
(1935) 10 MAD CK 0019
In the Madras High Court

Kanchamalai Pathar

APPELLANT

Vs

Ry. Shahaji Rajah Sahib (deceased) and Others

RESPONDENT

Date of Decision : 02-10-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, 47

Citation : AIR 1936 Mad 205 : (1936) ILR (Mad) 461 : (1936) 43 LW 238 :
(1936) 70 MLJ 162

Hon'ble Judges : Wadsworth, J;Venkatramana Rao, J;Varadachariar,
J;Lakshmana Rao, J;Cornish, J

Bench : Full Bench

Judgement

Cornish, J.—The facts out of which this Reference arises can be briefly stated. In execution of a decree against the sole defendant in a suit

the decree-holder attached certain lands of the judgment-debtor and brought them to sale.

2. The sale was fixed for 15th September, 1927 and took place on 16th September, 1927 and the property was knocked down to the bid of the

present appellant. But in the meantime the judgment-debtor had died on 8th September, 1927. His sons, the Respondents to this appeal, put in a

petition u/s 47 and Order 21, Rule 90 to have the sale set aside. In the affidavit supporting this petition it is alleged that the decree-holder,

notwithstanding that he and his vakil were aware of the judgment-debtor's death before the date of the sale, took no steps to bring on record the

legal representatives of the deceased judgment-debtor. It is true that no application was made u/s 50 CPC for leave to execute the decree against

the legal representative and that no notice was served on the legal representatives in accordance with Order 21, Rule 22(1).

3. The Subordinate Court confronted with some divergent rulings of this High Court felt bound to follow the decision of Phillips, J., in *Rajayya v.*

Annapurnamma (1925) 50 M.L.J. 662 and held that the sale was void against the legal representatives of the deceased. The auction-purchaser has appealed against this decision.

4. The question narrows itself down to this: Can a decreeholder whose decree is unsatisfied when the sole judgmentdebtor dies execute that decree without having recourse to Section 50?

5. The sections says: Section 50 (Sub-section 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 execute the same against the legal representative of the deceased

6. Sub-section (2) limits the liability of the legal representative when the decree is executed against him "to the extent of the property of the

deceased which has come to his hands and has not been duly disposed of". It is provided by Section 53 that, for the purpose of Section 50,

property which is liable in the hands of the Hindu son for the decree-debt of his deceased father shall be deemed to be the property of the

deceased which has come to the hands of the son as his legal representative.

7. The language of Section 50 is permissive. But this, as Ramesam, J., has pointed out in *S.N. Ragunathaswamy Iyengar and Others Vs. S. Gopau*

Rao and Others, , does not mean that recourse to the section may not be obligatory. If a decree-holder does not desire to proceed with the

execution after the judgment-debtor's death or if there are other parties on record against whom the decree can be executed, there will be no

occasion to have recourse to Section 50. But if execution of the decree is necessary against the legal representative of the deceased judgment-

debtor the decree holder has no option but to proceed u/s 50. He must apply to the Court to execute the decree against the legal representative

and notice must issue to the legal representative as required by Order 21, Rule 22.

8. 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. His

property remains subject to the decree and to an attachment upon it, notwithstanding that it has passed to his heir or to a surviving co-parcener, or,

if there is an executor, has vested in his executor. But his death effects a change in the parties liable to execution. The legal representative has

stepped into the place of the deceased judgment-debtor, with the liability under the decree, though his liability is limited to the extent of the

deceased's assets which have come into his hands and have not been duly administered by him. In these well-known principles lies the reason for

the provision in Section 50 enabling the decree-holder, whose decree has not been fully satisfied prior to the death of the judgment-debtor, to

apply to the Court to execute the decree against the legal representative. They also explain the notice required by Order 21, Rule 22. "It is quite

new to me" said Cotton, L.J., in *Shephard In re: Atkins v. Shephard* (1889) 43 Ch. D. 131 "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". Those observations appear to me

to be very pertinent to the case where the Court proceeds in execution of a decree made against A to sell property which on A's death has

devolved on B without the opportunity to B of coming before the Court to shew cause why execution should not proceed against him.

9. But the question on which judicial opinion in this Country has been so acutely divided is whether the application u/s 50 and the notice under

Order 21, Rule 22 are the foundation of the Court's jurisdiction, so that a sale in execution without these formalities will be void; or whether

absence of these formalities amounts to nothing worse than an irregularity which may or may not serve to avoid the sale. But it seems to me that

since the Privy Council ruling in *Raghunath Das and Others vs. Sundar Das Khetri* the subject is no longer open to controversy.

10. Their Lordships in 5 CWN 10 (Privy Council) had previously to consider the effect of an application u/s 50. It was held that it being within the

jurisdiction of the Court to receive an application u/s 50 the Court's mistake in issuing notice to a person whom it wrongly decided was the legal

representative of the deceased judgment-debtor did not render the Court's exercise of its jurisdiction ineffectual. This ruling suggests that an

application u/s 50 and the issue of a notice in accordance with Order 21, Rule 22, were necessary to give the Court a jurisdiction to issue process

against the legal representative. But the matter was made clear by their Lordships' judgment in *Raghunath Das and Others vs. Sundar Das Khetri* .

That was a case where there had been a devolution of property by reason of insolvency, and it was held that the Official Assignee being the legal

representative of the bankrupt the issue of a notice to him u/s 248 of the CPC (corresponding to Order 21, Rule 22(1) of the present Code) was a

condition to the Court's having jurisdiction to execute the decree against the legal representative. It was not a case of execution of a decree against

the legal representative of a deceased judgment-debtor, and at the time the definition of "Legal representative" as a person who in law represents

the estate of a deceased person had not been introduced into the Code. But their Lordships expressly approved *Gopal Chunder Chatterjee v.*

Gunamoni Dasi I.L.R.(1892) 20 Cal. 370 where it was held that the issue of a notice was necessary to give the Court jurisdiction to sell property

by way of execution against the legal representative of a deceased judgment-debtor. On this authority, I think, there can be no doubt that where

there has been no application u/s 50, and consequently no issue of notice under Order 21, Rule 22(1) 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.

11. Since these rulings an addition has been made to Order 21, Rule 22. It is Sub-rule 2, which says that nothing in Sub-rule 1 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. It has been held by a Full Bench of this

Court in *Rajagopala Aiyar v. Ramanujachariar* I.L.R.(1923) 47 Mad. 288 : 46 M.L.J. 104 (F.B.) that the effect of this Sub-rule is not to make the

issue of a notice a matter which does not pertain to the jurisdiction, but is by way of giving to the Court a special power to dispense with the issue

of a notice in the exceptional cases specified. I agree with that interpretation, and it is supported by the views of other High Courts in *Manmatha*

Nath Ghose v. Lachmi Debi I.L.R.(1927) 55 Cal. 96 and *Smith v. Kailash Chandra Chakravarty* I.L.R.(1931) 11 Pat. 241 On the facts of the

present case too, even if the Court had been moved u/s 50, I think there is nothing which have justified the Court in exercising its power under

Sub-rule 2. For these reasons I am of opinion that the sale is void, and that this appeal should be dismissed with costs.

Varadachariar. J:

12. I agree. On behalf of the appellant it has been contended by Mr. Srinivasa Aiyangar that as the judgment-debtor died only a week before the

sale and no judicial act remained to be performed during the interval, the omission to bring the legal representative on record before the sale can at

best only amount to an irregularity and the sale ought not to be set aside except on proof of substantial injury resulting from such omission. He laid

great stress on the necessity of protecting bona fide purchasers in Court sales and insisted that the lower Court should have followed the decision

of a Division Bench of this Court in Doraiswami and Others Vs. Chidambaram Pillai and Others, in preference to that of Phillips J., in Rajayya v.

Annapurnamma (1925) 50 M.L.J. 662 as the former is supported by a course of decisions in Allahabad and Calcutta. Incidentally he argued that

the Full Bench decision in Rajagopala Aiyar v. Ramanuja charier I.L.R.(1923) 47 Mad. 288 : 46 M.L.J. 104 (F.B.) on the strength of which

Phillips, J., dissented from Doraiswami and Others Vs. Chidambaram Pillai and Others, required reconsideration.

13. On principle and on the true construction of Sections 50 and 52 of the Code, he maintained that when a decree has been passed against a

person as legal representative or a decree passed against a person is after his death sought to be executed against the legal representative, all

further proceedings are taken only against the "estate" of the deceased person, that the presence or absence of the legal representative as a party

to such proceedings is not really a factor affecting the jurisdiction of the Court executing the decree, that the notice prescribed by Order 21, Rule

22 Civil Procedure Code, cannot therefore be taken to be a condition precedent to the acquisition of jurisdiction by the executing Court, that the

presence of the legal representative will be deemed essential only on the principle of audi alterant par tern and if no judicial act has been done in his

absence he would have nothing to complain of. He pointed out that the power given to the Court by Clause (2) of Order 21, Rule 22, Civil

Procedure Code, to issue a process in execution in certain circumstances even without issuing the notice prescribed by the first clause was itself an

indication that the service of such notice cannot be a pre-requisite to the acquisition of jurisdiction by the executing Court. Alternatively, he contended that whatever may be the position when a fresh application for execution has to be filed after the death of a judgment-debtor, the notice under Order 21, Rule 22 is not obligatory when it is merely sought to continue against the legal representative proceedings in execution started against the deceased judgment-debtor and pending at his death. Finally, he relied on the principle that an attachment brings the property attached into "custodia legis" and argued that thereafter it is the power and duty of the Court to carry out the purposes for which the attachment had been effected and the violation of any provision of the processual law at subsequent stages cannot affect the "jurisdiction" of the executing Court but can at best only amount to irregularities to be dealt with under Order 21, Rule 90, Civil Procedure Code.

14. The theory that on the death of a person, proceedings for recovery of a debt due by him are taken only against his "estate" and not against his

"legal representative" does not seem to be justified either by legal history or by the language of the Procedure Code. In discussing the development

of the law relating to the heir's liability for debts due by the ancestor, Justice Holmes (Common Law, Ch. X) refers to the rule of the Roman law

making the heir (if he enters on the inheritance) liable for all the debts of the ancestor, (whatever may be the extent of assets received by him) and

states that this rule was adopted even in England at the time of Glanville but modified by the time of Bracton. The rule was to some extent the same

even under the Hindu Law (see Mayne, para 304) and Bombay Act VII of 1866 was passed to limit the liability to the assets received by the

"heir" Subject to this limitation, the position (as stated by Mr. Holmes) is that the "heir" is identified with the ancestor or continues or represents the

"persona" of the ancestor A comparison with the position of a "universal donee" will be instructive in this connection; he is "" declared to be

"personally" liable for the debts and liabilities of the donor (as at the time of the gift) to the extent of the property comprised in the gift (Transfer of

Property Act, Section 128). It is thus clear that the liability is that of the taker and not of the estate (as an entity) though the "estate" furnishes the

measure of liability. The position is, if I may say so, correctly stated by Ranade, J., in *Erava v. Sidramappa* I.L.R.(1895) 21 Bom. P. 453 and

there is nothing inconsistent with it in the Judgment of then Privy Council in 5 CWN 10 (Privy Council) .

15. Some observations in Shephard, In re: Atkins v. Shephard (1889) 43 Ch. D. 131 are apposite in this connection. Shortly before the death of

the judgment-debtor, the decree-holder applied for a receiver by way of equitable execution; the application was being adjourned from time to

time and in the meantime the judgment-debtor died. Two days after his death, an order for a receiver was made without reviving the action or

bringing the heir at-law before the Court. In discussing the validity of that order, the question was incidentally discussed whether at law execution

can issue against the estate of a deceased person without leave of the Court (under Order 42 Rule 23 of the Rules of the Supreme Court), and all

the Lords Justices (Cotton, Bowen and Fry) refused to assent to the proposition that it can. Referring to Order 17 Rules of the Supreme Court

(corresponding to Order 22 Civil Procedure Code), they observed in the course of the argument as well as in their judgment that though by reason

of the death of a party, the action "may not be gone", it is gone "as against the dead person until he is represented and that Rule 1 of that order can

apply when the title has devolved on some one who is before the Court." The same principle ought to apply to an execution proceeding, though

Order 22 of the CPC does not in terms apply to execution proceedings. On page 137 Cotton L.J., observed:

It is quite new for 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

16. In Stewart v. Rhodes (1900) 1 Ch. 386 Stirling J., points out that the effect of the order granting leave to issue execution against the

representative is to make the representative the judgment-debtor. On page 402 Lindley M.R. preferred the view that the order granting leave

"dispenses with the necessity of a judgment" but neither of them contemplates the possibility of execution against the "estate" of the deceased

without leave under Order 42, Rule 23, Rules of the Supreme Court. In Rojagopala Aiyar v. Ramanujachariar I.L.R.(1923) 47 Mad. 288 : 1923

46 m.L.J. 104 (F.B.) Schwabe C.J. referring to *Blanchenay v. Burt* (1843) 4 Q.B. 707 and *Goodtitle dem. Murrell v. Badtitle* 9 Dowl. Prac

Cases 1009 observed that though under the English Common Law a writ of scire facias was necessary before execution could be had on a

judgment, if more than a year had elapsed from its date, an execution sale held without a scire facias was only voidable and not void. It must be

pointed out that in this respect a distinction was made between two classes of "dormant" judgments - that is those where the scire facias had to be

sued out between the original parties to the judgment and those where a new party was to be charged or benefited. In the latter case,

the issue of a writ without the revivor of the judgment by scire facias or by motion or other statutory proceeding is a more serious matter than its

issue on a dormant judgment. If an execution is issued and tested after the death of sole plaintiff, the authorities are evenly divided upon the

question whether it is void or irregular only. But if it issues and bears teste after the death of a sole defendant the authorities almost (but not quite)

unanimously adjudge it void. (Freeman--Void Judicial Sales, para. 24)

17. This distinction is also reflected in the decisions which discussed the difference between the two classes of cases in respect of the effect of a

revivor or scire facias See *Farran v. Beresford* (1842) 10 Cl. & F: 318 s.c. 8 E.R. 764 *Parrel v. Gleeson* (1844) 11 Cl. & F. 702 and *Ashootosh*

Dutt v. Doorga Churn Chatterjee I.L.R.(1880) 6 C. 504 and *Jogendra Chandra Roy v. Shyam Das* I.L.R.(1909) 36 C. 543

18. In *Ranken v. Harwood* (1846) 5 Hare. 215 s.c. 67 E.R. 893 where a judgment-debtor had sued out a writ of fi fa in the lifetime of his debtor

but the writ was placed in the hands of the Sheriff only the day after the debtor's death, the Vice-Chancellor observed that:

The creditor had an option to sue out a scire facias against the executor or (passing by the executor altogether and by force of the proceedings had

in testator's life time) to take in execution, Harwood's goods in whosoever hands they might be

19. This must be understood in the light of a peculiar rule of the Common Law and of the other observations in the case which differentiate

between proceedings at law in respect of the goods seized and proceedings by way of administration in respect of goods that vested in the

executor Under the Common Law, if a testator sole defendant died after judgment the plaintiff could issue execution against the goods of the

testator without any order, if the Judgment were recovered within a year before his death. (See William's Executors Part IV, Book, II Ch. I

Section 2--11th Edition p. 1353).The author adds:

But now by Order 42 Rule 23, if any change has taken place by death in the parties liable to execution, leave must be obtained to issue execution

against the goods of the testator This order must, it would seem, be obtained on notice to the exeeutor.

20. It was another rule of the English Law, that a writ, though put into the hands of the Sheriff after the judgment debtor's death took effect from

the teste of the writ. For the history of this rule see judgment of Fletcher Moulton L.J., in Johnson v. Pickering (1908) 1 K.B. 1 . To avoid

misapprehension arising from observations in some of the English cases reference may also be made to another principle of the English law that

judicial acts are to be considered as having taken place at the earliest possible period of the day on which they are done. In Wright v. Mills (1859)

4 H. & N. 488 : s.c. 157 E.R. 931 judgment was signed and execution issued at 11 A.M., on the day on which the judgment-debtor died at 9-30

A.M. The Court of Exchequer held that by reason of the above principle, the judgment and execution were regular cf. Clarke v. Bradlaugh (1881)

8 Q.B.D. 63 (C.A.). Order 20 Rule 6 of the Indian Code embodies another special principle which cannot be extended by analogy.

21. As regards the general principle, it was declared by Lord Hardwicke so long ago as in Nugent v. Gifford (1738) 1 Atk. 463 : 26 E.R. 294 that

the demand of a creditor is only a personal demand against the executor in respect of the assets come to his hands but there is no lien on the assets

22. It is on this that the principle is founded that the representative can alienate the ancestor's property and the creditors of the ancestor have their

remedy only against the representative and not against the alienee. cf. Jatniyatram Ramachandra v. Parbhudas Hathi (1872) 9 B.H.C.R. 116,

Bazayet Hossein v. Dhoolichund (1872) L.R. 5 IndAp 211 : ILR 4 C. 402 (P.C.) and Ram Dhun Dhur v. Mohesh Chunder Chowdhary I.L.R.

(1882) 9 C. 406. In respect of involuntary sales however, there is a difference between an heir and an administrator, in that it is only in the former

case, that the assets derived from the deceased can be sold for the personal debts of the heir see *Wahidunnissa v. Shubrattun* (1870) 6 Beng. L.R.

54 and *Basayet Hossein v. Dhooli Chund* (1872) L.R. 38 IndAp 211 : ILR 4 C. 402 (P.C.). That the creditor's right is against the representative

and not against the debtor's property in specie is also shown by the cases which recognize that even when the heir retains property of the ancestor,

a creditor of the deceased cannot seek to hold such property liable if the heir has by any means discharged debts of the ancestor to the value of the

assets, see *Ram Golam Dobey v. Auraya Begum* (1869) 12 W.R. 177 and *Veerasokka Raju v. Papiiah* I.L.R.(1902) 26 M. 792.

23. In the Procedure Code of 1859, Section 210 provided that on the death of a judgment-debtor application for execution of the decree may be

made "against the legal representative of the estate of the person so dying" and in *Dunput Singh v. Ranee Rajessuree* (1871) 15 W.R. 476 stress

was laid on this alternative form of the provision; but this was modified in 1877 and since then execution is to be had only against the "legal

representative" see observations in *Dunput Sing v. Ranee Rajassuree* (1871) 15 W.R. 476 and *Chathekelan v. Govinda Karunniar* I.L.R.(1892)

17 M. 186 : 4 M.L.J. 59. Even while Act VIII of 1859 was in force, it was observed by Phear J., in *Shurfun Bebee v. The Collector of Sarun*

(1868) 10 W.R. 201 that

by the fact of the debtor's death, his property passes from him. "It may be that it will, in the "hands of the transferee, remain still liable to satisfy the

deceased's debts; but if so, the transferee, for the same reason,, becomes the representative of the deceased for the payment of those debts, and

the proper mode of getting at such property of the deceased as he holds, is to put him on the record in the place of the deceased in the ordinary

mode which would necessitate the establishment of his representative character,, or else to bring a regular suit against him. There is no ground for

treating him as if he were holding benami for the dead man.

24. In *Madho Prasad v. Kesho Prasad* I.L.R.(1897) 19 All. 337, Sir John Edge (whose judgment in *Sheo Prasad v. Hira Lal* I.L.R.(1889) 12 All.

440 was much-relied on by the appellant's learned Counsel in another connection) described as "novel" the possibility of executing a decree

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". The circumstance that some decisions have differed from this ruling to the extent of holding that an application for execution bona fide made against a deceased defendant may help to save the bar of limitation as a "step-in-aid" of execution, does not affect the present question. The ground on which Sir John Edge distinguished his previous decision in *Sheo Prasad v. Hira Lal* I.L.R.(1889) 12 All. 440 will be presently dealt with.

25. An extract from Black on judgments quoted in *Goda Coopeeramier v. Sundarammal* I.L.R.(1909) 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. This certainly is not the law in England nor the law in India (see some of the cases referred to in *Muthuraman Chettiar v. Adaikappa Chetty* (1934) 67 M.L.J.. 681 .

While insisting on representation of a deceased person's estate, the High Court in India and the Judicial Committee have taken a very liberal attitude in the matter of condoning defective representation even in the event of death before the institution of or during the pendency of an action and much more so in the event of death after decree. See *Chaturbhuja Doss Kusaldoss & Sons v. Rajamanicka Mudali* I.L.R.(1930) 54 Mad.

212 and the other cases referred to in *Muthuratnan Chetty v. Adaikappa Chetty* (1934) 67 M.L.J.. 681 and in the report of the arguments in

Ramaswami Chettiar v. Oppilamani Chetti (1909) 19 M.L.J. 671 To refer to two extreme instances: *Mal-karjun v. Narhari* ILR (1900) 25 Bom.

337 (P.C.) held that a person even though he is not an heir may represent the estate if by an order of Court he has been held to be the

representative and *Ramaswami Chettiar v. Oppilamani Chetty* (1909) 19 M.L.J. 671 held that even in the absence of a decision of the Court to

that effect, a person may sufficiently represent the estate of a deceased person if from among several rival claimants thereto the decree-holder bona

fide chose him as being in possession of or having the best prima facie title to the estate.

26. Is the application of the above principles affected by the fact that the

property of a judgment-debtor has been attached in execution before his death? The observations of the Judicial Committee in Suraj Bansi Koer's Case - (1879) L.R. 6 I.A. 88 (Privy Council) do not suggest that there will be no devolution of the attached property on the successor but only that he would take it subject to the liability of discharging the particular decree debt. Though their Lordships speak of the proceedings having constituted in favour of the decree-holder "a valid charge upon the land", Courts in India and even the Judicial Committee in later cases have hitherto held that an attachment does not according to the Indian Law create any interest in the land or convert the attaching decree-holder into a "secured" creditor. In a very recent case (1879) L.R. 6 I.A. 88 (Privy Council) Lord Thackerston has used language which is calculated to revive this controversy; but even taking the attaching decree-holder to stand in the position of a secured creditor, the question will still remain as to the further procedure to be followed by him. The observations in Suraj Bansi Koer's case I.L.R.(1900) 25 Bom. 337 (P.C.) must be taken along with the fact noted in the judgment (on p. 161) that on Adit Sahai's death on the 19th May, 1873, that is four days before the date fixed for the sale, the proceedings were "revived in the usual way against his two sons as his heirs" and it was only after the Court had disposed of the objections raised by the mother on behalf of the sons by petition dated 14th July that the sale was held on the 28th July. The case is therefore no authority for the contention that if the judgment-debtor dies after attachment and very shortly before the date fixed for the sale, the sale could take place without bringing the legal representative on record.

27. In Sheo Prasad v. Hira Lal I.L.R.(1889) 12 All. 440 (F.B.) Sir John Edge and three other learned Judges held that when a judgment-debtor died after his property had been attached, the sale of such property was not rendered invalid by reason of the omission to make the legal representative a party to the sale proceedings. Mahmood, J., was of opinion that a sale under such circumstances would be irregular but that the remedy of the legal representative was by way of proceedings u/s 311(now Order 21, Rule 90) Civil Procedure Code. One need not quarrel with the statement that property under attachment must be considered as in the custody of the law and that an attachment would not abate on the death

of the judgment-debtor. Adoubt was recently raised in this Court whether on the death of a judgment-debtor before an application for execution

had been finally disposed of, the proper course for the decree-holder was to present a fresh application for execution against the legal

representative or to continue the existing execution petition by making the legal representative a party to it. We may now take it as settled that both

courses are open to the decree-holder - see Venkatachalam Chetti v. Ramaswami Servai I.L.R.(1931) 55 Mad. 352 : 1931 62 M.L.J. 1 (F.B.),

cf. Purushotham v. Rajbai ILR (1900) 34 Bom. 142 and Bhagwan Das v. Jugul Kishore I.L.R.(1920) 42 All. 570. But what are the steps to be

taken by the decree-holder, if he wishes to continue the pending execution proceedings? In Abdur Rahman v. Shankar Dat Dube I.L.R.(1895) 17

All. 162 a Division Bench interpreted the Full Bench Judgment in Sheo Prasad v. Hira Lal I.L.R.(1889) 12 All. 440 (F.B.) as depriving the Court

of the power to add the legal representative in such proceedings. A course of decisions in this Presidency beginning from Ramaswami v. Bagirathi

I.L.R.(1883) 6 Mad. 180 have held that notwithstanding attachment during the judgment-debtor's life-time, the property could not be validly sold

after his death unless his representative was brought on record. See Krishnayya v. Unnissa Begum I.L.R.(1891) 15 Mad. 399 Narayan Kothan v.

Kalyanasundaram Pillai ILR 19 Mad. 219 Groves v. Administrator General Madras I.L.R.(1998) 22 Mad. 119 Samandan Karkat Edathil

Rayarappan Nambiar Vs. Malikandi Aketh Mayan, , C. Kuppuswami Mudaliar and Others Vs. Y. Subramaniyam Chettiar and Others, . Rajayya

v. Annupurnanima (1925) 50 M.L.J. 662 and Kanakasapapathi v. Ven-katarama Aiyar (1909) 5 I.C. 339. The learned Judges of the Allahabad

High Court dissent from this view because (i) in their opinion Section 234 of the Code of 1882 could have no application to a case where by

reason of the subsisting attachment the legal representative could not have disposed of the property and (ii) there is no provision in the Code

requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment. They did not

approach the question from the point of view of general principles as to the effect of the death of a party on the jurisdiction of the Court.

Mahmood, J., was of opinion that the objection of the legal representative could rest only on the principle of audi alteram partem. I am not

persuaded that as suggested in Tarangini Debt v. Raj Krishna Mondal 32 C.W.N. 418 and by some of the annotations on the Code the reasoning

in Sheo Prasad v. Hiralal I.L.R.(1889) 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. It seems to me the better course is to say, with all respect, that the construction placed by the

learned Judges on Section 234 was not warranted by the language of that section. I would respectfully adopt the observations made by Boddam,

J., in Groves v. Administrator-General of Madras I.L.R.(1898) 22 Mad. 119. The first clause of Section 234 (now Section 50) is absolute in the

declaration about execution of the decree against the legal representative; the second clause for reasons already explained, only defines the extent

of liability. This way of reading the two clauses is supported by the introduction of the words "where the decree is executed against such legal

representative at the commencement of the second clause in Section 50 of the Code of 1908. Even in Allahabad the authority of the ruling in Sheo

Prasad v. Hira Lal I.L.R.(1889) 12 All. 440 (F.B.) has been greatly restricted (if not questioned) in the recent decision in Chandi Prasad v. Jamna

I.L.R.(1927) 49 All. 830.

28. In Calcutta, the learned Judges have not dissented from the Madras cases but point out that while holding the sale to be void "they nevertheless

proceed to set aside the sale" See Bepin Behary Bera v. Sasi Bhusan Dhatta 18 C.W.N. 766 It is true that in some of the Madras cases a sale in

such circumstances has been spoken of as "voidable" but the context makes it fairly clear that the learned Judges did not there contemplate an

application u/s 311, Civil Procedure Code, requiring independent proof of substantial injury. The later cases in Calcutta have merely followed the

decision in Bepin Behary Bera v. Sasi Bhusan Dhatta 18 C.W.N. 766 . The very fact that in several judgments of the Calcutta High Court (as also

in the judgment of the Privy Council in Malkarjun v. Narhari (1889) L.R. 27 IndAp 216 ; ILR 25 Bom. 337 : 1889 10 M.L.J. 368 (P.C.) a suit

governed by Article 12 of the Limitation Act is contemplated will show that the mere use of the word "voidable" or the expression " set aside " will

not necessarily involve the conditions imposed by Section 311 (Order 21, Rule 90). cf. Erava v. Sidramappa I.L.R.(1895) 21 Bom. 424 and the

cases prior to the Code of 1908 setting aside a sale on the ground of fraud). It may be noted in passing that in the present case, the application

was made within 30 days of the sale and before its confirmation and it can make no difference whether the sale is held to be "void" or "voidable"

so long as the conditions of Order 21, Rule 90, are not insisted on. So far as this High Court is concerned, the decision in Ramaswami v. Bagirathi

I.L.R.(1883) 6 Mad. 180 has been uniformly followed and is not clear whether even in Doraiswami and Others Vs. Chidambaram Pillai and

Others, the learned Judges meant to dissent from it.

29. Without repeating the reasons given by Phillips, JJ., in Rajayya v. Annapurnamma (1925) 50 M.L.J. 662 for not following the decision in

Doraiswami and Others Vs. Chidambaram Pillai and Others, I may respectfully say that the judgment of Spencer and Krishnan, JJ. is almost

wholly based on a misreading of the judgment in Malkarjun v. Narhari (1899) L.R. 27 IndAp 216 : ILR 25 Bom. 337 at 374 : 10 M.L.J. 368

(P.C.) and an erroneous assumption that the earlier Madras rulings rest not on any principle of jurisdiction but merely on the principle audi alterant

par tent. It is begging the question to assume (as Spencer, J., does on p. 67) that when proceeding to sale without bringing the legal representative

on record "the decree-holder has done all that the law requires him to do". The argument based on the reference in Sections 50 and 53 of the

Code to "the property of the deceased" has already been dealt with.

30. As the argument based on the introduction in the new Code of Clause (2) to Order 21, Rule 22, has been pressed before us, it requires more

than a passing notice. It is undoubtedly a matter for comment as felt by the learned Judge who decided Rajagopala Aiyar v. Ramanujachariar

I.L.R.(1923) 47 Mad. 288 : 1923 46 M.L.J. 104 (F.B.). that the legislature should have dealt with the two classes of cases referred to in the first

clause of Order 21, Rule 22, as if they stood on the same footing for all purposes. In adopting that arrangement it seems to have followed the

English Rules (Order 42, Rule 23 of the Rules the Supreme Court) and the provisions in force in India, (under the old Regulations) even before

Section 216 of the Code of 1859 was enacted. Out of deference to the observations of the Privy Council in Raghunath Das and Others vs. Sundar

Das Khetri Courts in India held even under the new Code that compliance with

the provisions of Order 21, Rule 22, is a condition precedent to the acquisition of jurisdiction by the executing Court see *Rajagopala Aiyar v. Ramanujachariar* I.L.R.(1923) 47 Mad. 288 : 1923 46 M.L.J. 104 (F.B.), *Manmatha Nath Ghose v. Lachmi Debi* I.L.R.(1927) 55 Cal. 96, and *Prishchandra Nandi v. Rahatennessa Bibi* (1930) ILR 58 Cal. 825 but it must be admitted that their way of dealing with Clause (2) of that rule is not above criticism. If as held in *Rajanikanta Saha v. Empeor* I.L.R. (1930) 58 Cal. 940 and in *Shaikh Yakub Harunkhan Vs. Mahadev Narayan Prabhu Desai*, the omission to record reasons for taking action under that clause is only an "irregularity" the description of the first clause as "mandatory" may sometimes lead to an illogical position. I may in this connection refer to the observations of Chitty, J., in *Richer son In re.: Scales v. Heyhoe* (1893) 3 Ch. 146 on the construction of Order 16, Rule 46, Rules of the Supreme Court, which empowered the Court in certain circumstances to dispense with service on the representative of a deceased person. The learned Judge said "there must be a constat on the face of the order that the attention of the Judge was called to the point and that he decided to proceed". It is however sufficient for the present purpose to point out that Clause (2) is only negative in form, in that it does not preclude the Court from issuing execution without issuing a notice under Clause (1) and that if on general principles or on a proper construction of Section 50, the Court has no jurisdiction to sell a dead man's estate, Clause (2) of Order 21, Rule 22, will not operate to confer such jurisdiction on the Court. In this connection a distinction has been suggested between cases where execution is sought by a fresh application filed after the death of a judgment-debtor and those where it is only sought to continue a pending execution application. *Ramanathan Chettiar v. Ramanathan Chettiar* (1928) 30 L.W. 995 . It is open to argument that this distinction is not reconcilable with the decision of the Judicial Committee in *Raghunath Das and Others vs. Sundar Das Khetri* See also *Smith v. Kailash Chandra Chakravarthy* I.L.R.(1931) 11 Pat. 241 But even in *Ramanathan Chettiar v. Ramanathan Chettiar* (1928) 30 L.W. 955 the learned Judges recognise the necessity for notice to the legal representative when by the death of a sole judgment-debtor pending the execution petition his estate will otherwise be left unrepresented, The case

in Krishna Pershad Siugh v. Moti Chand I.L.R.(1912) 40 Cal, 635 ; 25 M.L.J. 140 (P.C.) was not a case of non-representation of the estate of

the deceased judgment-debtor. The minor sons have been impleaded in the suit itself but they were represented by a Court-guardian and not by

the father On the transfer of the decree for execution to another court, the former Court-guardian could not take steps to protect their interests; this

is apparently why their Lordships say on p. 646 "there was no effective representation of the infant heir " see also Fani v. Surendra (1921) 35

C.L.J. 9 and Kuppuswami Aiyangar v. Bavaswami Rao I.L.R.(1926) 50 Mad. 357 I may also point out that in that case the application itself had

been filed u/s 311, Civil Procedure Code,, and as their Lordships were satisfied as to the proof of "substantial injury" it was unnecessary for them

to consider whether the minor would have been entitled to relief independently of Section 311.

31. It only remains to deal with the argument based on the observations in 5 CWN 10 (Privy Council) and Sheo Prasad v. Hira Lal I.L.R.(1887)

12 All. 440 (F.B.) and elsewhere, as to the necessity of protecting bona fide auction purchasers and considerations of convenience. In answer to

the first, it is sufficient to point out that all observations about the right of purchasers have expressly or impliedly been made subject to conditions

relating to the jurisdiction of the Court in respect of the decree or sale as the case may be. For instance in Gopal Chandar Chatterjee v. Gunamani

Dasi I.L.R.(1892) 20 Cal. 370 which the Judicial Committee approve of in Raghunath Das v. Sunder Das Khetri (1914) 41 I.A. 251 : ILR 42

Cal. 72 : 27 M.L.J. 150 (P.C.) the finding of the lower appellate Court was that the auction purchaser had acted bona fide but the High Court

nevertheless held the sale void. In the period anterior to the confirmation of the sale, this argument has even less force because it is not the principle

of law that during this period an auction-purchaser has anything like an "absolute" right, to insist on the sale being confirmed, cf. Umadai Raja Rajai

Damara Kumara Thimma Nayanim Bahadur Varu Raja of Kalahasti Vs. Sri Raja Velugoti Sri Rajagopala Krishna Yachendra Bahadur Varu,

K.C.I.E., Maharajah of Venkatagiri and Another, and Tangaturi Jagannatham v. Seshagiri Rao (1916) 20 M.L.T. 479. In cases falling under

Order 21, Rule 90, the fact that the auction purchaser may have acted perfectly bona fide is no bar to the setting aside of the sale.

32. Coming next to considerations of convenience, it is by no means clear that they point necessarily or even predominantly in favour of the course

contended for, on behalf of the appellant. If it may seem a hardship that a decree-holder or auction-purchaser should be frustrated or defeated by

the death of the judgment-debtor of which they may not sometimes be even aware, it is equally possible to conceive of cases where the legal

representative may not be aware of the pending execution proceedings and it will certainly be a serious hardship to deny to him the opportunity of

taking steps under Order 21, Rules 89 and 90, if, as is not unlikely, he should not become aware of the sale before the expiry of 30 days from the

sale. Again, it is not justifiable to assume that once the proclamation of sale has been settled after notice to the judgment-debtor everything

necessary to safeguard his interests has been done. There are provisions in the Code which secure very considerable practical advantages to the

judgment-debtor right down to the moment of sale and under some of these, it is for him to take the initiative and not merely to oppose an

application by the decree-holder, for example Order 21, Rules 69 and 83; and if the sale is to take place without any legal representative in record,

these advantages will be denied to him, where, as in the present case, the judgment-debtor is a father who dies undivided from his sons, there is an

even more serious objection to the sale going on without bringing the sons on record. The sons may wish to raise a contention that the property

sought to be sold is "joint family property" and that the decree against the father was passed in respect of an illegal or immoral debt. In view of

Section 53 CPC these questions must be decided by the executing court and they cannot be said to fall under Order 21, Rule 90. Nor, in view of

the very wide terms of Section 47 CPC could it be maintained that they can be raised and decided in a separate suit.

33. I am therefore of opinion that the court below was right in holding the sale to be void.

Wadsworth, J.

34. I agree with my learned brothers Cornish and Varadachariar, JJ., and have nothing to add.

Venkatramana Rao, J.

35. I agree. The plaintiff, 6th respondent herein obtained a money-decree

against the first defendant, since deceased and in execution thereof attached certain Immovable property of his. After the proclamation of sale was settled and the order for sale was passed, the first defendant died and without impleading his legal representatives or notice to them the sale was held and the property was purchased by the appellant. Is the sale void or voidable? If the Court has no jurisdiction to sell the property under such circumstances, it is certainly void. If it has, then it is only voidable and the further question arises, is the omission to implead the legal representatives or to issue a notice to them a material irregularity sufficient by itself to have the sale set aside or must substantial injury be shown? Therefore the main question for decision is had the Court jurisdiction to sell?

Jurisdiction may be defined to be the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it.

Such jurisdiction naturally divides itself under three broad heads, (vis.), (1) with reference to the subject-matter, (2) the parties, (3) the particular question, which calls for decision. A court cannot adjudicate upon a subject-matter which does not fall within its province as defined or limited by law * * * *. As regards jurisdiction in relation to persons, a Court cannot act upon persons, who are not legally before it, upon one who is not a party to the litigation. * * * *. As regards jurisdiction in regard to the particular question which a Court assumed jurisdiction to decide, it can pass judgment only upon a matter which has been submitted to its determination and which under the statute it has authority to decide". Per Mukherji, J.

in *Sukh Lai Sheikh v. Tarachand Ta* I.L.R.(1905) 33 Cal. 68 (F.B.).

36. In this case the. Court has jurisdiction over the subject-matter, namely, the execution of its own decree, but has it jurisdiction in relation to the parties? In order to have it, the proper parties must be before it, otherwise the Court would have no jurisdiction to sell the property of persons who were not parties to the proceedings. It is contended by Mr. V. V. Srinivasa Ayyangar that the decree was properly passed against the deceased first defendant and while he was alive; the Court had attached the property and taken it under its custody and nothing further required to be done and everything essential for the Court to have jurisdiction had been complied with, in relation to the subject-matter and the parties and the question to be decided. According to him the decree has established the liability of the

deceased; and the estate of the first defendant after his death is virtually the Judgment-debtor and the party before the Court; and the addition of legal representative is not necessary. He relies strongly on the Full Bench decision in Sheo Prasad v. Hira Lal I.L.R.(1889) 12 All. 440 (F.B.) on Doraiswami and Others Vs. Chidambaram Pillai and Others, and Malkarjun v. Narhari I.L.R.(1900) 25 Bom. 337 (P.C.). Before examining the soundness of the Allahabad view, which is based on the theory of attachment, it is necessary to define exactly the legal effect of the death of a defendant in relation to his property. One of the recognised modes known to law by which property is lost is the death of its owner.

37. As Salraond observes in his ""Jurisprudence"".

Dead men are no longer persons in the eye of the law They have laid down their legal personality with their lives and are now destitute of rights as

they are free from liabilities * * * *, They do not even remain owners of their property until their successors enter upon the inheritance

38. As explained by Ranade, J, in Erava v. Siddaramappa I.L.R.(1895) 21 Bom. 424 .

The so-called estate of a deceased person is a very convenient legal fiction, but, as a matter of fact, there is in Hindu Law at least no such

objective reality as the estate of a deceased person. At the moment of Nagapp.Vs death, the property owned by him ceased to be his, and

became the property of his heirs subject, of course, to the liabilities and obligations created by him

39. The expression "the estate of the judgment-debtor" is used in the several sections of the Civil Procedure Code, to indicate the quantum of

liability and to signify that the legal representative is to pay from and out of the estate which was of the deceased and devolved on him in contrast

to what was already owned by him. That it is the legal representative that becomes in fact liable will be clear if the theory on which this liability is

fastened is understood. The notion of the continuance of the existence of the ancestor in the heir is largely involved in the conception of succession

and by the resort to this fiction, the rights and obligations which were attached to his person were deemed to continue, so much so that the heir

was even held liable personally for the debts of the deceased but now the law has modified it and limited the liability to the extent of the estate

which he has in-herited and he is rendered liable personally only if he is unable to prove that he duly applied the property he got. As Salmond says:

The rights which a dead man thus leaves behind him vest in his representative. They pass to some persons when the dead man or the law on his

behalf has appointed to represent him in the world of the living. The representative bears the persona of the deceased and therefore has vested in

him all the inheritable rights and has imposed upon him all the inheritable liabilities of the deceased. Inheritance in some sort is a legal and fictitious

con-tinuation of the personality of the dead man, for the representative is in some sort identified by the law with the person whom he represents.

40. 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 Vide Shephard in Re: Atkins v. Shephard (1889) 43 Ch. D. 131 . No decree can be passed without

bringing his representative on the record. After he is so brought he becomes the defendant. Similarly-after the decree he becomes the judgment-

debtor If there is no attachment of his property, even Sir John Edge in Madho Pershad v. Kesho Pershad I.L.R.(1897) 19 A. 337 concedes that

any execution had without the legal representative on record is ineffectual. Indeed he observes,

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 and without any notice to the representative and without any one to protect the

property being brought upon the record.

41. It is not possible to understand how the attachment should make any difference and how the property can be protected without the

representative being on the record if there is an attachment. As observed by Boddam, J. in Groves v. Administrator General of Madras I.L.R.

(1898) 22 Mad. 119.

The fact that property attached is in the custody of the law does not vest the property in the Court. The attachment does not effect the legal

devolution of the property; it only gives at the best the custody of the property, without affecting the right to the property, to the Court

42. If the correct juristic principle is that the dead man is no person in the eye of

the law and on the death of a judgment-debtor, the liability of

paying his debts devolves on his legal representative whether on decree or otherwise, the Court cannot regain the jurisdiction which it has lost till

the representative is impleaded and made the judgment-debtor and the property which became his cannot be sold and no right thereto would pass

to the execution purchaser.

43. That it is obligatory to implead the legal representative is clear from the various enactments relating to civil procedure passed from time to time

by the Legislature. The provisions of Act VIII of 1859 relating to this were Sections 210 and 211 and 203. Section 210 corresponded to Section

234 of Act XIV of 1882 and Section 50 of Act V of 1908 and Sections 211 and 203 to Section 51 of Act V of 1908. Section 210 is in these

terms:

If any person against whom a decree has been made shall die before execution has been fully had thereon, application for execution thereof may be

made against the legal representative or the estate of the persons so dying as aforesaid and if the Court shall think proper to grant such application,

the decree may be executed accordingly.

44. This section was interpreted to mean that the property of the deceased in the hands of a person other than the legal representative, can be

proceeded against, making him a party and to that extent a representative of the estate. But no execution can issue against the estate without

somebody being on the record, representing the estate. In *Lekhraj Roy v. Echarem Misser* 7 W.R 52 Mcpherson J. observes the following:

The present application is defective and wholly bad... it is made generally against the estate of the deceased Echaram Misser... We are quite clear

that no execution can issue till some one is placed on the record, as representing the estate. 51. 210 of Act VIII speaks of execution against the

estate ; but that does not in our opinion mean the estate independent of some person who is. for some reason or another, legally liable to a greater

or less extent as representing the deceased person under the decree. We know of no precedent for the issue of execution against the estate of a

dead man when there is no one on record who represents him.

45. To a similar effect is the case reported in *Amirnnnissa Khatoon v. Meer Mozujer Hussein Chowdhry* (1873) 12 Beng L.R. 65 and foot note

on page 69 of 12 Beng. L.R.

46. Section 234 of Act X of 1877 and Act XIV of 1882 replaced Section 210 of Act XIV of 1859. Section 234 was in these terms:

If a judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the Court which passed it to execute

the same against the legal representative of the deceased.

47. Farren, C.J. described the effect of Sections 234 and 248 thus, in *Erava v. Sidramappa* I.L.R.(1895) 21 Bom. 424.

Section 248 of the Code places a decree where a year had elapsed since the last preceding in execution and a decree in cases where the

judgment-debtor has died upon the same footing. A duty is imposed on the Court to give the requisite notice before execution issues in. either

case. The procedure to be adopted in the case of the death of the judgment-debtor where the execution is sought against his property is laid down

in Section 234 of the Code. To my mind it appears to be the only way in which the decree can be enforced. The Code of 1859 provided (Section

210) that an application for execution could be made against the "estate" of a person dying after decree against him, but no such provision is to be

found in the present Code.

48. The position is made perfectly clear by their Lordships of the Privy Council in *Raghunatha Das v. Sunder Das Khetri* (1914) 41 I.A. 251 251 :

ILR 42 Cal. 72 : 1914 27 M.L.J. 150 (P.C.) where after an order for sale, the judgment-debtor became insolvent, their Lordships assume that

notice u/s 248 should go to the Official Assignee and on that basis make the following observations:

As laid down in *Gopala Chandra Chatterjee v. Gunamani Dasi* I.L.R.(1892) 20 Cal. 370 a notice, u/s 248 of the Code is necessary in order that

the Court should obtain jurisdiction (the italics are mine) to sell property by way of execution against the legal re-presentative of a judgment-

debtor.

49. This case is an authority for two propositions: (1) Whatever the stage of execution, whenever a judgment-debtor dies, the presence of a legal

representative is necessary before further proceedings can be had. (2) It is a case of jurisdiction and not a case of mere irregularity because there

would be no party on the record until the legal representative is impleaded.

50. The Madras High Court before the passing of the Act V of 1908, has consistently taken the view, differing from the Allahabad decision, that if

the judgment-debtor dies before the decree has been fully executed, it is obligatory on the executing creditor to apply for execution against the

legal, representative see *Groves v. Administrator General of Madras* I.L.R.(1898) 22 Mad. 119 The legislature has accepted the Madras view

and amended the Section by sub-stituting "fully satisfied" for "fully executed".

51. The Code contemplates the necessity of a judgment-debtor being a party to sale proceedings. The provisions of the Code show that even after

decree the law gives the debtor many reasonable facilities for saving the property from sale and if a sale has become inevitable the law further

enables him under proper restrictions to complain of irregularity in connection with it. How could the interest of a judgment-debtor, if he be dead,

be effectively protected in execution if he is to go on without being represented therein?

52. Mr. V.V. Srinivasa Iyengar contended that u/s 50, if it is only necessary for him to apply for execution, the decree-holder should do so and

after the order for sale there would be no necessity for him to apply for execution and Order 21, Rule 22 applies only when the execution

proceedings are initiated, *Doraiswami and Others Vs. Chidambaram Pillai and Others*, . This contention gives the go by to the word ""fully

satisfied"". When the judgment-debtor dies, there is no one who could be said to be a party. Hence the necessity for the application and after the

application is made, the Court is bound to issue notice under Order 21, Rule 22. In a pending execution proceeding, there is no necessity to make

a fresh execution application but the execution will be continued from the stage where it was when the judgment-debtor died. Mr. V. V. Srinivasa

Aiyangar strongly relied on 5 CWN 10 (Privy Council) for the position that the omission to bring on record the legal representative is only an

irregularity and does not affect the jurisdiction of the Court and that this is the correct position is strengthened according to him by the legislature

enacting Clause (2) of Order 21, Rule 22. As the Privy Council have themselves explained the scope of this section in *Raghunath Das and Others*

vs. *Sundar Das Khetri* it is not a case of no representation but it is a case of wrong representation. If there is a wrong representation or a defective

representation as in Krishna Pershad v. Motichand I.L.R.(1912) 40 Cal. 635 or Ramanathan Chetty v. Ramanathan Chetty (1928) 30 L.W. 995,

the legal representatives on the record being minors or insane - cf. Narayana Kothan v. Kalyanasundaram Pillai I.L.R.(1895) 19 Mad. 219 and

not represented by proper guardian or no guardian there is no want of jurisdiction in such cases but it will be a case of irregularity or even "material

irregularity" sufficient in itself to invalidate the sale. The argument based on Order 21, Rule 22 may be briefly dealt with. It may be legitimate to

contend that if there is a judgment-debtor on the record, there is always jurisdiction to sell and omission to issue a notice would not take away

jurisdiction and Order 21, Rule 22, Clause (2) is intended to apply to cases coming under Clause (a), but the legislature has clubbed both (a) and

(b) of Clause (1) together and the issue of a notice is made mandatory. What the legislature contemplates is there must be an application u/s 50 to

execute the decree against the legal representative and once that it is made, both els. (a) and (b) of Order 21, Rule 22, stand on the same footing

and in both the cases if the conditions mentioned in Clause (2) are satisfied, the legislature can dispense with the notice. As pointed out in

Rajagopala Aiyar v. Ramanujachari I.L.R.(1923) 47 Mad. 288 : 1923 46 M.L.J. 104 (F.B.) ""the only effect of the Sub-section is to give the

Court jurisdiction in certain cases in which without it the Court would have none"".

53. The true legal position is correctly summed up in Ramanathan Chetty v. Ramanathan Chetty (1928) 30 L.W. 995:

An initial notice under Rule 22 when issued does sufficiently, for the purposes of the law, bring into Court the estate against which execution is

being enforced and sufficiently retains it there, 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.

So:

the only thing sold was the right of a dead man which passes no property the rights of the dead man being at the time of the sale in his legal

representatives and their rights were not sold or in any way affected because they were not on the record. Groves v. Administrator-General of

Madras I.L.R.(1898) 22 Mad. 119 .

54. The sale in this case is therefore void. Even if it is not void, the omission to implead the legal representatives is a material irregularity sufficient

by itself to invalidate the sale without any further proof of substantial injury. See 5 CWN 10 (Privy Council) .

55. Mr. Srinivasa Aiyangar next contended that a bona fide purchaser at an execution sale ought not to be affected by the irregularities in the Court

proceedings and relied on the Privy Council decision in *Rezva Mahtan v. Ramkishen Singh* (1836) L.R. 13 IndAp 106 : ILR 14 Cal. 18, 24 and

25 (P.C.). Their Lordships therein observe ""if the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order

for execution"". Therefore the question is one of jurisdiction and not bona fides. If there is no jurisdiction, no amount of bona fides can confer title

on an executing purchaser.

56. The decision in *Doraiswami and Others Vs. Chidambaram Pillai and Others*, is vitiated by certain wrong assumptions. The learned Judges

observe ""It may not be accurate to speak of a dead man as owning property; it is well understood that in law there; are estates of deceased

persons"". It has been already shown that this conception is wrong and why the expression ""the estate of a deceased person"" is used by the

legislature. Another assumption is ""when the law only prescribes the issue of a notice to them at the commencement of the execution proceedings,

they cannot claim as a matter of right, to have a fresh notice if their representation of the deceased's estate commences during the progress of the

carrying out of the processes of the Court"". This is again based on a misreading of Section 50 and Order 21, Rule 22. Their Lordships again

proceed on a misunderstanding of the scope of the decision in 5 CWN 10 (Privy Council) and *Gopal Chunder Chatterjee v. Gunamani Dasi*

I.L.R.(1892) 20 Cal. 370.

57. I am therefore of opinion that *S.N. Ragunathaswamy Iyengar and Others Vs. S. Gopau Rao and Others*, and *Kampineni Rajayya v.*

Kalapatapu Annapurnamma (1925) 50 M.L.J. 662 have been correctly decided and the sale in this case is void and the appeal fails and should be

dismissed with costs.

Lakshmana Rao, J.

58. This is an appeal by the auction-purchaser and the question for determination is whether the lower Court was right in holding that the sale was void.

59. The sale was held in execution of a simple money decree obtained by the sixth respondent against the undivided father of respondents 1 to 5

and it is common ground that the judgment-debtor against whom the decree was being executed died after the order for sale but before the actual

sale. The legal representatives were not impleaded though the demise of the judgment-debtor was brought to the notice of the decree-holder and

Court, and the sale was held with none on record to represent the estate. The appellant became the purchaser and the application out of which this

appeal arises was filed by respondents 1 to 5 to avoid the sale on among other grounds that it was void. The lower Court upheld their contention

that the sale was void and hence this appeal.

60. There was under the previous CPC a conflict as to whether the legal representative, should be impleaded if the judgment-debtor dies after

attachment of his properties, but the conflict was set at rest by the present Code by substituting the word "satisfied" for the word "executed" in

Section 50 and legislative sanction was accorded to the Madras view that until the sale is actually held the decree cannot be said to be fully

executed, and if the judgment-debtor dies before sale and further execution is needed, his legal representative ought to be brought on record. It is

therefore futile to contend that once the order for sale is passed, the legal representative need not be impleaded, and the real question is whether

the failure to implead the legal representative renders the sale void or voidable. It is well settled that attachment does not create any interest in or

charge over the property, nor do Sections 50, 52 and 53 which relate to execution against the legal representative and liability of ancestral

property prevent or postpone the vesting of the property in the legal representative. They merely define the liability of the legal representative and

the property in his hands, and in spite of the order for sale the the legal representative can in certain cases challenge the right of the decree-holder

to proceed against the property. A separate suit in respect of that matter will be barred u/s 47 and it would be wrong to allow the sale to proceed

until proper steps are taken to bring the legal representative before Court and

obtain an order binding on him. The property vests in him on the death of the judgment-debtor and unless further proceedings are to be dropped there is no option left to the decree-holder but to follow the procedure laid down in Section 50, namely, to execute the decree against the legal representative. This can be done either by an independent application or by impleading the legal representative in the pending execution petition, but as pointed out in *Gopal Chunder Chatterjee v. Gunamoni Dasi* I.L.R.(1892) 20 Cal. 370 which was approved by the Privy Council in *Raghunath Das v. Sunder Das Khetri* I.L.R.(1914) 20 Cal. 370 a notice u/s 248 of the old Code corresponding to Order 21, Rule 22 of the present 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. Clause 2, of Order 21, Rule 22, which under certain circumstances empowers the Court to issue any process in execution without issuing the prescribed notice, assumes the presence on record of some person against whom the process is to be issued and as observed in *Rajagopala Aiyar v. Ramanujachariar* I.L.R. (1923) 47 Mad. 288 : 46 M.L.J. 104 (F.B.) the only effect of this clause is to give the Court jurisdiction in certain cases which without it the Court would have none, The decision in *Malkarjun v. Narhari* I.L.R.(1900) 25 Bom. 337 (P.C.) wherein a wrong person was impleaded but held to be the true heir, has no bearing and the sale in the this case must be held to be void. That was the view of this Court from the earliest times and the decision in *Doraiswami and Others Vs. Chidambaram Pillai and Others*, which took the opposite view was disapproved by the Full Bench soon after in *Rajagopala Aiyar Ramanujachariar* (1928) 30 L.W. 995. The decision of the lower Court is therefore right and the appeal must be dismissed with costs.