

**(1875) 03 CAL CK 0006**

**Calcutta High Court**

**Case No:** Rule No. 1160 of 1874

In Re: Petition of  
Samuel Cochrane

Vs

APPELLANT

RESPONDENT

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**Date of Decision:** March 3, 1875

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### **Judgement**

Jackson, J.

It is a rule which we have always observed in affording relief to parties applying to this Court under s. 15 of the High Courts" Act, that it must be made quite clear that the party applying for it has not contributed by his own conduct to his being placed in the position he finds himself in. Now it is quite clear that Mr. Cochrane had the fullest opportunity on two occasions of appearing before the Court and showing cause against the acts he complained of. He abstained from doing so under advice. The learned Advocate-General contends that he was perfectly justified in so abstaining, inasmuch as the acts of the Court were absolutely null. It appears to me that acts of the nature complained of, when done after notice to the party affected by them, cannot be regarded as nullities so as to enable the petitioner to take the position that he was absolved from the necessity of taking notice, and entitle him to apply to this Court for setting aside the sale: and the clearer the ground on which the acts complained of are said to be bad and erroneous, the easier his course was to come before the Court and induce it to stay its hands. It may be that notwithstanding what I have said, we should have been inclined to allow the petitioner before us the relief he seeks in the present form, if we saw reason to think that a suit for setting aside the sale would not be successful; but it appears from the papers that the party who purchased at the sale is the decree-holder, the party who set the Court in motion. There can be no doubt I think that the decree-holder herself having been the purchaser cannot, if the petitioner"s allegations be true, successfully contend that a suit to set aside the sale would not lie. Under the circumstances I think that the petitioner is not entitled to have the relief asked for, and that this rule should be discharged with costs.

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<sup>(1)</sup>Before Mr. Justice Bayley and Mr. Justice Mackpherson.

In the matter of the Petition of Girendronath Tagore and Others.\*

The 15th December 1868.

Act VIII of 1859, s. 210--Execution of Decree passed against Deceased Person.

When a decree has been passed against a deceased person, execution of such decree cannot be had under the CPC against his legal representatives.

Mr. R.T. Allan and Baboo Taruck Nath Dutt for the Petitioners.

Baboos Sreenath Dass and Obhoy Churn Doss for the Opposite Party.

Macpherson, J.--I think this rule ought to be made absolute so far as regards quashing the execution proceedings which have been taken against the petitioners as the legal representatives of Girendronath Tagore, deceased.

A decree was obtained by Hurronath Roy in the Sadder Court on the 28th February 1861, against Madhub Chunder Chowdhry, Girendronath Tagore, and others. The plaintiff in that suit, Hurronath Roy, or his representatives, recently applied to the Court of the Subordinate Judge of Pubna for execution of that decree, against the present petitioners as the legal representatives of Girendronath Tagore. Upon this application being made, notice was issued by the Court under s. 216 of Act VIII of 1859, calling upon the present petitioners to show cause why the decree should not be executed against them. They thereupon showed cause, and the cause shown was this:--that although the name of their father Girendronath Tagore appeared as a defendant in the decree of the 23rd February 1861, and throughout the whole of the proceedings in that suit, Girendronath Tagore had in fact died on the 19th December 1854, some fifteen or sixteen months before the plaint in that suit was filed. The present petitioners therefore contended before the Subordinate Judge, and as it seems to me very reasonably, that as the suit was instituted against a dead man, and as the decree was obtained against the same dead man so long ago as 1861 the decree was practically worthless, and they were not now liable under that decree as his legal representatives, especially as they never had any notice of the proceedings in that suit until the application for execution was made against them. The decree of which execution was sought was the decree of another Court, so the Subordinate Judge did not himself dispose of the question whether execution should or should not issue, but postponed the further hearing of the matter, and gave the parties leave to apply under the provisions of s. 290, Act VIII of 1859 to the Court which made the decree. Thereupon the petitioners apply to this Court to quash the whole proceedings taken by the decree-holder against them, upon the ground that they are in no possible way liable under the decree of February 1861, and that the lower Court has no jurisdiction to entertain the application against them. There is some confusion, and possibly irregularity in the way in which the matter is, brought before this Court, and some misapprehension as to the remedy to which the parties are entitled. But the substantial case made by the petitioners, and one of their prayers, is that the order for the execution

may be quashed on the ground of the petitioners" being in no way liable under the decree of February 1861.

Upon the merits, we must take it that the petitioners" case is made out. In moving for the rule nisi which was obtained on the 25th of August last, the petitioners made use of an affidavit sworn to by one of the members of their family in which the grounds of the application are distinctly set forth; and in this affidavit it is sworn that Girendronath Tagore died before Hurrionath"s suit was even instituted. That affidavit, although filed in August last, has not been contradicted or answered in any way. Therefore, for the purposes of the present application we must consider the facts stated therein to be true. As it is established that Girendronath Tagore, the person against whose legal representatives the decree is now sought to be executed, died before any decree was passed, it appears to me that execution cannot be issued; for no provision is made in the CPC for the issue of execution against the legal representative of a deceased defendant in such a case. S. 210 of Act VIII of 1859 is the section which declares when execution may be issued against the legal representatives or the estate of a deceased judgment-debtor. The words of that section are:--"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 person so dying as aforesaid." These words do not embrace a case like the present, because they evidently contemplate only the case of a person who, bring alive at the time when a decree is passed against him, dies before execution is fully had of that decree. The section does not include or provide for the case of a person against whom a decree is made having died before the decree is made. And it is little to be wondered at that the Code does not provide for such a contingency, for it would not readily occur to ordinary minds that decrees would ever be asked for or made against dead men. There is no other section in the Code of Civil Procedure, excepting s. 210, under which a decree-holder is empowered to apply for execution against the legal representatives, of a deceased judgment-debtor; and as s. 210 does not (as I have shown) apply to the present case, this decree cannot be executed against the legal representatives of Girendronath Tagore. I think therefore all the proceedings taken against the petitioners in execution of the decree of February 1861 ought to be quashed; and that the petitioners are entitled to their costs of this application.

Bayley, J.--I am of the same opinion. S. 210 of Act VIII of 1859 is as clear as words can make it that if a party against whom a decree is made dies before execution is fully had of that decree, application for execution may be made against the legal representatives of the deceased.

In this case however there was an affidavit and a petition of objection setting forth that Girendronath Tagore died even before the institution of the suit, and nothing has been adduced by the opposite party to show that the facts stated in the affidavit and in the petition of objection are incorrect, although there was ample time for this being done. I therefore may legally assume the facts stated in the above papers to be correct.

Girendronath thus was not a party against whom a decree was made; therefore under the

terms of s. 210, Act VIII of 1859, the execution proceedings could not be legally taken by the decree-holder against the defendants as representatives of Girendronath.

I concur in the order proposed to be passed by Mr. Macpherson J., in this case.

\* Rule, No. 1228 of 1868, against an order of the Subordinate Judge of Pubna dated the 23rd February 1861.