Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wendt.

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ERANEE *et al.* *v.* NUSSERWANJEE.

D. C., Colombo, 23,289.

Action on foreign judgment—Partnership transaction—Death of one of several partners—Right of surviving partner or partners to continue the action—Legal representatives of deceased partner need not be joined —Prescription—"Absence beyond seas"—Presence of agent or attorney — Constructive inhabitancy — Insufficiency — Prescription Ordinance (No. 22 of 1871), ss. 7, 11, 14, and 15.

On the death of one of two or more partners, the right to sue on any partnership transaction survives to the surviving partner or partners; the legal representatives of the deceased partner or partners are not necessary parties to such a suit.

The appointment of an attorney or agent to act for a person in Ceylon does not remove the disability constituted by "absence beyond seas" under section 14 of Ordinance No. 22 of 1871.

Quære.—Whether an interlocutory order which has not been appealed against can be opened upon the hearing of the appeal on the final judgment.

THE plaintiffs, who were at one time carrying on business in partnership, obtained judgment as such partners, on June 25, 1902, against the defendant, in the High Court at Fort William, Bengal, for a sum of Rs. 14,448 and interest.

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The plaintiffs, on April 21, 1906, through their attorney, instituted an action on the said judgment in the District Court. On November 30, 1906, the first plaintiff died, and an application was made by the surviving plaintiff, under section 393 of the Civil Procedure Code, to continue the action alone. This was opposed by the defendant, who contended that the legal representatives of the deceased plaintiff ought also to be joined in the action as plaintiffs.

Grenier, D. J., held as follows on this point (March 25, 1907):—

"The two plaintiffs on the record obtained judgment against the defendant in the High Court of Calcutta on June 25, 1902, for the sum of Rs. 14,448.92, with interest at 6 per cent. thereon. The plaintiffs were partners, and sued as such in that Court. The judgment and decree of the High Court of Calcutta describe them as partners, and there can be no question therefore that the judgment was in favour of the plaintiffs as partners. The plaintiffs instituted this action in the District Court of Colombo upon the foundation of the judgment of the High Court of Calcutta on April 21, 1906. Since the institution of the action the first plaintiff died at Calcutta on November 30, 1906. This fact is admitted. The question is whether the cause of action survived to the second plaintiff on the death of his co-partner. I am of opinion that it did, and that, under section 393 of the Civil Procedure Code, the second plaintiff is entitled to proceed on with the action without joining the legal representatives of the deceased partner. The judgment upon which this action is based is one in favour of the plaintiffs as co-partners, and the suit in the Calcutta High Court was presumably in respect of an obligation which the defendant has contracted with the plaintiffs as co-partners. The action in this Court proceeded upon the judgment of that Court, and the defendant's liability is clearly one not to the plaintiffs as individuals but as co-partners. It may be that at the date of the institution of the action in this Court the partnership was no longer in existence, but that, I presume, did not prevent the plaintiffs from joining in an action for the recovery of a partnership debt. I understand the general rule of law to be that in the case of the death of one of two co-partners the cause of action survives to the other, and the authorities cited by Mr. Jayewardene seem to be in point. Lord Lindley, in his book on Partnership, is by no means sure that the rule has been altered after the passing of the new Judicature Act, and that the legal representative of the deceased partner must sue and be sued. I allow the prayer of the petition, and make order under section 393 that the action do proceed at the instance of the petitioner, the second plaintiff, and that the costs of this application be costs in the cause."

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The case subsequently came on for hearing before F. R. Dias, Esq., Acting District Judge, and the following issues were framed:—

1. Has the power of attorney in favour of T. A. J. Noorbhai ceased to be operative as and from the date of the first plaintiff's death, and can the second plaintiff maintain this action in its present form?

2. Is the plaintiffs' cause of action prescribed?

3. Do the facts set out in paragraph 7 of the plaint take the plaintiffs' case out of the operation of section 11, or any other section of the Prescription Ordinance, No. 22 of 1871?

4. Was the plaintiffs' alleged disability removed by the fact of their having on April 11, 1903, appointed Carimjee Jafferjee, a resident of Colombo, their attorney in Ceylon for the purpose of suing on this judgment?

The Acting District Judge (F. R. Dias, Esq.) held as follows (September 9, 1907) on the issues:—

"The two plaintiffs M. B. Eranee and B. R. Eranee were co-partners, carrying on business as rice merchants in Calcutta under the style of B. M. Eranee & Co., and in respect of some dealings which the defendant had with that firm they sued him in the High Court at Calcutta, and on June 25, 1902, judgment was signed against him for Rs. 14,448.8.2 with interest and costs. The present action has been brought upon that judgment, which, with interest and costs, amounted to Rs. 19,998.72 at the date of its institution, namely, April 24, 1906.

"Neither of the plaintiffs has ever been in this country, and they are represented locally by Mr. Noorbhai, whom they appointed their attorney for the purpose of suing the defendant and taking all other necessary steps against him in that connection by a power of attorney executed on January 10, 1906. The debt was one due to the partnership, but at the time the plaintiffs signed their power of attorney they had ceased to be partners. Some months after the action was filed the first plaintiff died, and in March, 1907, upon application made by the second plaintiff, with due notice to defendant and after full discussion, the Court made an order under section 393 of the Code directing the action to proceed at the instance of the second plaintiff alone. That order has not been appealed against.

"The defendant admits he has not paid any part of the plaintiffs' claim, but he denies his liability to pay it now on two grounds: (i.) The action is prescribed under section 11 of Prescription Ordinance; and (ii.) it cannot be maintained in its present form as the first plaintiff is dead, and his power of attorney has ceased to be operative, and Mr. Noorbhai has no right to represent his legal representatives, who are not now before the Court.

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" The second point is scarcely in issue now, as it is covered by the order of my predecessor, Mr. Grenier, above referred to. The defendant is bound by it, and it is not competent for me to re-open it should I consider it necessary to do so. To the reasons given by that Judge I need only add that, the Indian judgment being one in respect of a debt due not to the two men in their individual capacity, but as members of a partnership, on the death of one of the partners the right to sue on it, just as in the case of a contract with the firm, survived to the surviving partner or his representative, and the representatives of the first deceased partner would have no right at all to join in such action. In the present case it seems to me that the death of the first plaintiff, after the filing of the action, makes no difference whatever. If he had died before, it cannot for a moment be doubted that the proper person to sue would be the second plaintiff, so that in our present circumstances we may very well treat the case as if the first plaintiff was never a party to it, without prejudice to the rights of anybody. The power of attorney to Mr. Noorbhai was not given by the two plaintiffs jointly, but jointly and severally, so that he is entitled to act under it for one without the other. Hence, in my opinion, the objection to the maintenance of the action in its present form fails.

" As regards the question of prescription, the defendant seeks to bring the case within the three-year limit provided by the 11th section of the Ordinance, while the plaintiffs bring it under the six-year limit in section 7, on the ground that the foreign judgment is of the nature of a written contract. I cannot accept this latter contention. When a person obtains a judgment against another, he has a right, if he chooses to do so, to bring an action on the judgment for the money due. That right arises from the existence not of a contract between the two parties, but of a circumstance (viz., the recovery of the judgment) which enables the plaintiff to sue the defendant; and the judgment itself is nothing more than evidence of that circumstance.

" Our Ordinance is silent as to actions founded on foreign judgments, so that I think the defendant is right in applying section 11, which provides for all *casus omissi*. He is, however, faced with this difficulty, namely, that prescription has never begun to run against these plaintiffs, they being always ' absent beyond the seas '—one of the disabilities provided for in section 15. It has been argued that this does not apply to persons in the position of the plaintiffs, who have never been in this country, but only to such as have been here and gone away temporarily. No authority has been cited for putting such a strained construction on plain words, which mean no more than the being outside the territorial limits of a particular country, without any reference to the person's presence there before.

" It was further urged that, even if the plaintiffs were under the disability relied upon, it was removed by their appointment of Mr. Carimjee Jafferjee as their attorney on April 11, 1903, to sue the defendant on this very judgment. Through him they were constructively present in this country, so that prescription began to run against them as from that date, and this action was filed just too late.

" The Appeal Court decision in the case of *Ponniah v. Nagu Lebbe*[1] is an authority which the defendant cannot possibly get over. It was there held that there was only one way by which absence from a place can be terminated, namely, by going to that place, and that consequently the appointment of an attorney to act in Ceylon did not remove the disability constituted by absence beyond the seas under our Ordinance section 14.

" The defendant fails on all the issues that have been framed, and I enter decree for second plaintiff as prayed with costs. "

The defendant appealed.

F. M. de Saram, for him.—The order allowing the action to be continued by the surviving plaintiff was bad; the legal representatives of the deceased partner are necessary parties, because at the date of action the partnership had been dissolved and the plaintiffs were suing in their individual capacities. Whatever might have been the law some time ago, since the passing of the Judicature Act the legal representatives of a deceased partner are necessary parties to an action in respect of a partnership transaction (Lindley on *Partnership*). On the question of prescription, it cannot be said that the plaintiffs were " absent beyond seas " during the prescriptive period, inasmuch as they had an attorney here during that time who could have sued. The presence of the attorney in the Island is equivalent to the presence of the principal. He might have brought the action, if he so desired. The decision in *Ponniah v. Nugu Lebbe*[2] is not supported by any other authority.

H. A. Jayewardene, for the plaintiff, respondent.—The order of Grenier, D.J., is right. The law is clear that where one of several partners dies the cause of action survives to the surviving partner or partners alone, and not to the surviving partners and the legal representatives of the deceased partner. (*Williams on Executors, pp. 486, 638, and 1512; Dicey on Parties, Rule 24; McLean v. Kennard*,[3] *Gobino Prasad v. Chandar Sekhar*;[4] *Bechardass v. Sagunbaksh*.[5]) On the question of prescription; the decision in *Ponniah v. Nugu Lebbe* is supported by the decision of the Privy

[1] *(1906) 9 N. L. R. 368.*
[2] *(1906) 9 N. L. R. 368.*
[3] *(1874) L. R. 9 Ch. App. 346.*
[4] *(1887) 9 Allahabad 486.*
[5] *(1892) 17 Bombay 6.*

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Council in *Ruckimaboye v. Mottichund*,[1] where it was held that what the law contemplated was the actual presence of a party within the jurisdiction of the Court, and not a mere constructive inhabitancy through an attorney or agent.

F. M. de Saram, in reply.

March 20, 1908. HUTCHINSON C.J.—

In this case two plaintiffs sued the defendant to recover from him a sum of money, which, by decree dated June 25, 1902, in an action in the High Court of Judicature at Fort William, the defendant had been ordered to pay to the plaintiffs suing in the name and style of B. M. Eranee & Co., and the plaintiffs said that at the time the cause of action arose they were residents in Calcutta, and ever since that date have continued to reside in India. Before the answer was filed the first plaintiff died. By his answer the defendant said that the alleged disability of the plaintiffs referred to in the plaint had been removed by their appointment, on April 11, 1903, of an attorney resident in Colombo to sue the defendant on the judgment relied on in the plaint, and that therefore the plaintiff's action was prescribed; and he also said that by reason of the death of the first plaintiff the power of attorney given to the attorney who acted for the plaintiffs in this action had ceased to have effect. Afterwards the surviving plaintiff applied to the Court for an order that the action might proceed at his instance alone. This was opposed by the defendant; but on March 25, 1907, the District Judge made an order allowing the application, and that order was not appealed against. The action then went on for trial, and judgment was given for the plaintiff.

The points urged by the appellant are the following:—

First.—That the order made by the District Court allowing the action to proceed at the instance of the plaintiff was wrong.

I will deal with that first.

The plaintiff objects that the defendant cannot now re-open the point decided by the Judge, viz., that the cause of action survives to the surviving plaintiff, and he referred to the cases reported in *2 Appeal Court Reports 259* and *10 N. L. R. 41*. I do not feel quite sure about that, and I prefer to decide the first point on the ground that the cause of action did survive to the surviving plaintiff. The judgment of the Calcutta Court was in favour of the two plaintiffs as a partnership firm. It seems from the pleadings that before this action was brought the partnership had been dissolved; but in this action the plaintiffs sued on that judgment, which was a judgment in favour of the firm, and I think it is clear that when one of them died, the benefit of the judgment survived to the

[1] *5 Moore's Indian Appeals 234.*

urvivor, without prejudice to any question as to what the rights nd liabilities may be of the survivor as between him and the epresentatives of the deceased plaintiff.

The next point taken by the appellant was that the disability of absence beyond the seas ceased when the plaintiffs, although still absence beyond the seas, appointed an attorney to sue for them in Ceylon. I think a person, who is in fact absent beyond the seas, does not cease to be so by the appointment of an agent to act for him in Ceylon, and it appears there is authority for that, viz., *5 Moore's Indian Appeal Cases 234* and *9 N. L. R. 368.*

The next argument for the appellant was that the power of attorney given by the plaintiffs ceased to have any effect upon the death of one of the plaintiffs; that it was a joint power, and that the attorney could not act under it after the first plaintiff's death.

The power was given to enable the attorney to bring an action, the action being for a debt due to the plaintiffs as partners. If the cause of action survive, I think that the power for the attorney to go on with the action also survives. In my opinion the cause of action did survive, therefore the right of the attorney to go on with it also survives. I would therefore dismiss the appeal with costs.

WENDT J.—

I agree. The judgment being in favour of two persons as partners it was necessary for them both to join in suing upon it, although subsequent to the judgment the partnership had been dissolved. As between the parties to the judgment it is still considered a partnership asset. When, therefore, one of the plaintiffs, died, I think it is clear from the authorities, both English and Indian, which have been cited to us, that although his interest in partnership property passed to his executor, yet the remedy in respect of that property survived to the surviving partner alone, and that it could be brought in his name alone, it being neither necessary nor competent for the executor to join with him in suing.

I agree with my Lord in what he has said on the other two points taken by the appellant. I do not wish to add anything regarding them.

Appeal dismissed.