," said Lord Hothouse,

> the Court actually had not the jurisdiction which it purported to exercise. It is a different matter when the Court has by its decree established the debtor's liability and is in the process of working it out against his estate.... There can be no question that omission to serve notice on the legal representative is a serious irregularity, sufficient by itself to entitle the plaintiff to vacate the sale. But there may be defences to such a proceeding, and justice cannot be done unless those defences are examined by legal methods.

91. Consequently a suit or an application under the Code was necessary to set aside the sale,

92. This case is clear authority for the proposition that actual notice to the legal representative is not necessary to give jurisdiction. In certain circumstances the sale may be with jurisdiction even though the actual legal representative has neither been served with notice nor received information.

93. In 1910, in Livinia Ashton v. Madhab-moni Dasi 11 Cri. L. J. 489, we find Mooker-jee and Teunon JJ., saying:

> The case of Mallearjun v. Narhari15 is authority for the proposition that a sale held without issue of a notice under Section 248, Civil P. C, is not a nullity and cannot be ignored by the party whose property has been sold as if the sale had never taken place; but such omission is a serious irregularity which makes the sale voidable.

94. I draw attention to one passage in the judgment of Mookerjee J. At page 498 he said:

> The provisions of Section 248 have been borrowed from the English procedure for a writ of scire facias. In England it is well settled, that if execution is issued of a judgment without issue of a notice where such notice is essential, the execution is not necessarily a nullity, though it would be set aside as wholly irregular if proceedings had duly been taken in that behalf : Blanchenay v. Burt (1869) 4 Q. B. 707, Good Title v. Bad Title (1813) 9 Dow 1009. The same rule has been adopted in the American Courts in which it was ruled that if a writ of scire facias has not been served out, the sale is nevertheless valid till it is avoided; in other words, it is an irregularity which is waived by failure to move to quash the writ.

95. In 1913, in another Calcutta case, Bepin Behary Bera v. Sasi Bhusan Datta18 C.W.N, 766 it was held that in a sale under the Public Demands Recovery Act, where the Court was apprised of the death of one of the judgment-debtors but the property was nevertheless sold without notice to the legal representatives, the sale was not a nullity but only voidable. The learned Judges relied upon Sheo Prasad v. Sir a Lal (90) 12 All. 440 and Malkarjun's case. (01) 25 Bom. 337

96. In 1914 came the well-known Privy Council case, Raghunath Das v. Sundar Das Khetri A.I.R. 1914 P.C. 129 where Lord Parker of Wadding-ton said:

> As laid down in Gopal Chunder Chatterjee v. Gunamoni Dasi 20 Cal. 370 a notice under Section 248 of the Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor.

97. The first thing which I wish to say about this case is that Sir John Edge, whose judgment in Sheo Prasad v. Sira Lal (90) 12 All. 440 I have dealt with, was a party to this decision of the Privy Council, and it seems to me extremely unlikely that Sir John Edge would have allowed himself to be a party to anything really inconsistent with his decision in Sheo Prasad's case29 without that case being first noticed. It is not unreasonable to infer that if properly understood Raghunath Das's case A.I.R. 1914 P.C. 129 is not inconsistent with Sheo Prasad's case (90) 12 All. 440 The only other thing which I wish to say about this case is that it was a decision upon the old Section 248 which did not contain the present Sub-section (2) allowing the Court to dispense with the notice at its discretion.

98. In 1916 we find a curious Calcutta case, Shyam Mandal v. Satinath Banerjee 44 Cal. 954 in which Mookerjee J. sitting with Cuming J. without any reference to his previous decisions where he had taken an opposite view said:

> It was pointed out by the Judicial Committee in Raghunath Das v. Sundar Das Khetri 41. I.A. 251 that the notice prescribed by Section 248 of the Code of 1882 (now replaced by Order 21, Rule 22) is necessary in order that the Court should obtain jurisdiction to proceed against the property of the judgment-debtor by way of execution. The omission to give notice, as required by the rule, is not a mere irregularity which makes the proceeding voidable, but is a defect which goes to the root of the proceeding and renders it void for want of jurisdiction.

99. In 1918 there was an interesting Oudh case, Kaniz Mehdi Begam v. Basul Beg A. I. R. 1918 Oudh 379 in which the case of a mortgage decree was distinguished from that of a money decree. The learned Judges were pressed with Raghunath Das's case A.I.R. 1914 P.C. 129 and they said:

> It will be noticed, however, that the decree which was before their Lordships in that case, though passed originally on a mortgage, was not a decree for sale under the mortgage but a simple money decree. Now there is a broad distinction to be drawn between a sale under a mortgage decree and an attachment and sale under a simple money decree. A mortgage decree directs the sale of the particular property described in it and the jurisdiction to sell is derived from the decree itself.

100. In an Oudh case of 1920, Mt. Masmmare' v. Gulzari Lal A.I.R. 1920 oudh 178 Daniels A. J. C. said:

> At the same time I differ from the view taken in the Madras cases that the sale under such circumstances is an absolute nullity, and agree with the view which has found favour alike in Allahabad, Bombay and Calcutta that it is at most an irregularity which would justify the sale being set aside by any person prejudiced thereby. The position is entirely different from that of a decree being passed or a fresh execution taking place against a person who was not a party. Hero the property of the deceased judgment-debtor was liable for satisfaction of the decree and that property had already been brought into the custody of the Court for the purpose of satisfying the decree.

101. This was a case where the judgment-debtor had died after the attachment.

102. Reference was made in the above case to the Madras view; but in the very same year, in Sitaramayya v. Gopalakrishnamma A. I. R. 1920 Mad. 1034 a Division Bench of the Madras High Court held that where there is a subsisting attachment and a Court proceeds to sell the property in pursuance of that attachment it would not be acting without jurisdiction if no notice is given of the application for an order for sale. The absence of notice is a mere irregularity, and does not render the sale null and void. This was a case where execution was taken out more than one year after the decree. The learned Judges drew, special attention to the distinction in law between an application for execution and an application for taking a step-in-aid of execution.

103. As against this, in 1922, in Raghunatha-sami Ayyangar v. Gopauj Rao A. I. R. 1922 Mad. 307 another Bench of the Madras High Court, in the case of a mortgage decree, held that where the procedure laid down by Section 50, Civil P. C, had not been followed the sale was a nullity and did not require to be set aside.

104. Next year, in 1923, came the important Full Bench decision of the Madras High Court in Rajagopala Ayyar v. Bamanujachariar 47 Mad. 288. The Full Bench held that in a case where notice under Order 21, Rule 22, Civil P. C has not been issued and the omission is due not to the fact that Sub-rule (2) has been applied but to the fact that notice was not asked for, a sale held in execution is a nullity and not merely voidable, but is void only as against the person to whom notice should have been but was not issued. It is noticeable that Sir Walter Salis Schwabe, C. J. in his decision remarked:

> If this matter were free from authority I should incline to the view that non-compliance with the provisions of Order 21, It. 22, was a material irregularity, and not an illegality which will make the subsequent sale a nullity. In England there was a rule of common law that judgments after a lapse of a year and a day could not be executed unless an order for what was known as a scire facias was first obtained. There are authorities to the effect that a disregard of that rule rendered the subsequent sale in execution voidable, and not void : Blanchenay v. Burt (1869) 4 Q. B. 707 and Good Title v. Bad Title, (1813) 9 Dow 1009 and the same rule applies in America : see Freeman on Void Judicial Sales, p. 97; but in my judgment, there are authorities here to the contrary which preclude such a view being taken here.

105. He then went on to refer to Raghunath Das's case. A.I.R. 1914 P.C. 129

106. In 1925 the question was considered by a Bench of the Patna High Court in Barham-deo v. Saligram A. I. R. 1925 Pat. 384 and it was held by Ross and Kulwant Sahay JJ. that where the judgment-debtor dies after attachment and issue of sale

proclamation, and his legal representatives are not brought on the record, the auction-sale is not null and void but is merely irregular and can only be set aside upon appropriate proceedings being taken within the period of limitation. This was a case where the execution proceeded in the name of the deceased judgment-debtor. The learned Judges relied mainly upon Sheo Prasad v. Hira Lal (90) 12 All. 440

107. In 1926 came another Calcutta case. In Kara Prasad Gain v. Gopal Chandra Gain MANU/WB/0129/1926 : 31 C. W. N. 299 a Division Bench held that the death of the judgment-debtor after attachment of property and before sale does not necessarily invalidate the sale. In this case also Sheo Prasad v. Hira Lal (90) 12 All. 440 was relied upon.

108. In 1927 there was a decision on the point in the Calcutta High Court by Sir George Rankin C. J., and Mitter J. in Tarangini Debi v. Raj Krishna Mondal MANU/WB/0382/1927 : 32 C .W. N. 418. The judgment was delivered by Sir George Rankin, and it was held that where the judgment-debtor dies after the sale proclamation and notice of attachment have been served on him it is proper thereafter to bring his representatives on the record in the execution proceedings, but failure to do so is an irregularity and no more and does not make the sale void.

109. In 1928 came what is, to my mind, a very important Privy Council case, namely, Jang Bahadur v. Bank of Upper India Limited 55 I.A. 227. This was a case where the decree had been transferred to another Court for execution. After that, the judgment-debtor died. Section 50 provides that the application to proceed against the legal representative is to be made to the Court which passed the decree; but an application was made not to that Court but to the transferee Court. The latter issued notice, but no application had been made to and no notice had been issued by the only Court entitled under Section 50. The legal representative, however, made no objection to the transferee Court making the order. Their Lordships held that what had happened was merely an irregularity in procedure which could be waived and had been waived. In the course of his judgment Lord Sinha said:

> If the judgment-debtor dies before any such certificate (the certificate by the transferee Court to the Court which passed the decree that the decree has been executed) is issued, the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death. But before execution can proceed against the legal representative of the deceased judgment-debtor the decree-holder must get an order for substitution from the Court which passed the decree; this is a matter of procedure and not of jurisdiction" (the italics are mine). "The jurisdiction over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure the defect may be waived, and the party which has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings.

110. In the same year the point came before Kulwant Sahay and Macpherson JJ. of the Patna High Court in Fakhrul Islam v. Rani Bhubaneshwari Kuer A. I. R. 1929 Pat. 79. It was held that though ordinarily a sale without service of notice under Order 21, Rule 22 is without jurisdiction, nevertheless if a notice has in fact been issued and the judgment-debtor though not served has appeared and contested the execution, the object of Rule 22 has been achieved and the Court has jurisdiction to hold the sale.

111. There was another Madras case, also in 1928, Bamnathan Chettiar v. Ramanandan Ghettiar A. I. R. 1929 Mad. 275 in which a Division Bench held that the mandatory character of the provision for notice under Order 21, Rule 22, applies only where the application for execution is being first taken out. The learned Judges said:

> It is obviously not the law that the moment a judgment-debtor in an execution petition dies, the Court loses jurisdiction in the matter and the execution petition collapses... If it were to be held otherwise, then a meticulous and ridiculous inquiry into perhaps the exact minute of the party's death might be necessary, whether, for example, the death was just at the time when the property was being knocked down to the highest bidder or at the time of the confirmation of the sale.

112. They held that the death of the judgment-debtor during the pendency of the execution proceedings does not entail in law the issue of a fresh notice to his legal representatives, unless the result of the death of the party to whom notice was originally issued is to leave no one at all on the record to represent the estate and thus to effect the disappearance of the estate from the jurisdiction of the Court.

113. In 1930, in Srishohandra Nandi v. Rahatannessa Bibi 58 Cal. 825, a Division Bench consisting of Mukherji and Mitter JJ. followed Raghunath Das's case A.I.R. 1914 P.C. 129 and held that an auction-sale held in execution of a mortgage-decree without serving notice under Order 21, II. 22, on one of the judgment-debtors does not bind the share of that particular judgment-debtor; but it was also held that the sale was void only as regards the share of that particular judgment-debtor, and was not void in its entirety. It is significant that Sir Man-matha Nath Mukherji in delivering the judgment said:

> it is perhaps too late to contend that, in view of the insertion of Sub-rule (2), nothing corresponding to which there was in Section 248 of the Code of 1882, what was under the Code of 1882 regarded as want of jurisdiction should now only be regarded as an irregularity.

114. But at the same time he added that he found it very difficult to reconcile the view as to absolute want of jurisdiction with what the sub-rule says, since the sub-rule leaves it entirely to the Court in a case, in which in the exercise of its discretion it considers that the issue of such notice would cause unreasonable delay or defeat the ends of justice, not to issue that notice. "Of course," he said,

> the Court has to record its reasons for dispensing with the notice and that is obligatory; but it has been held (he referred to two cases) that omission in that respect is a mere irregularity.

115. The same year and month, August 1930, came another Calcutta decision, by Rankin C. J. and Ghose J., namely, Chandra Nath Bagchi v. Nabadip Chandra Dutt MANU/WB/0276/1930 : AIR1931Cal476 . This was a case where no notice had been served under Order 21, Rule 22, though the execution was more than a year after the; date of the decree, but despite the failure to issue notice the judgment-debtors appeared and actively contested the execution proceedings. The question was in such circumstances did the failure to issue notice go to the root of the jurisdiction? The Court held that it did not. Sir George Rankin in the course of his judgment said that it was quite unnecessary to push the abstract logic of the case of Raghunath Das v. Sunder Das Khetri A.I.R. 1914 P.C. 129, to this ridiculous extreme. He referred to the Patna case I have just noticed, Fakhrul Islam v. Rani Bhubaneshwari Kuer A. I. R.

1929 Pat. 79, with approval, and said:

> It appears to me to be merely piling unreason upon technicality to hold upon the circumstances of this case that it is open to the judgment-debtors on these grounds to object to the jurisdiction of the Court because they have not got a formal notice to do something, namely, to dispute the execution of the decree when in point of fact they were busy disputing about it .... for the best part of the last two years.

116. In 1931, the question came before the Patna High Court again in Smith v. Kailash Chandra Chakraverty, 11 Pat. 241.5, Wort J. held that Rule 22 also contemplates the case where the execution is levied in the first instance against the judgment-debtor and subsequently after his death the decree is sought to be executed against his legal representative, and that a notice calling upon the legal representative to show cause why substitution should not be made is not a proper notice as contemplated by Rule 22, and the failure to serve a proper notice renders the sale invalid. It is to be noted, however, that in this case there had been an application under Order 21, Rule 90, to set aside the sale, and Wort J. concluded by saying' "the sale must bo set aside." Moreover, Fazl Ali J. (as he then was) in agreeing to the appeal being allowed proceeded upon the basis that the notice under Order 21, Rule 22, such as it was, had not been properly served.

117. In 1931 also there was a case of the Peshawar Judicial Commissioner's Court, Muhammad Zaman v. Sher Muhammad, 144 I. c. 14 in which it was held that the notice under Order 21, Rule 22, Civil P. C, is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representatives of the deceased judgment-debtor, and a sale without issuing such notice is null and void and not merely irregular. This decision was based upon Raghunath Das's case A.I.R. 1914 P.C. 129

118. In 1932 there was the Patna case of F.E. Chrestien v. Jagdeo Prasad A. I. R. 1934 Pat. 274 in which Macpherson and Dhavle JJ. held that where there are circumstances in which, even apart from Sub-section (2) of Order 21, Rule 22, the notice under Sub-section (1) can be dispensed with, the failure to issue the notice does not go to the jurisdiction of the executing Court. The jurisdiction of the executing Court would not be destroyed by an error in the notice as to the residence of the judgment-debtor. The reference to the circumstances in which the notice could be dispensed with was to the previous Patna case of Fahhrul Islam v. Rani Bhubaneshivari Kuer A. I. R. 1929 Pat. 79 which I have already noticed. This decision proceeded upon the basis that what can be dispensed with cannot be a matter of jurisdiction.

119. I next come to a most important Madras case which was decided in 1935, namely, Kanchamalai Pathar v. Shahaji Rajah Sahib A.I.R. 1936 Mad. 205 In that case a Full Bench of five Judges of the Madras High Court, in a case where in execution of a money-decree property was attached and after the proclamation of sale was settled and the order for sale was passed the judgment-debtor died, but no application was made under Section 50, and no notice was served on the legal representatives under Order 21, Rule 22, held that the sale was void and not merely voidable. In this case the question was dealt with at great length by Varadachariar J., and the decision was based not alone upon Raghunath Das's case A.I.R. 1914 P.C. 129 but also upon the general principle that the Court cannot sell the property of a dead man. Reference was made both by Varadachariar J. and by Cornish J. to In re Shephard; Atkins v.

Shephard (1890) 43 Ch. D. 131 and the following passage from the judgment of Cotton L. J., was quoted:

> It is quite new to me to hear it alleged that there is anything in the rules to enable the Court to make an order against a person who is not a party to the action. It is against all principle to proceed against him until he has been brought before the Court or all proper steps to bring him before the Court have been taken ineffectually.

120. With the greatest respect it seems to me that sufficient importance was not attached by these learned Judges to the fact that the decision in question proceeded upon the ground that an application for the appointment of a Receiver, with which the Court was concerned, was not an application in execution, but an application in the action and so was governed by the principles governing devolution of parties in actions, and not in execution. It will be noticed that the expression used by Cotton L. J. in the passage quoted was against a person who is not a party to the action. The distinction which this case illustrates was emphasised by Lord Hobhouse in Malkarjun's case. (01) 25 Bom. 337

121. In 1937 there was another Patna case, Rani Brajobala Debi v. Thahur Madhusudan Singh A.I.R. 1938 Pat. 162 in which Fazl Ali J. (as he then was), sitting with Rowland J., held that the absence of notice under Order 21, Rule 22, goes to the root of the jurisdiction of the executing Court. This was a case where the notice was necessary merely because execution had been applied for more than a year after the date of the decree, and the executing Court had dispensed with the notice owing to an erroneous report made by the office. The previous conflicting decisions upon the question were not, however, referred to.

122. In 1940, the question came up again in Patna before a Full Bench consisting of Harries C. J., Dhavle and Manohar Lall JJ. in Hari Prasad Singh v. Lalbehari Saran Singh A. I. R. 1940 Pat. 328 . This was a case under the Bihar 'and Orissa Public Demands Recovery Act, 1914. The certificate-debtor had died between the date of the service of notice on him under Section 7 of the Act and the date of the actual sale and the sale was held without any notice to the legal representatives. Dhavle J, in a lengthy judgment, after examining most of the previous decisions of the various High Courts, held that the sale in respect of the share of the deceased certificate-debtor was not null and void; but the other two learned Judges held that it was not necessary in the case to decide that question and preferred to refrain from expressing a definite opinion.

123. In 1941, in Durga Singh v. Sugambar Singh (22) 7 P.L.T. 520 a Division Bench of the Patna High Court consisting of Harries C. J. and Pazl Ali J. (as he then was) went so far as to hold that mere issue of the notice under Order 21, Rule 22, is not sufficient, The Court must be satisfied that the notice has been served on the person whom the Court regards as the proper recipient of the notice, otherwise the subsequent sale is wholly without jurisdiction, "We are not told whether the notice was required by reason of execution being more than one year after the decree, or because it is now required in all cases under the amended Patna rule. The only cases referred to were Raghunath Das's case A.I.R. 1914 P.C. 129 and Malkarjun's case, (01) 25 Bom. 337 and no reference was made to the previous Patna decisions in which a different view had been taken.

124. Lastly, I will refer to a Calcutta case decided in 1942, Faizaddi Taluhdar v.

Bezia Begum I.L.R. (1942) Cal. 262. In this case the fact of the death of the judgment-debtor had apparently not been brought to the notice of the decree-holder, with the result that the legal representatives were not brought on the record. The death, had taken place before the publication of the sale proclamation. Reliance was placed, in support of the contention that the sale was merely voidable, on Sir George Rankin's judgment in Tarangini Debi v. Raj Krishna Mondal (28) 115 I. C. 520 Edgley and Akram JJ. hold that the failure to bring the representatives on record rendered the sale void. They followed the Madras Full Bench case, Kanchamalai Pathar v. Shahaji Rajah Sahib A.I.R. 1936 Mad. 205 and in regard to Sir George Rankin's judgment they simply observed that apparently his attention was not directed to the decision of the Privy Council in Raghunath Das's case A.I.R. 1914 P.C. 129. It is a little surprising to find a Division Bench in effect overruling a previous Division Bench decision of the same Court upon the ground that Sir George Rankin in 1927 was not aware of a well-known Privy Council decision of 1914.

125. I now proceed to an examination of the problems that arise out of the reference. Inevitably in the course of examination of the previous decisions I have here and there hinted at my own opinion. I take first the question of the effect of failure of the Court for some reason to issue the notice under Order 21, Rule 22, though the application under Section 50 has been made; that is, the case of failure of notice though not of failure to implead. This is the bare question whether the issue of notice under Order 21, Rule 22, is the basis of jurisdiction or merely a rule of procedure. My view is that it is a rule of procedure, and that the word "shall" is used merely in the directory sense, as it was in Order 21, Rule 66. So far as I am aware, it has never been held that the failure to issue notice under Order 21, Rule 66, goes to the root of the Court's jurisdiction.

126. My first reason for this view is the insertion in the Code of 1908 of Sub-rule (2) enabling the Court in certain circumstances in its discretion to dispense with the notice. Whatever may have been the position with regard to the old Section 248, I fail to understand how anything that can be dispensed with can go to the root of the Court's jurisdiction. A Court surely cannot dispense with its own jurisdiction. I do not agree with the view taken in the Madras Full Bench cases that the insertion of Sub-rule (2) makes no difference. On the contrary, it seems to me a clear indication by the Legislature of its intention that the notice was not the foundation of jurisdiction. I may here notice the interesting fact that several of the High Courts have since themselves taken care to make it even plainer, by amending Order 21, Rule 22, that the intention was not to make the issue of notice the foundation of jurisdiction. Thus, the Calcutta High Court has added Sub-rule (8) as follows:

> (3) Omission to issue a notice in a case where notice is required under Sub-rule (1) or to record reasons in a case where notice is dispensed with under Sub-rule (2), shall not affect the jurisdiction of the Court in executing the decree.

127. The Allahabad High Court has added a proviso to Sub-rule (2):

> Provided that no order for the execution of a decree shall" be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission.

128. The Lahore High Court has added at the end of the rule:

> Failure to record such reason shall be considered an irregularity not amounting to a defect in jurisdiction.

129. The Madras High Court has added a proviso to Sub-rule (2):

> Provided that no order for execution of a decree shall be invalid owing to the omission of the Court to record its reasons, unless the judgment-debtor has sustained substantial injury as the result of such omission.

130. The Nagpur High Court, like the Allahabad High Court, has added a proviso to Sub-rule (2):

> Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission.

131. In Oudh the same proviso has been added.

132. I think in endeavoring to arrive at the intention of the Legislature in enacting Section 248 and Order 21, Rule 22, it is permissible to look at the history of the provision. There can be no doubt at all that in this provision and in Section 50 the Legislature was copying English practice and introducing something to correspond to the old English judicial writ of scire facias, the place of which has since been taken substantially by Order 42, Rule 23 of the Rules of the Supreme Court. The fact that scire facias had to issue in cases, inter alia, where execution was taken out more than a year and a day after the decree, or where there had been a change in parties so as to involve execution against or by legal representatives, and that Section 248 related practically to similar circumstances is surely very significant. A very interesting discussion of this question is to be found in a Calcutta case of 1909, Jogendra Chandra Roy v. Shyam Das (09) 36 Cal. 543 Mookerjee J. says (552):

> If now we bear in mind the essential features of a writ of scire facias and of the result to be gained by a recourse to it, it is by no means difficult to identify it substantially with the procedure embodied in Section 248, Civil P.C. The object of this procedure as also of the procedure embodied in the, corresponding Section 216 of the Code of 1859, was to give notice, so as to prevent undue surprise to a judgment-debtor, when more than one year had elapsed between the date of the decree and the application for execution, or when the decree was sought to be enforced against the legal representative of the party against whom the decree was originally made.

133. The importance of this lies in the fact that in England execution issued without a scire facias was not a nullity, but voidable only : see Halsbury's Laws of England, Edn. 2, by Lord Hailsham, Vol. 14, p. 8, Note (1) to Para. 10. Reference is made to Blanchenay v. Burt (1869) 4 Q. B. 707 and Spooner v. Payne (1847) 11 Q. B. 13646.

134. I would also refer to Edwards on the Law of Execution, book 1 chap. 1, Section 2 (v), p. 43. The learned author quotes Order 42, Rule 22 of the Supreme Court Rules:

> As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or the date of the order.

135. and then goes on to say:

> Before the passing of the C. L. P. Act, 1852, execution must have been issued within a year and a day. If it were not so issued it was necessary to issue out a writ of scire facias to have the benefit of the judgment. By analogy to the old practice, it may be stated that if execution were to be issued on a judgment more than six years old, without any application or order under the next rule (R. 23), such execution would not necessarily be a nullity, though it would be set aside as wholly irregular.

136. It is quite true that the reference was to execution of dormant judgments between original parties but it is, I think, to be noticed that Order 42, Rule 23, which deals with four classes of cases (a), (b), (c) and (d), lumps together under (a) the case where six years have elapsed since the judgment or date of the order and the case where any change has taken place by death or otherwise in the parties entitled or liable to execution. I do not think, therefore, that any distinction can be drawn in this matter between these two classes of cases. Varadachariar J. in Kancha-malai Pathar v. Shahaji Rajah Sahib A.I.R. 1936 Mad. 205 suggests that there is such a distinction, but with respect I cannot find that the cases on the point referred to by him support his contention. There may be a distinction in this respect that in the former class of cases absence of notice is not so seriously regarded. Edwards in the work cited, at p. 24, says, that the application under S. 23 is made ex parte in most cases, and he adds at p. 44 that

> it follows from Rules 22 and 23 that execution may issue at any time within six years, but that after that time leave is necessary. The writ of execution may in all cases issue without notice to the execution debtor, notwithstanding the provisions of Order 44, Rule 13.

137. Whereas he says at page 54,

> on the devolution of liability of the person subject to the judgment or order the application for leave to issue execution, and where necessary for change of parties, is made on motion or summons, and not ex parte.

138. It is one thing, however, to say that notice is necessary and quite another thing to say that execution without notice is a complete nullity.

139. I would also like to refer to the provisions of Order 17, Rule 4 of the Supreme Court Rules. This rule runs as follows:

> Where by reason of marriage, death or bankruptcy or any other event occurring after the commencement of the cause or matter and causing a change or transmission of interest or liability or by reason of any person interested coming into existence after the commencement of the cause or matter it becomes necessary or desirable that any person not already a party should be made a party or any person already a party should be made a party in another capacity an order that the proceeding shall be carried on between the continuing parties and such new party or parties may be obtained ex parte on application to the Court or a Judge upon allegation of such change or transmission of interest or liability or such person interested having come into existence.

140. It seems to me that the procedure contemplated by the old writ of scire facias,

or under Order 42, Rule 23, is a matter of procedure, and not of jurisdiction. If so, is it an unjustifiable inference to hold that the corresponding procedure provided for in India by Section 50 and O. 21, Rule 22, is of the same character ?

141. One test of whether a provision goes to the root of the jurisdiction is whether it can in any circumstances be waived. Quite apart from Sub-rule (2) it seems clear that notice under Rule 22 of Order 21 can be waived if the judgment-debtor or the legal representative obtains notice in some other manner and acquires knowledge and appears to contest the proceedings. That is surely the effect of Sir George Rankin's decision in Chandra Nath Bagchi v. Naba-dip Chandra Butt MANU/WB/0276/1930 : AIR1931Cal476 where he holds that the formal notice is unnecessary if the circumstances indicate that there was notice in substance. That is surely also the effect of the Privy Council decision in Jang Bahadur v. Bank of Upper India, Limited A. I. R. 1928 P. C. 162 where Lord Sinha says (p. 233): "before execution can proceed against the legal representative of the deceased judgment-debtor the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure and not of jurisdiction." That is the effect too of the decision of this Court in Fakhrul Islam v. Rani Bhubaneshwari Kuer A. I. R. 1929 Pat. 79 where the judgment-debtor though not served with a notice had appeared and contested the execution. It seems perfectly clear that even apart from Sub-rule (2) the notice can in certain cases be waived or dispensed with. If that is so, it surely follows that the notice is not the basis of jurisdiction. It it is the issue of the notice which gives the jurisdiction, it may be asked whence does the jurisdiction come where the notice is dispensed with under either Sub-rule (2) or for other reasons, or where it is entirely unnecessary, as it was before the 1986 Patna amendment in cases where execution was taken out against the judgment-debtor within one year of the decree ?

142. It has been strongly argued by Mr. P. R. Das for the respondent that Order 21, Rule 22, and especially in its present Patna form, contemplates the issue of a notice only when the execution petition is originally filed, and not when substitution is made during the course of execution proceedings. It seems to me fairer, however, and more in accord with what seems to have been the intention of the Legislature, to regard Order 21, Rule 22, as a provision for notice at any stage of the proceedings so as to give the legal representative an opportunity of showing cause. Apart from that, I do not want to base my decision upon any technical ground. For the reasons which I have already given I am of opinion that the failure to issue notice, while a serious irregularity, does not affect the jurisdiction of the Court so as to render a subsequent sale a complete nullity. If this involves hardship in some cases to the legal representative of a judgment-debtor, since under Article 166, Limitation Act, an application to set aside the sale is given the short period of limitation of one month (evidently to afford protection to bona fide purchasers), it must be remembered that the interests of the purchaser at court-auction sales are equally deserving of protection. It is hard enough to get reasonable bids at these sales, except perhaps by the decree-holder himself, and if there is to be this added insecurity in the purchaser's title for a period which may extend to 12 years, and the necessity of his making what has been called in one of the cases I have cited, "a meticulous and ridiculous enquiry" it is likely to make the public even more diffident of purchasing at such sales than it is at present. On the other hand, any hardship to the legal representative can be easily avoided by making Section 5, Limitation Act, applicable to applications to set aside sales by the legal representatives of judgment-debtors. It is no doubt such considerations that have weighed with the High Courts which have made the alterations in Order 21, Rule 22 that I have already noticed.

143. The second question which I have propounded is, what is the position where notice has been issued but not properly served ? What I have already said answers that question. If the sale is not a complete nullity where no notice has issued, then a fortiori it is not a nullity where there has issued a notice of some sort. Moreover, Malkarjun's case15 is, I think, direct authority for the proposition that incorrectness of the notice issued, and its non-service on the proper person, does not affect the Court's jurisdiction.

144. If it is said that on general principles any order passed by a Court against a person not before it should be regarded as a nullity, the answer is, I think, that it is quite enough if it is not regarded as binding upon the person in question. Take for example the case of an ex parte decree. The defendant subsequently comes forward under Order 9, Rule 13, and establishes that he never received any notice of the proceedings. The decree will, of course, be set aside; but the words used in Order 9, Rule 13, are "set aside," and no one has ever contended or could contend that the decree does not have to be set aside but can be ignored.

145. The third case which I postulated is where there has been no notice under Order 21, Rule 22, but there has been notice under some other provision of the law, or the representative of the deceased has otherwise acquired knowledge of the proceedings. If the proceedings are not a nullity, even where there has been no notice and no knowledge, they cannot be a nullity where there is knowledge, and this case is directly covered by the reasoning of Sir George Rankin in Chandra Nath Bagchi v. Nabadip Chandra Dutt MANU/WB/0276/1930 : AIR1931Cal476 with which I respectfully agree.

146. I have now dealt with the matter of Order 21, Rule 22 and I turn to the question of failure of the decree-holder to implead the legal representative; to my mind an entirely different matter. The question of the issue of notice under Order 21, Rule 22, only arises where an application is made to execute the decree, or to continue the execution, against the legal representative. Where there is no such application, the question of notice cannot arise. There is no failure of the Court to do anything it ought to do. There is no non-compliance with Order 21, Rule 22. The Court has done everything the law requires it to do, and done it regularly, upon the materials before it. The non-compliance, on the contrary, is with the provisions of Section 50, and is on the part of the decree-holder. There may be cases where the conduct of the decree-holder has been completely bona fide and where also there has been no negligence on his part; the cases, for example, where the death takes place only just before the sale and neither the Court nor the decree-holder learns of the death until after the sale has taken place. In the case which gave rise to the present reference the death, in fact, took place only the, day before the sale was held. What is the effect of the failure, in such cases, of the decree-holder to apply under Section 50 to implead the legal representative of the deceased judgment-debtor ? I assume that he should apply as soon as he becomes aware of the death, and that Section 50 was not intended to apply only to cases of fresh applications for execution. That, I think, is the correct view upon general principles. At the same time, I think, there is a clear distinction between cases where the death of the judgment-debtor takes place before execution has been taken out and cases where execution has already in part proceeded and the processes of the Court have already issued. We are concerned here only with the latter class of cases, so I do not propose to consider the former.

147. Turning to English law we find the distinction I have just indicated well recognized, and whatever might be the position, if death takes place before issue of

the writ, it was most certainly not the case that the death of the judgment-debtor, even the sole judgment-debtor, after the writ had issued, rendered the subsequent proceedings a complete nullity. On the contrary, in certain cases at least, execution could validly proceed without impleading the legal representative, and the proceedings were not regarded as even irregular. If I may refer to Anderson on the Law of Execution ; in speaking of the writ of fieri facias, at p. 188, he says:

> The death of the execution-debtor has no effect either in rendering the writ inoperative or in staying its execution, and the sheriff must proceed under it as if the person against whom it was issued were still alive : Ranken v. Harwood (1846) 10 Jur. 794, per Mellish L. J., Re Davies ; Ex parte Williams (1872) 7 Oh. 314, Needham's case (1867) 12 Mod. 5, Thoroughgood's case Noy 73, Horton v. Jtuesby Comb. 33.

148. And, at p. 213, the learned author says:

149. Harwood 5 Har 215, etc." At p. 188 also he says:

> It matters not that the death of the debtor occurred before the delivery of the writ. Where the sheriff acts in this event, he must be careful not to take any of the property of the executor or administrator.

150. Again, at p. 371, in dealing with the writ of elegit Anderson says:

> As the writ remains in force notwithstanding the death of the debtor, it must be carried into effect by the sheriff in spite of such an event (Tidd's Practice, Edn. 8, 1074).

151. Returning to Edwards on the Law of Execution, at page 51, in chap. I, Section 3, Sub-sections (iii) and (iv), he distinguishes between the cases where change of parties takes place after judgment signed and before execution issued, and where change of parties takes place after execution issued but before it is completed or return made. We are at present concerned only with the second class of cases. At p. 55, the learned author says:

> The writ of execution is a mandate to the sheriff or other officer If the person dies against whom or against whose property it is directed before the sheriff has begun its execution, different considerations arise. The authorities on this point are somewhat conflicting.... On the above cases it would appear that where the execution of the writ has actually begun, the person pursuing the execution is safe in proceeding, notwithstanding the death or devolution of interest of the party against whom the execution is issued.

152. Thus it appears that where the execution of the writ had actually begun the person pursuing the execution could proceed notwithstanding the death, without taking any steps. That is the case which is analogous to the case we are considering, where death has taken place after the attachment (if any) has been made, the sale proclamation has issued, and the sale has actually been ordered. Varadachariar J. in Kanchamalai Pathar v. Shahaji Rajah Sahib A.I.R. 1936 Mad. 205 in dealing with this question quotes a passage from Freeman on Void Judicial Sales, paragraph 24 to the effect that

> if the writ issues and bears tests after the death of the sole defendant the authorities almost (but not quite) unanimously adjudge it void.

153. Apart from the fact that Freeman is dealing with American law, he is speaking of the case where the writ issues after the death, and not where the writ is already under execution when death takes place.

154. Is there any reason why the English common law principle should not apply in India? I can find nothing in the Civil Procedure Code which negatives it. In India, as in England, it is clear that the execution proceedings do not abate by reason of the judgment-debtor's death. Lord Sinha has pointed that out in the Privy Council case, Jang Bahadur v. Bank of Upper India, Limited A. I. R. 1928 P. C. 162 to which I have several times referred. Order 22, Rule 12, Civil P. C, indeed makes that clear. The orders' of the Court therefore remain valid and in force, and in the case we are considering all necessary orders providing for the sale have already been passed, and passed perfectly regularly, in the lifetime of the judgment-debtor. I can see no difference in this respect between execution of a money-decree where attachment has issued, and execution of a mortgage-decree where the sale is directed by the decree itself. In both cases the sale proclamation has been drawn up and published; the order for the sale has actually been made. All that remains to be done is of administrative character, namely, the actual holding of the sale by the Court's Nazir, whose duty, I think, may for this purpose be regarded as analogous with that of the English sheriff. Can it be said that when the Nazir is following out the Court's orders, which were perfectly valid orders, the sale becomes a nullity merely because just before the actual sale a death takes place of which neither he nor the Court nor the decree-holder have any knowledge ? To my mind, this question should be emphatically answered in the negative. That was the answer which Sir John Edge gave in Sheo Prasad v. Hira Lal (90) 12 All. 440 as far back as 1889. That is the Indian case which deals with the matter in this aspect, and speaking for myself I can find nothing throughout the long course of subsequent Indian decisions which detracts from the reasoning of Sir John Edge and his four brother Judges. It has been argued, however, that what remains to be done is not purely administrative, because the sale has to be confirmed, and confirmation of the sale is a judicial act. Assuming for the purpose of the argument that confirmation of the sale is a judicial act, there is still, I think, a short complete answer. Even though the sale while unconfirmed is incomplete, it has still reached a stage, even without confirmation, where it is something which in the view of the framers of the Code has to be set aside. Order 21, Rules 89, 90 and 91 all provide for applications challenging unconfirmed sales, yet all of them speak of setting aside the Sale if the application succeeds. Cut out confirmation altogether. It is still true that under the scheme of the Code the administrative act of the Nazir in carrying out the Court's orders produces something that is voidable, but not void.

155. The provisions of Order 21, Rule 91 seem to me particularly instructive with regard to the manner in which the framers of the Code of Civil Procedure intended that wholly irregular sales should be regarded. This rule deals with cases where after the sale it is found that the judgment-debtor had no saleable interest. Prima facie, if ever a sale was to be regarded as a nullity, this would be such a case. The sale has been a sale of nothing. No title has been transferred, because there was no transferable title; yet even here the framers of the Code evidently considered that something had been brought about which needed to be set aside before there could be a re-sale. Hence this provision enabling a purchaser to apply to the Court "to set aside the sale" as the rule puts it. The provisions of Section 65 seem to me to confirm the view I am taking. This section lays down that when the sale becomes absolute the title is deemed to vest in the purchaser from the date of the sale, and not from the time when the sale becomes absolute. I do not think the Legislature was

here intending to apply any einsteinium abstractions with regard to the nature of time, but was merely emphasising that the crucial date with regard to the transfer of title is the date of the sale, and that the date of confirmation is not the date of vesting the title but merely of making the title already vested indefeasible.

156. But, it may be asked, on general principles how can the Court order the sale of the property of a dead man ? The answer is, I think,, three-fold : (1) The Court does not strictly speaking order the sale of a dead man's property. The order was made before the death. (2) The law, whether in England, America or India, does contemplate such a thing happening in certain circumstances. I have dealt with the position under English Common law. As for America, the Courts seem to have gone even further. In Kanchamalai Pathar v. Shahaji Rajah Sahib A.I.R. 1936 Mad. 205 Varadachariar J. says:

> An extract from Black on Judgments quoted in Coopooramier v. Soondarammall ('09) 33 Mad. 167 suggests that in America the death of a defendant even during the pendency of an action may not be regarded as depriving the Court of jurisdiction to deal with the case in the absence of the legal representative and a judgment pronounced against a dead man is not void or open to collateral attack.

157. (3) In India, Order 22, Rule 6, Civil P. C, expressly provides for the case where a judgment may be pronounced against a dead man and shall have the same force and effect as if it had been pronounced before the death took place. The principle lying behind that rule seems to be that once the hearing has been concluded, everything between the parties and the Court has been done, and all that remains is the formal promulgation of the Court's decision. Is it unreasonable to apply this principle by analogy to the case where as between the decree-holder and the judgment-debtor everything has been decided by the Court, and all that is necessary is the putting into administrative effect of the orders passed? I can find nothing on general principles to suggest that the sale must on this account be a nullity and without jurisdiction.

158. Again, it may be asked, looking at the matter in its other aspect, and regarding the property after the death of the judgment-debtor as that of the legal representative, can the Court have any jurisdiction to sell the property of a person not before it ? Here I think there is a four-fold answer: (1) That is precisely what is contemplated in Malharjun's case (01) 25 Bom. 337 (2) That is comparable to what happens, as I have already noticed, in the case of an ex parte decree, where the defendant subsequently comes in under Order 9, Rule 13, and shows that he had received no summons and had had no notice whatever of the proceedings. If the Court's decree is a valid decree until he gets it set aside, then is there anything in principle to prevent the court sale from being a valid sale until it is set aside? (3) It is not really a case of selling the property of some one not before the Court, because the legal representative takes the property subject to or diminished by the decree-holder's right created by the attachment, or, in the case of the mortgage-decree for sale, by the decree itself. I do not want to use the word "charge," though the question whether an attachment creates a charge is undoubtedly open in view of: Lord Thankerton's observations in Anantapadmanabhaswami v. Official Receiver, Secunderabad MANU/PR/0015/1933 I would prefer to use the words of Fletcher Moulton L.J. in Johnson v. Pickering (1908) 1 K. B. 154, where he speaks of the

> right, charge or lien, or whatever is the proper term to use, in favour of the

execution creditor, which binds money of the execution debtor within the bailiwick.

159. His Lordship in that case says:

> I am satisfied that the effect of the decision in Hasluck v. Clark (1899) 1 Q.B. 699 is that the property which vests under the administration order in the trustee, and is to be administered for the benefit of the creditors of the deceased, is the pro-perty of the deceased, subject to any liabilities and rights which attached to it in his hands. If I were of opinion that, as against the execution debtor, any actual charge or lion, or right of that kind, as regards this money existed by virtue of the Judgments Act, 1838, Section 12, and the writ of scire facias, I should have been disposed to think that the contention of the execution creditor was correct, and that we should be obliged to regard the property to be administered under the administration order as being the total property of the execution debtor as diminished by this right.

160. The argument did not succeed in that case, because the decision was held to depend purely upon the special provisions of Section 12, Judgments Act, 1838, with regard to money, as opposed to the general principle with regard to goods. But the reference to the general principle is there, and, in my opinion, we should regard the property at the disposal of and vested in the legal representative as the total property of the judgment-debtor as diminished by the right, charge, or lien, whatever word may be used, created by the attachment or by the mortgage-decree.

161. (4) The sale proclamation has been published. It is notice to all the world, including the legal representative of the judgment-debtor. The latter has therefore in a sense had notice as a member of the public. That was a point made by Sir John Edge in Sheo Prasad v. Hira Lal (90) 12 All. 440

162. I will refer to one more English case, Bushell v. Timson, (1934) 2 K. B. 79 It was a case under Rule 82, Workmen's Compensation Rules, 1926, and it was held that compliance with the rules was a condition precedent to execution to enforce an award. Charles J. said that "there was a sale under an execution which was non-existent in law, and the sale was in its inception void." He went on, however, to add that

> there is a distinction between an execution on an award under the Workmen's Compensation Act and Rules, and an execution under a judgment, which is not hedged round with specific rules.

163. The inference, I think, may be drawn that the learned Judge was of opinion that had the sale been in an execution under a judgment the case would have been different, and the sale would not have been void in its inception.

164. I have had the advantage of reading the judgment of my learned brother Chatterji.

165. As I read his judgment, he is also of opinion that the sale is not a nullity. He holds it void merely in the sense that it is not binding upon the legal representative of the judgment-debtor. He suggests it is something that can be validated by confirmation if the legal representative is substituted before that is done. He does not seem to regard it as something that can be attacked collaterally so that any one can

treat the purchaser as a trespasser. He holds indeed that not even the judgment-debtor's legal representative can ignore it and eject the purchaser as a trespasser, because the legal representative can only resist the purchaser's possession, or recover possession if he has lost it, by paying up the redemption money.

166. Definitions of the words "void" and "voidable" may differ, and it seems to me the question whether the Hale is to be called void or voidable is consequently not so important. The crucial question is whether it is something that has to be sot aside, or something that can be ignored. That, to my mind, is equivalent to the question whether it operates or does not operate, unless and until challenged, as a transfer of the title. I have adopted the definition that a "void sale" is one which can be attacked collaterally as having transferred no title at all to the purchaser, and can be ignored by the judgment-debtor or his legal representative, or whoever was the owner of the property at the time of the sale.

167. As I hold that there is a prima facie transfer of the title in the case under contemplation, I hold in accordance with this definition that the sale is not void, though in a sense the sale might perhaps be called not binding as against the legal representative. Whatever way it may be described, I am of opinion that it is something that cannot be ignored without being set aside. My learned brother seeks to find a half-way house between the sale that, as regards the legal representative, is a nullity that can be ignored, and the sale that is voidable merely. In my judgment, no such compromise is logically possible. Either the sale transfers the title, or it does not. If it does, the legal representative is bound by it, unless he gets it set aside. If it does not, he can ignore it, and is consequently entitled to treat the purchaser as a trespasser.

168. My answer to the question referred to the Full Bench is that in none of the circumstances which can arise within the terms of the reference is the sale void in the sense that it can be attacked collaterally or ignored. The sale may, however, be voidable upon a proper application or suit as the case may be.

Sinha, J.

169. I have had the advantage of reading the elaborate judgment prepared by my learned brother Chatterji as also that prepared by my learned brother Meredith. I need hardly add that I have carefully considered the different aspects of the matter discussed in the two judgments. I respectfully agree with the conclusions, and the reasons given for those conclusions, arrived at by my brother Chatterji. A large volume of case-law bearing upon the question referred to the Full Bench has been discussed in great detail by my learned colleagues, and I do not think I can usefully add to the discussion of the case-law on the subject. But I wish to add a few' observations of my own in support of the reasons given by my brother Chatterji for the conclusions arrived at by him.

170. The decision of their Lordships of the Judicial Committee of the Privy Council in 41. I. A. 2512 has been consistently held by all the High Courts in India to be the leading authority for the proposition that, without issuing the requisite notice under Rule 22 of Order 21, Civil P. C, the Court does not obtain jurisdiction to sell the property of the judgment-debtor or his legal representative, and all the. High Courts have consistently followed, as they were bound to follow, that decision. In some of the cases in the Calcutta High Court noticed in the judgments of my learned colleagues that decision has been sought to be distinguished on the ground that the

judgment-debtor, having notice of the execution proceedings, took those very steps by way of objection to the execution which a notice under Rule 22 of Order 21 would have given him an opportunity to take, even though no regular notice under that rule had been given to him. How far those decisions are in conformity with the ruling of the Privy Council aforesaid is not for me to say. But, in my opinion, it cannot be said that the decision of their Lordships of the Privy Council has been abrogated by subsequent legislation by providing for exceptional cases in which the Court, for reasons to be stated in writing, can dispense with the issue of such a notice. The Patna High Court has adopted an amendment of Rule 22 (1) of Order 21, making it obligatory in all cases, and not only in those originally covered by Sub-rule (1) of Rule 22, that the notice should issue to the person against whom execution is sought, to show cause why the decree should not be executed against him. This amendment of Rule 22 (1) of Order 21, instead of detracting from the effect of the Privy Council decision aforesaid, has made it a rule of universal application.

171. But it was vehemently argued by Mr. P.R. Das on behalf of the decree-holder-auction-purchaser that in the present case no application for execution was made against the legal representative of the deceased judgment-debtor, and, therefore, Rule 22 of Order 21 of the Code did not come into operation. Assuming that it was so, what is the legal position ? It is the settled law that execution proceedings come to an end with the confirmation of the sale, and my learned brother Chatterji' has taken great pains to show that, until that stage is reached, the judgment-debtor, or his legal representative, can pay up the decretal sum, and, in the case of a mortgage sale, redeem the property until the sale is actually confirmed. If the judgment-debtor dies before the sale, does the execution proceeding continue in spite of his death ? I think the answer is in the negative. The execution proceedings would come to an end as soon as the judgment-debtor dies, unless the decree-holder makes an application to the executing Court to continue the same proceedings against the legal representative of the deceased. Hence, on the happening of the death of the judgment-debtor against whom the execution proceedings had originally been initiated, one of the two courses is open to the decree-holder-either he has to take out fresh execution proceedings or to make an application in the same proceedings to continue them as against the legal representative of the deceased judgment-debtor. It is true that execution proceedings do not, as suits do, abate on the death of either party on default of an application for making substitution in his stead. But that does not mean that they continue on the death of the person against whom execution had been taken out. It follows from these considerations that whichever course is adopted by the decree-holder, the legal representative of the deceased judgment-debtor has to be brought on the record in order to bring the execution to its logical conclusion. If that has to be done, it has to be done on notice to the persons concerned or to someone who could be adjudged by the executing Court as the legal representative of the deceased judgment-debtor. As held by the Judicial Committee of the Privy Council in 27 I. A. 216 the decree-holder has got to take proceedings for bringing on record the legal representative of the deceased judgment-debtor. If he takes the necessary steps, and the Court is invited to determine the question of whether the person., sought to be proceeded against is the legal representative of the deceased judgment-debtor, and the Court does determine the matter in the affirmative, the decree-holder has done all that was within his power to do, or the law required him to do.

172. There is, according to the decision of the Court somebody to represent the estate of the deceased on the record of the execution case. That decision of the Court gives it the jurisdiction to proceed against the estate of the deceased. But in the present case no such proceeding was taken. The result has been that the execution

proceedings continued against a dead person, and, as the Court has no jurisdiction against a dead person, all its subsequent orders culminating in the confirmation of the sale are inoperative to convey any title to the auction-purchaser-in this case the decree-holder himself as against the owner of the property. The owner of the property was no party to the execution proceedings resulting in the confirmation of the sale of the property, and, consequently, he is not bound by that sale in the sense that he need not take proceedings in the execution Court, or institute a regular suit for setting aside the sale. Generally speaking, it is one of the basic principles of jurisprudence that a person who is not a party to the transaction or to a judgment, is not bound by that transaction or by that judgment. He need not sue to set that aside. So far as he is concerned, he is entitled to treat it as non-existent. If it were otherwise, it is not difficult to think of cases where the judgment-debtor or his legal representative, without getting any notice of the execution proceedings, may be completely deprived of his property without any fault of his own.

173. In my opinion, it is not always safe to refer to the English or the American rules of law governing a case like the present. The English law is based on technicalities of procedure and on certain historical developments of the law which do not apply with their full force to Indian conditions or to the statute law in India. Their Lordships of the Judicial Committee have on many occasions deprecated the practice of the Indian Courts invoking the aid of the English law or of the American law which in most cases is derived from the common law of England. It may be that in the present case, if governed by the English law, the sale may have been merely voidable in the sense that it would be binding upon the owner of the property unless set aside in a proper proceeding; but I would refrain from going into that question as I am not fully conversant with the rules of English law bearing upon the subject.

174. Reference to the provisions of Rules 89, 90 and 91 of Order 21 of the Code, which contemplate the setting aside of sales, before they are confirmed, at the instance of certain persons interested either in the property or in the sale proceeds, is not of much assistance to the determination of the question referred to the Full Beach. Those rules presuppose the know-ledge of the sale, and of the circumstances leading up to the sale, and the Code has provided for speedy remedy whereby the rights and liabilities of the auction-purchaser, the decree-holder, the judgment-debtor and also of certain persons not before the Court in the sense of 'not being parties to the execution proceedings, may be expeditiously determined. In this connexion reference may be made to Section 115, Clause (a), Civil P. C. The section contemplates that a party aggrieved by a certain order passed by a Court without jurisdiction may have it set aside by the High Court. Ordinarily, an order passed by a Court in excess of its jurisdiction would be void, and, therefore, need not be set aside. But, as Such an illegal order passed without jurisdiction has been made against the parties to the litigation, they are bound to have it set aside by appropriate proceedings: otherwise they would be debarred from questioning the binding effect of that order in a collateral proceeding. In my opinion, Section 115, Civil P. C, has made that provision in order expeditiously to settle the rights of the parties to a litigation. If such a provision were absent from the Code, it might possibly have been open to a litigant to ignore orders passed by a Court beyond its jurisdiction. It follows, therefore, that, if an order is passed by a Court beyond its jurisdiction, but in the presence of the party affected by that order, that party is bound to take appropriate proceedings to have the order declared null and void. In my opinion, therefore, the provisions of Rules 89, 90 and 91 of Order 21, Civil P. C, contemplating the setting aside of certain sales before they had been confirmed, are only meant to provide the quickest, and perhaps the cheapest, proceeding for getting

rid of the effect of an order which may, or may not, have been within the competence of the Court. R. 91 of Order 21 of the Code provides a speedy remedy to the auction-purchaser so that he may not lose, may be for ever, his good money which he may have put into Court after his bid had been accepted by the Court. But that rule does not lend itself to the construction that the auction-purchaser has purchased anything at all or that any title has passed to him with respect to the property which he had purported to purchase. The rule presupposes that nothing has passed by the sale and that the purchaser should be enabled to get back his money which he may not recover otherwise.

175. The provisions of Order 22, Rule 6, Civil P. C, also cannot be pressed into aid for the determination of the question before the Full Bench, inasmuch as that rule is an exception to the general rule that a decree in favour of, or against, a dead person is a nullity. The rule is based upon the consideration that so far as the parties are concerned they have done all that was required of them by law to bring the proceedings to a stage at which the Court only has to do its own part. But can the same consideration apply to a case where there is a void created by the death of one of the necessary parties to the proceedings, and the legal representative of the deceased is expected by the provisions of Rule 89 of O. 21 as also Rule 5 of Order 34, Civil P. C, to take certain steps towards the satisfaction of the decree or the redemption of the mortgaged property directed by the decree to be sold in default of payment of the ascertained sum?

176. Again, there is no analogy between the position created by the passing of an ex parte decree and the consequent proceedings to be taken under Rule 13 of Order 9, Civil P. C. on the one hand, and the sale of the property after the death of the judgment-debtor and before his legal representative has been brought on the record on the other. In the former case the person concerned is actually a party to the proceedings, and any decree passed against him binds him so long as it is not set aside by the Court at the instance of the person affected by it. But in the latter case there, is no such person on the record, and it is not difficult to think of cases where the legal representative of the deceased judgment-debtor may not be aware of the fact of the sale for some years after the sale. It has also been suggested that a sale in the absence of the legal representative of the deceased judgment-debtor does not amount to selling his property because the Court had already passed an order for a sale of the property when it was in the hands of the deceased judgment-debtor. But, all the same, the property at the date of the sale vested in the legal representative, and what was sold was his. It may be subject to a charge or lien, but the property may be worth many times the value of the charge or the lien. It may sometimes happen that the property is not worth more, or much more, than the lien on the property subject to which the legal representative may have taken it on the death of the deceased judgment-debtor. But in such cases perhaps it would not be worth the while of the legal representative to bother himself or the Court about it. On the other hand, if it were to be laid down that a sale in such circumstances in the absence of, and without notice to, the legal representative passes his title, it will, in my opinion, lead to serious results.

177. It has also been suggested that the issue of the sale proclamation and the publication of the same amount to notice to the whole world including the legal representative of the judgment-debtor. Is that so either in fact or in law ? In my opinion, it is neither. It is a notice to persons who may be interested in bidding for the property to come and bid at the sale. In practice nobody, who is not interested in purchasing some property at a court sale, bothers to know about the contents of the

sale proclamation or that a particular sale is to take place on a specified day. In the result, I agree with my" brother Chatterji in answering the question referred to the Full Bench that the sale contemplated in the question is void as against the party not before the Court in the sense that it is not valid and operative against him.

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