

APPELLATE CIVIL.

Before Falshaw and Dua, JJ.

THE PUNJAB CO-OPERATIVE BANK, LTD.,—Appellant.

versus

L. BIKRAM LAL AND OTHERS,—Respondents.

Execution First Appeal No. 47 of 1951

1958

 September, 30th

Code of Civil Procedure (Act V of 1908)—Sections 42 and 50—Application for substitution of legal representatives of a deceased judgment-debtor—Whether must be made to the court which passed the decree or can it be made to the transferee court executing the decree—Court passing the decree becoming a foreign court after transfer of the decree—Transferee Court—Whether competent to execute it against the legal representatives—Indian Independence (Legal Proceedings) Order, 1947—Para 4—Scope of—Rules of procedure...Purpose of.

Held, that section 50 of the Code of Civil Procedure does not confer exclusive jurisdiction on the Court which passed the decree for proceeding against the legal representatives of the judgment-debtor and it is a matter purely of procedure and the transferee Court is not completely without jurisdiction in dealing with this matter. An application for substitution of legal representatives need not, therefore, necessarily be made only in the court which passed the decree and without such an application execution can proceed in the transferee Court. It would, however, depend on the circumstances of each case. If the objection is waived or if otherwise it is not possible to approach the Court which passed the decree or for other sufficient and adequate reason the transferee Court so considers, then it can proceed with the execution application.

Held, that where by the partition of the country the court which passed the decree happens to fall in a foreign territory, the transferee court should be held to possess full jurisdiction to execute the decree against the legal representatives. An application for this purpose can also be validly made to the court which passed the decree even after it has become a foreign court.

Held, that the only time relevant for determining the applicability and true scope and purpose of para 4 of the Indian Independence (Legal Proceedings) Order, 1947, is the appointed day which is the 15th of August, 1947. If proceedings for the execution of a decree, which was passed by a court at Lahore but had been transferred to a court at Ferozepore for execution before the partition, are pending in the court at Ferozepore immediately before the 15th of August, 1947, any order passed therein by the Ferozepore Court must be given effect to in both the Dominions of India and Pakistan as if it had been passed by a Court of competent jurisdiction. In view of the provisions of subparas (1) and (3) of para 4 of the Indian Independence (Legal Proceedings) Order, 1947, the Ferozepore Court, in such circumstances, should be considered to be competent to proceed with the execution application against the legal representatives just as the court passing the decree would be.

Held, that procedure is a handmaid and not mistress of law and rules of procedure should subserve and not

govern. Procedure is only a channel to administer law, and it should not be instrumental in impeding or obstructing justice; rules of procedure should always be utilised for advancing and not for defeating the cause of justice.

Case referred by Hon'ble Mr. Justice Bishan Narain on the 18th November, 1955 to a Division Bench for opinion on the legal points involved in the case. The Division Bench consisting of Hon'ble Mr. Justice Falshaw and Hon'ble Mr. Justice Dua finally decided the case on the 30th September, 1958, on merits.

Execution First Appeal from the order of Shri Mohinder Singh, Senior Sub-Judge, Ferozepore, dated the 2nd January, 1951, dismissing the execution application of the Decree-holder Bank.

S. D. BAHRI, for Appellant.

J. N. SETH and R. SACHAR, for Respondents.

ORDER

Bishan Narain,
J.

BISHAN NARAIN, J.—It will be convenient to deal with Execution First Appeal No. 47 of 1951 and Execution First Appeal No. 48 of 1951 together as the points involved in both the appeals are the same.

The facts out of which Execution First Appeal No. 47 of 1951 has arisen are these. The Punjab Co-operative Bank Ltd., obtained a mortgage decree for Rs. 30,000 against Piare Lal on 31st August, 1936, from the Court of the Additional District Judge Lahore. The Bank obtained an order from ^a the Lahore Court for transfer of the decree to Ferozepore under section 39, Civil Procedure Code. The Bank then applied to the Court of the Senior Sub-Judge Ferozepore for execution of that decree on 22nd April, 1943 and it was dismissed on 18th June, 1943, after partial satisfaction. The Bank then applied again on 3rd January, 1946, for execution of the decree but this time the application was made against the legal representatives of the

Judgment-debtor as Piare Lal had died in the meanwhile. This application was also dismissed on 7th February 1947 and on the same date a fresh application was made for realisation of Rs. 8,824-12-4 as balance due under the decree. The legal representatives filed objections on 20th May, 1947, urging *inter alia* that only the Court which passed the decree could order execution against the legal representatives under section 50, Civil Procedure Code. The parties' evidence on the other issues involving questions of fact was concluded on 20th December, 1947, and two days later the legal representatives raised a new objection and that was to the effect that as the Lahore Court was a foreign Court its decree could not be executed by an Indian Court. This objection was, however, overruled by order dated 6th February, 1948. Thereafter the executing Court held that under section 50, Civil Procedure Code, the application for impleading the legal representatives lies to the Court which passed the decree and ordered on 21st May, 1948, that proceedings be stayed till the decree-holder Bank obtains the necessary orders from the Lahore Court. It appears that the Bank had already approached the Lahore Court on 12th March, 1948, for that purpose and that Court by order dated 21st May, 1948, impleaded three sons and the widow of the deceased judgment-debtor. Another application was made to the Lahore Court for impleading Basant Lal Malhotra another son of the judgment-debtor and that this application was granted by an order dated 15th October, 1949. The execution proceedings were then resumed in the Ferozepore Court and the execution application was dismissed on the ground that it was not filed in accordance with law as an application for execution against the legal representatives could only be made in Lahore and after 15th August, 1947, that being a foreign Court could not deal

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with the matter. It is against this decision that the Bank has appealed to this Court (Execution First Appeal No. 47 of 1951).

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The facts out of which Execution First Appeal No. 48 of 1951, has arisen are these. The Bari Doab Bank Ltd., had obtained a money decree for Rs. 24,065-10-0 against the same Piare Lal on 26th October, 1934, from the Court of Sub-Judge 1st Class Lahore. The Bank got the decree transferred to Ferozepore under section 39, Civil Procedure Code. The Ferozepore Court dismissed the application on 30th October, 1942. The Bank filed a fresh application on 18th October, 1945, for realisation of Rs. 6,923-8-0 as balance due under the decree. The proceedings were stayed under section 6 of the Soldiers (Litigation) Act, 1925, by order dated 1st March, 1946, as Bikram Lal one of the sons and the legal representative of Piare Lal was on active service. The execution proceedings were resumed on 12th April, 1947. Thereafter the proceedings in this case and in the case of Punjab Co-operative Bank Ltd., were taken together. The same objections were filed by the legal representatives and the same orders were passed thereon as narrated above. The only difference is that the Lahore Court brought the legal representatives on record on 1st July, 1949, and the oral evidence was recorded in this case and was made with the consent of the parties in the case of the Punjab Co-operative Bank Ltd. The appeal of the Bari Doab Bank Ltd., is numbered as Execution First Appeal No. 48 of 1951.

Now these facts raise two questions of law and they are—(1) Whether the application for substitution of legal representatives must be made only in the Court which passed the decree and without such an application execution cannot proceed in

the transferee Court and (2) Whether an application for this purpose in Lahore Court after 15th August, 1947, is valid.

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Dealing first with the second question it appears to me that after 15th August, 1947, the Lahore Court has become a foreign Court and any order passed by it after that date under section 50, Civil Procedure Code, has no effect in this country. The first point seems to be more difficult to decide. Under section 50, Civil Procedure Code, the decree-holder on the death of the judgment-debtor may apply to the Court which passed the decree to execute it against the legal representatives of the deceased judgment-debtor. Under section 39, Civil Procedure Code, the Court that passed the decree may send it to another Court for execution. On such a transfer the transferee Court has under section 42, Civil Procedure Code the same powers in executing it as if it had passed the decree and under section 40, Civil Procedure Code, it shall execute it according to the rules applicable to itself. Under Order 21, rule 22(2), Civil Procedure Code, where an execution application is made against the legal representatives then the executing Court may not issue notice to the legal representatives under certain circumstances and it has been repeatedly laid down that the provisions of this order apply to transferee Court as well. Now the transferee Court continues to have jurisdiction to execute the decree even if repeated applications are made for the purpose till it certifies to the Court that passed the decree the fact of its execution or failure under section 41, Civil Procedure Code. It is well settled that the Court which passed the decree continues to have jurisdiction to execute the decree itself or to send it to some other Court for this purpose even if it has already transferred it

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to another Court. In this connection the provisions of section 146, Civil Procedure Code, are also not to be ignored. This section provides that when proceedings can be taken against a person on an application then an application can be made against persons claiming under him. Thus under this section an application can be made against a legal representative of a judgment-debtor. It will not be irrelevant to state at this place that provisions of Order 22 do not apply to execution proceedings and it is not necessary to file a separate application to bring the legal representatives of a judgment-debtor on the record. In view of these provisions of law it appears to me that after transfer of a decree the jurisdiction of the transferee Court is not excluded to execute it against the legal representatives of the judgment-debtor. There was a conflict of views in this matter in various High Courts till their Lordships of the Privy Council held in *Jung Bahadur v. Bank of Upper India, Ltd., Lucknow* (1):—

“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, e.g., if the application for substitution is made to the Court to whom decree is transferred instead of to the Court passing the decree, 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."

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It is clear from this decision that their Lordships of the Privy Council ultimately decided the matter on the ground that the legal representatives of the judgment-debtor were estopped from raising it. This decision to my mind does not hold finally that the transferee Court has no power or jurisdiction to execute the transferred decree against the legal representatives of the judgment-debtor. It has, however, been decided by the Pepsu High Court in *A. S. Metal Mart v. The First National Bank Ambala* (1), that the words "may apply" in section 50 should be read "shall apply" and that any application for execution of the decree against the legal representatives of the deceased judgment-debtor in the transferee Court is not competent without getting the legal representatives impleaded in the Court which passed the decree.

Now if the transferee Court has jurisdiction to entertain such an application then even after partition of the country that jurisdiction has been preserved by para 4 of the Indian Independence (Legal Proceedings) Order, 1947, which lays down:—

" * * * * * (1) all proceedings pending immediately before the appointed day in any civil or criminal court (other than a High Court) in the Province of Bengal, the Punjab or Assam shall be continued in that court as

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if the said Act had not been passed, and that court shall continue to have for the purposes of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day; * * * * *

In view of the importance of the matter I am of the opinion that the points of law involved in this case should be decided by a larger Bench. Let the papers be placed before the Hon'ble the Chief Justice for orders.

JUDGMENT

Dua, J.

DUA, J.—The facts of the two appeals (Execution First Appeal No. 47 of 1951 and Execution First Appeal No. 48 of 1951) have been given in detail in the referring order. In both the cases decrees for fairly large amounts were obtained by the decree-holders appellants from the Civil Courts at Lahore before the partition of the country. In E.F.A. No. 47 of 1951, the Punjab Co-operative Bank Ltd., obtained a mortgage decree for Rs. 30,000 against Piare Lal on the 31st of August, 1936, from the Court of the Additional District Judge, Lahore, and an order from the Lahore Court for transfer of the decree to Ferozepur under section 39 of the Code of Civil Procedure was duly obtained. On the 22nd of April, 1943, the Bank Decree-Holder applied to the Court of the Senior Subordinate Judge, Ferozepur, for execution of the decree which was dismissed on the 18th of June, 1943, after partial satisfaction. On the 3rd of January, 1946, the decree-holder put in a fresh application for execution of the decree as the judgment-debtor

Piare Lal had died in the meanwhile. This petition was filed against his legal representatives and was dismissed on the 7th of February, 1947, but on the same date a fresh application was filed for realising a sum of Rs. 8,824-12-4 which was the balance, then due under the decree. On the 20th of May, 1947, the legal representatives of the judgment-debtor filed objections objecting to the decree being executed against them on the ground, *inter alia*, that it was only the parent Court which passed the decree that could order execution to proceed against the legal representatives under the provisions of section 50 of the Code of Civil Procedure. The parties led evidence on other pleas which raised questions of fact, which evidence was concluded on the 20th of December, 1947; two days later the legal representatives raised a new objection that the Lahore Court being a foreign Court, its decree could not be executed by the Indian Courts. This objection was overruled by the executing Court on the 6th of February, 1948. On the 21st of May, 1948, the executing Court held that under section 50 of the Code of Civil Procedure the application for impleading the legal representatives could only be made to the Court which passed the decree and till the decree-holder Bank obtained the necessary orders from the Lahore Court the execution could not proceed. In pursuance of this order he stayed the execution proceedings. It appears that the Bank had in the meanwhile already approached the Lahore Court on the 12th of March, 1948, and the Lahore Court had by order dated 21st of May, 1948, impleaded the three sons and the widow of the deceased judgment-debtor as legal representatives. Another son of the judgment-debtor Shri Basant Lal Malhotra was also, later impleaded as a judgment-debtor by the Lahore Court on the 15th October, 1949.

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The execution proceedings in the Ferozepore Court were thereupon resumed but the execution application was dismissed on the 2nd of January, 1951, on the ground that it was not filed in accordance with law, as an application for execution against the legal representatives could only be made in the Court at Lahore and after the 15th of August, 1947, the Lahore Court being a foreign Court it could not deal with the matter. An appeal against that order, as mentioned above, is registered as E.F.A. 47 of 1951.

In the other appeal (E.F.A. 48 of 1951) the Bari Doab Bank Ltd., had obtained on the 26th of October, 1934. a money decree for Rs. 24,065-10-0 from the Court of Subordinate Judge. 1st Class, Lahore. This decree was also got duly transferred to Ferozepore under section 39 of the Code of Civil Procedure. The Ferozepur Court dismissed the application on the 30th of October, 1942, and the decree-holder Bank filed a fresh application for execution on the 18th of October, 1945, for realising a sum of Rs. 6,923-8-0 the balance then due under the decree. These proceedings were stayed under the Soldiers (Litigation) Act 1925 by order dated 1st of March, 1946, as one of the sons and legal representatives of the judgment-debtor happened to be on active service. It may be noticed that the judgment-debtor had in the ~~meantime died and the proceedings were stayed~~ because one of the persons who was sought to be held liable was entitled to the benefit of the Soldiers (Litigation) Act. Proceedings in execution of this decree were resumed on the 12th of April, 1947, whereafter the proceedings in both the cases (the decree of the Punjab Co-operative Bank Ltd. and the decree of the Bari Doab Bank Ltd.) were taken together. Same objections were raised by the legal representatives and same

orders were passed by the executing Court as mentioned in the earlier part of this judgment, the only difference being that the legal representatives in this case were brought on the record in the Lahore Court on the 1st of July, 1949, whereas in the case of the Punjab Co-operative Bank Ltd., they had been brought on the record on the 21st of May, 1948. The oral evidence was recorded in this case viz. of the Bari Doab Bank Ltd. and with the consent of the parties it was made evidence in the case of the Punjab Co-operative Bank Ltd., as well.

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These two appeals originally came up before Bishan Narain, J., who by his order dated 18th of November, 1955, felt that in view of the importance of the following two questions the case deserved to be decided by a larger Bench:—

- (1) Whether the application for substitution of legal representatives must be made only in the Court which passed the decree and without such an application execution cannot proceed in the transferee Court, and
- (2) Whether an application for this purpose in Lahore Court after 15th of August, 1947, is valid.

It appears that before the learned Single Judge reliance on behalf of the decree-holders was only placed on sub-para (1) and not on sub-para (3) of 4 of the Indian Independence (Legal Proceedings) Order, 1947. *para* Para 4 of the Indian Independence (Legal Proceedings) Order, 1947, reads thus:—

4. Notwithstanding the creation of certain new Provinces and the transfer of certain territories from the Province

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of Assam to the Province of East Bengal
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- (1) all proceedings pending immediately before the appointed day in any civil or criminal court (other than a High Court) in the Province of Bengal, the Punjab or Assam shall be continued in that court as if the said Act had not been passed, and that court shall continue to have for the purpose of the said proceedings all the jurisdiction and powers which it had immediately before the appointed day;
- (2) any appeal or application for revision in respect of any proceedings so pending in any such court shall lie in the court which would have appellate, or as the case may be revisional, jurisdiction over that court if the proceedings were instituted in that court after the appointed day; and
- (3) effect shall be given within the territories of either of the two Dominions to any judgment, decree, order or sentence of any such "court in the said proceedings, as if it had been passed by a court of competent jurisdiction within that Dominion."

From the facts narrated above it would be clear that both the execution proceedings were pending in the Court at Ferozepur immediately before the appointed day, i.e., 15th of August, 1947. Those proceedings by virtue of para 4(1) were to continue in the Ferozepur Court as if the Indian Independence (Legal Proceedings) Order, 1947,

had not been passed. In other words for the purposes of these proceedings the Lahore Court could not be considered to be a foreign Court; and in this view of the matter the Court below, in my opinion, was not right in observing that the order of the Additional District Judge, Lahore, after the 15th of August, 1947, was the order of a foreign Court with respect to the proceedings in dispute.

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Reading together sub-paras (1) and (3) of para 4 of the Indian Independence (Legal Proceedings) Order, 1947, the picture becomes clearer still. Sub-para (3) lays down that effect must be given within the territories of both the Dominions of India and Pakistan to any judgment, decree or order of any Court such as is referred to in sub-para (1) as if it had been passed by a Court of competent jurisdiction within that Dominion. This, in my opinion, clearly shows that if an order is passed by the Ferozepur Court in the proceedings pending immediately before the 15th of August, 1947, then that order must be given effect to in both the Dominions of India and Pakistan as if it had been passed by a Court of competent jurisdiction. In view of these provisions of law I am inclined to take the view that the Ferozepur Court should be considered to be competent to proceed with the execution application against the legal representatives just as the Court passing the decree would be.

The matter may be looked at from another point of view as well. Section 50 of the Code of Civil Procedure lays down that 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. In both the appeals before us the decree-holders did actually apply to the Courts which passed the

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decrees to execute the same against the legal representatives of the judgment-debtor. Section 50 of the Code of Civil Procedure is, in the circumstances, being fully complied with. The judgment-debtors, however, say that the Courts at Lahore are foreign Courts and therefore, the applications in those Courts are of no avail to the decree-holders. If that is so then the only Court which can deal with the execution applications is the Ferozepur Court and here also the decree-holders have applied for executing their decrees against the legal representatives of the deceased judgment-debtor. I have not been able to appreciate the contention of the judgment-debtors when they contend in the one breath that the decree-holders must approach the parent Court wherever it may be situated, and in the second breath they object that because the parent Court is in a foreign country therefore, an application in that Court can be of no avail. Either there is a parent Court in existence which can properly be approached in accordance with law for the purpose of executing the decree against the legal representatives of the judgment-debtor or there is no such Court in existence. If such a Court is in existence then the decree-holder has properly approached that Court and if there is no such Court in existence then also the decree-holder has moved the only Court which is seized of the matter viz., the Ferozepore Court.

There is still another way of dealing with the question which arises for consideration in the present case. In *Kumar Jang Bahadur v. Bank of Upper India, Ltd.* (1), their Lordships of the Privy Council after noticing an apparent divergence of opinion among the different High Courts in India on the question of interpretation of section 50,

(1) I.L.R. 3 Luck 314

Civil Procedure Code, observed that the matter of getting an order for substitution of the legal representative in place of the deceased judgment-debtor was a matter of procedure and not of jurisdiction and a non-compliance with such procedure could under the law be waived. Their Lordships when dealing with this matter, made a reference to *Sham Lal Pal v. Madhu Sudan Sircar* (1), *Amar Chandra v. Guruprosunno* (2), and *Swami Nath Ayyar v. Vaidya Nath Sastri* (3), and finally observed as follows:—

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“After consideration of all the circumstances of the case under appeal, their Lordships come to the conclusion that the *Hardoi Court* had jurisdiction to deal with the matter of the execution transferred to it; that the exercise of such jurisdiction as against the appellant though irregular in the first instance was submitted to for a considerable time by him. He cannot now be heard to object to the exercise of such jurisdiction and it would be to permit a gross abuse of procedure if he was allowed to do so.”

In *Mt. Begam Bibi v. Bulaqi Shah and sons* (4), a Division Bench of the Lahore High Court followed *Sham Lal Pal v. Madhusudan Sircar* (1) and held that an application for substitution of the legal representative of the deceased can be made to the Court to which the decree has been transferred for execution and in any case if the application is not made to the Court passing the decree it is a mere irregularity which is covered by section 99 of the Code of Civil Procedure. Similarly in *S.*

(1) I.L.R. 22 Cal. 558

(2) I.L.R. 27 Cal. 488

(3) I.L.R. 28 Mad. 466

(4) A.I.R. 1926 Lah. 34

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Marahmat Husain v. Oudh Commercial Bank Ltd. and others (1), it was observed that section 50(1) of the Code of Civil Procedure does not give an exclusive jurisdiction to the Court which passed the decree for the purposes of substituting the names of legal representatives of the deceased judgment-debtor and an application may also be made to and orders passed by the Court to which a decree has been transferred for execution. In that case also reference has made to *Sham Lal Pal v. Madhusudan Sircar* (2) and *Kumar Jang Bahadur v. Bank of Upper India, Ltd.* (3). Procedure, it has repeatedly been observed, is a handmaid and not mistress of law and rules of procedure should subserve and not govern. Procedure is only a channel to administer law, and it should not be instrumental in impeding or obstructing justice, rules of procedure should always be utilised for advancing and not for defeating the cause of justice. If therefore, as observed by their Lordships of the Privy Council, it is only a matter of procedure, and not of jurisdiction that the Court passing the decree should normally be approached for proceeding against the legal representatives of the judgment-debtor and if failure to approach such Court is a mere irregularity then, where by partition of the country such Court happens to fall in a foreign territory, the transferee Court should in such circumstances be held to possess full jurisdiction to execute the decree against the legal representatives. This principle, in my opinion, is also deducible from the provisions of section 42 of the Code of Civil Procedure which lays down that the Court executing the decree sent to it shall have the same powers in executing the decree as if it had been passed by itself.

(1) A.I.R. 1931 All. 320

(2) I.L.R. 22 Cal. 558

(3) I.L. R. 3 Luck 314 (P.C.)

The learned counsel for the respondents has also placed his reliance on the Privy Council decision mentioned above; he, however, contends that an objection based on the omission to approach the parent Court may be waived but if it is not waived then, so the counsel argues, the decree-holder has no right in the first instance to approach the transferee Court for proceeding against the legal representatives of the judgment-debtor. In support of his contention he has further referred us to the case of *Official Trustee of Bengal and another v. Basdeo Bhagat and others* (1). Their Lordships in the reported case after referring to *Kumar Jang Bahadur v. Bank of Upper India Ltd* (2), observed as follows:—

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“Their Lordships have held that it is irregular for the Court which has not passed the decree to proceed with the execution against the representatives of a deceased judgment-debtor as under the provisions of Section 50, Civil Procedure Code, the application for such execution is to be made to the Court which passed the decree. Their Lordships have, however, held that if the judgment-debtor waived the objection or acquiesced in execution, the proceedings are not void because there is no want of jurisdiction. In my opinion the learned Subordinate Judge has rightly pointed out that the questions of acquiescence or of waiver can only arise when steps have been taken for execution and the Courts are called upon to decide whether the steps taken should stand or should be set aside.

(1) A.I.R. 1937 Pat. 239

(2) I.L.R. 3 Lucknow 314

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We are at a stage when no execution has been issued. When it is brought to the notice of the Court that a certain procedure is irregular, and when the proceedings can be regularised by applications to the proper Court, there is no reason why the Court should allow the irregular proceeding to continue."

It may be noticed that their Lordships of the Patna High Court expressly observed that if the proceedings could be regularised they should be regularised. In the present case the position adopted by the judgment-debtors clearly shows that if their objections are upheld then the proceedings cannot be regularised. The Patna case thus is of not much assistance to the counsel for the respondents. The next case on which he has placed reliance is *K. K. M. Muthukaruppan Chettyar v. P. S. T. Sellami Achi* (1). Here again the learned Judges relied on *Kumar Jang Bahrdur v. Bank of Upper India Ltd.* (2) and clearly observed that the matter dealt with by section 50 of the Code of Civil Procedure was one of procedure and not of jurisdiction. On the facts of that case, however, an execution application had been filed in the transferee Court in Burma after Burma had separated from India. It appears that the decree in that case had been passed by a Subordinate Judge in Madras and had been transferred to Burma for execution in October, 1936. The order for transfer was received in the Court at Burma in October, 1936. According to Order 21, Rule 10(a) Code of Civil Procedure, as in force in Burma, it was provided that in the absence of an application made by the decreeholder within six months of the date of receipt of the papers the Court shall return them to the

(1) A.I.R. 1938 Rang. 385

(2) I.L.R. 3 Luck. 314

Court which passed the decree with a certificate of the circumstances. This period of six months had expired on the 29th of April, 1937, when according to the above provision of law the papers should have been sent back to the Court passing the decree. The application for execution in the transferee Court was made on the 19th of May, 1937. Separation of Burma had taken effect on the 1st of April, 1937. On these facts, the petition which the decree-holder filed on the 19th of May, 1937, was obviously to a Court which could not proceed with the application as no application had been made within six months from the date of the receipt of the order of transfer. In these circumstances the learned Judges of the Rangoon High Court held and, in my opinion, rightly that the execution application could not proceed in the Burma Courts. The learned counsel then placed his reliance on *S. S. Said ul Hamid v. The Federal India Assurance Co. Ltd., New Delhi* (1). This is a judgment by a learned Single Judge of this Court but it is not clear whether any proceedings were actually pending in a Court in India on the 15th of August, 1947, which circumstance is material for the purposes of interpreting the provisions of para 4 of the Indian Independence (Legal Proceedings) Order. The judgment only refers to the circumstance that between 11th of October, 1947, and 15th of April, 1948, there was no proceedings pending in the Court of the Senior Subordinate Judge at Delhi. In my opinion the only time relevant for determining the applicability and true scope and purpose of para 4 of the Indian Independence (Legal Proceedings) Order, 1947, is the appointed day which is the 15th of August, 1947. This decision is thus not of much assistance to the respondent.

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Lastly, the learned counsel drew our attention to the judgment of a Single Judge of the erstwhile Pepsu High Court reported as *A. S. Metal Mart v. The First National Bank, Ambala* (1). In that case the learned Judge particularly relied on *Official Trustee of Bengal and another v. Basdeo Bhagat and others* (2). If this judgment holds that the Court passing the decree is the only Court which has the exclusive jurisdiction to entertain an application for proceeding against the legal representatives of the judgment-debtor then with the utmost respect I disagree with it. Their Lordships of the Privy Council have in clear and express words laid down that this is a mere matter of procedure and not of jurisdiction.

After fully considering the matter I am of the view that section 50 of the Code of the Civil Procedure does not confer exclusive jurisdiction on the Court which passed the decree for proceeding against the legal representatives of the judgment-debtor and it is a matter purely of procedure and the transferee Court is not completely without jurisdiction in dealing with this matter. Section 42 of the Code of Civil Procedure also supports this view. My answer therefore, to the two questions referred by the learned Single Judge would be:—

- (1) an application for substitution of legal representatives need not necessarily be made only in the Court which passed the decree and without such an application execution can proceed in the transferee Court. It would, however, depend on the circumstances of each case. If the objection is waived or if otherwise it is not possible to approach the

(1) A.I.R. 1954 Pepsu 115
(2) A.I.R. 1937 Pat. 239