

APPELLATE CIVIL.

Before Jack and Mitter J.J.

NAZIR AHAMMAD

v.

TAMIJADDI AHAMMAD HOWLADAR.*

1929.

Mar. 22.

Abatement—Abatement of suit, whether takes place when plaintiff dies after the preliminary decree and before the final decree is passed—Code of Civil Procedure (Act V of 1908), O. XXII, r. 3.

No abatement of a suit takes place when a plaintiff dies after a preliminary decree is passed in a mortgage suit, and no application for substitution of his heirs is made within the time limited by law.

Order XXII, rule 3 of the Civil Procedure Code, 1908, has no application in such cases.

Perumal Pillay v. Perumal Chetty (1) followed.

Lachmi Narain Marwari v. Balmakund Marwari (2) referred to.

Bhadrnath Janu v. Tara Chand Jana (3) and *Munujendra Dutt Chowdhury v. Jnan Ranjan Somardar* (4) dissented from.

SECOND APPEAL by the plaintiffs, Nazir Ahammad and others.

The appeal arose out of an application for final decree in a mortgage suit. There were two plaintiffs in the suit, Abdul Hamid and Nazir Ahammad. After the preliminary decree was passed, Abdul Hamid died and his heirs, including his father, Alam Gazi, were substituted in his place in the appeal, that was preferred against the preliminary decree, but not in the suit itself. After the disposal of the appeal, Alam Gazi died and the plaintiff, Nazir Ahammad, and some persons, who claimed to be the legal representatives of the other plaintiff, applied that a final decree might be passed in their favour, after making the necessary substitution in the suit in place of the

*Appeal from Appellate Decree, No. 603 of 1927, against the decree of Kumud Kanta Sen, Subordinate Judge of Barisal, dated Sept. 9, 1926, reversing the decree of Moulvi Sayed Amjadali, Munsif of Bhola, dated Aug. 29, 1925.

(1) (1928) I. L. R. 51 Mad. 701.

(3) (1920) 25 C. W. N. 595.

(2) (1924) I. L. R. 4 Pat. 61;

(4) (1925) 87 Ind. Cas. 818.

L. R. 51 I. A. 321.

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deceased plaintiff. The legal representatives of Alam Gazi, however, were not parties to the application.

The defendants contended *inter alia* that there being no substitution, in the suit, in the place of the deceased plaintiff, within the prescribed time, it abated as against him, and consequently the whole suit abated. The Munsif overruled the objection of the defendants and passed a final decree for $14\frac{2}{3}$ annas share of the claim in favour of plaintiff No. 2 and the heirs of plaintiff No. 1, except Alam Gazi. On appeal by the defendants, the Subordinate Judge reversed the decree passed by the Munsif and dismissed the plaintiffs' entire application.

The plaintiffs, thereupon, appealed to the High Court.

Mr. Gunadacharan Sen and *Mr. Ramendra-chandra Ray*, for the appellants.

Mr. Satindranath Ray Chaudhuri for *Mr. Prabodhchandra Kar*, for the respondent.

MITTER J. The question of law, which arises for consideration in this appeal, is as to whether, on the death of one of two mortgagees, after they had obtained a preliminary decree for sale of the mortgage property, the suit abates, if the heirs of the deceased mortgagee are not brought on record of the suit within the time limited by law. The appellants, who are the surviving mortgagees and the heirs of the deceased mortgagee, contend that the suit does not abate, whereas the mortgagors, now respondents, contend that the suit has abated. The lower appellate court has accepted the contention of the respondents and has dismissed the plaintiffs' suit.

The appellants contend that the view taken by the lower appellate court is erroneous, as Order XXII, rule 3 of the Code of Civil Procedure does not apply, where a plaintiff, in a mortgage suit, dies after the preliminary and before the final decree; on the other hand, the respondents contend that Order XXII, rule 3 applies, as, under the Code of 1908, proceedings,

after the preliminary decree, are not proceedings in execution and that the suit continues until the final decree is passed.

It seems to us that the contention of the appellants must prevail, for, as has been recently pointed out by their Lordships of the Judicial Committee of the Privy Council, that, after a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. In the case of *Lachmi Narain Marwari v. Balmakund Marwari* (1), Lord Phillimore, in delivering the judgment of their Lordships said:—"The parties have on the making of the "decree acquired rights or incurred liability which "are fixed unless or until the decree is varied or set "aside. After a decree any party can apply to have "it enforced." Although these observations were made in a case, where, after a preliminary decree for partition, the plaintiff did not appear when the case came on for final decree and the case was struck off, the same principle should apply to a case where as in the present, a man did not appear, because he could not appear, as he was then dead. The question which arises for decision in the present case arose directly for decision before a Full Bench of the Madras High Court in the case of *Perumal Pillay v. Perumal Chetty* (2). In that case, Sir Murray Coutts Trotter, Chief Justice, held that Order XXII, rules 3 and 4 did not apply to circumstances such as exist in the present case. We are in entire agreement with that decision and with the reasons on which the Full Bench rested their judgments.

The Allahabad High Court, we may observe, has also taken the same view as the Madras Full Bench. See *Ali Bahadur Beg v. Rafi-ulla* (3). It remains to notice two cases of our own Court, which take the view that the provisions of Order XXII, rule 4 apply both before and after the passing of the preliminary decree. See *Bhutnath Jana v. Tara Chand Jana* (4)

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(3) (1926) I. L. R. 49 All. 310.

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and *Manujendra Dutt Chowdhury v. Jnan Ranjan Somaddar* (1). We do not think that these decisions can be held to be good law in view of the observations made by the Judicial Committee in *Lachmi Narain's case* to which reference has already been made. For the reasons given above, we hold that the decision of the lower appellate court, dismissing plaintiffs' suit, must be set aside and the judgment of the court of first instance restored with costs throughout. The court of first instance granted a decree in favour of the plaintiffs except the heirs of Alam Gazi for $14\frac{2}{3}$ annas share of the mortgage money and, as the plaintiffs did not appeal to the lower appellate court and were content with the decree of the first court, they can not have a decree for their whole claim.

JACK J. I agree.

Appeal allowed.

A. A.

(1) (1925) 87 Ind. Cas. 818.