ORIGINAL CIVIL.

Before Panckridge J.

1935

July 23.

ABDUL RAHIM

v.

EZEKIEL.*

Decree—Death of mortgagor after preliminary mortgage decree—Final decree passed without substitution of deceased defendant's legal representative, if a nullity—Suit to set aside null decree—Appointment of administrator pendente lite, *Effect of.*

Whatever be the position with regard to abatement, a final decree in a mortgage suit is a decree and as such subject to the ordinary rule that a decree as against a defendant who was dead at the time it was made is a nullity.

Anmol Singh v. *Hari Shankar* (1) relied on.

Muthiah Chettyar v. *Tha Zan Hla* (2) ; *Nazir Ahammad* v. *Tamijaddi Ahammad Howladar* (3) ; *Perumal Pillay* v. *Perumal Chetty* (4) and *Lachmi Narain Marwari* v. *Balmakund Marwari* (5) not applied.

In such a case, the legal representatives of the deceased mortgagor, can properly raise the question of the validity of the decree in an independent suit and should not be prejudiced by the fact that an administrator *pendente lite* had been appointed prior to the sale by the Court.

ORIGINAL SUIT.

This was a suit for a declaration that a final mortgage decree, passed against the mother of the plaintiffs after her death, was a nullity and for setting aside the decree and the sale under it. The facts appear fully from the judgment.

Sudhis Ray and *A. K. Bhattacharya* for the plaintiffs. A decree against a dead mortgagor is a nullity and cannot be executed against the legal

* Original Suit No. 1544 of 1934.

(1) (1930) I. L. R. 52 All. 910.

(2) (1933) I. L. R. 11 Ran. 446.

(3) (1929) I. L. R. 57 Cal. 285.

(4) (1928) I. L. R. 51 Mad. 701.

(5) (1924) I. L. R. 4 Pat. 61 ; L. R. 51 I.A. 321.

representatives. *Jungli Lall* v. *Laddu Ram Marwari* (1); *Bhutnath Jana* v. *Tara Chand Jana* (2); *Anmol Singh* v. *Hari Shankar* (3); *Mahabir Singh* v. *Dip Narain Tewari* (4); *Elokeshee Dasee* v. *Kunjabihari Basak* (5); *Radha Prasad Singh* v. *Lal Sahab Rai* (6); *Haribandhu Pal* v. *Harimohan Mahimchandra Kailashchandra and Hiralal Saha* (7); *Narain Das* v. *Kalu Ram* (8).

N. N. Bose and *H. Banarji* for the defendant. The authority of *Jungli Lall* v. *Laddu Ram Marwari* (1) has been weakened, if not in fact overruled by the judgment of the Judicial Committee in *Lachmi Narain Marwari* v. *Balmakund Marwari* (9). From it follows the proposition that the suit cannot abate after preliminary mortgage decree and, therefore, the final decree cannot be a nullity. *Perumal Pillay* v. *Perumal Chetty* (10); *Nazir Ahammad* v. *Tamijaddi Ahammad Howladar* (11) and *Nathuni Narayan Singh* v. *Arjun Gir* (12).

The estate of the deceased defendant was represented by the administrator *pendente lite* at the time when the mortgaged property was sold by the Registrar. The administrator did not object to the sale and therefore the plaintiffs are now precluded from challenging it. They may apply to have the appointment of the administrator set aside and if that is done they may proceed to have the mortgage sale set aside.

PANCKRIDGE J. The plaintiffs are the minor sons and legal representatives of one Musammat Jamila Khatoon deceased.

(1) (1919) 4 Pat. L. J. 240.
(2) (1920) 25 C.W.N. 595.
(3) (1930) I. L. R. 52 All. 910.
(4) (1931) I. L. R. 54 All. 25.
(5) (1933) I. L. R. 60 Cal. 940.
(6) (1890) I. L. R. 13 All. 53; L. R. 17 I. A. 150.
(7) (1929) I. L. R. 57 Cal. 931.
(8) (1919) 2 Lah. L. J. 144.
(9) (1924) I. L. R. 4 Pat. 61 (66); L. R. 51 I. A. 321 (325).
(10) (1928) I. L. R. 51 Mad. 701, 703, 709, 710.
(11) (1929) I. L. R. 57 Cal. 285.
(12) [1925] A. I. R. (Pat.) 434; 87 Ind. Cas. 47.

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Jamila was the owner of a 7/80th share in certain immoveable properties, some situated within and some outside the jurisdiction of the Court.

On August 29, 1929, Jamila and her co-sharers mortgaged these properties to the first defendant, David Ezekiel.

On August 16, 1930, the first defendant instituted suit No. 1921 of 1930 in this Court to enforce the mortgage against the mortgagors including Jamila.

On July 22, 1931, a preliminary mortgage decree was made.

On September 15, 1932, Jamila died leaving her surviving two minor sons, the present plaintiffs, and a minor daughter who has since died. During Jamila's life time her husband Khaliloon Nabikhan divorced her.

On November 28, 1932, the first defendant obtained a final mortgage decree in ignorance of the death of Jamila and without having had her legal representative brought on the record.

On November 15, 1933, one of the other mortgagors informed the first defendant's attorneys of Jamila's death, and they in January, 1934, called upon the husband, mother, and sister of Jamila to take out representation to her estate.

No steps were taken by Jamila's relations, and on January 23, 1934, one Rashbihari Pal, as nominee of the first defendant, applied under section 251 of the Indian Succession Act to be appointed administrator *pendente lite* of the estate of Jamila. No citation was issued upon the present plaintiffs of whose existence the first defendant was not aware.

On January 24, 1934, the grant was made to Rashbihari Pal, who was substituted for Jamila on February 13, 1934.

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On May 12, 1934, the mortgaged properties were sold by the Registrar and purchased by the first defendant who had obtained leave to bid. Inasmuch, however, as the reserve price was not reached the sanction of the Court was necessary and this was obtained on July 4, 1934.

The present suit was instituted on August 24, 1934, against the first defendant as the mortgagee and purchaser of the mortgaged properties and against Jamila's co-mortgagors as *pro forma* defendants.

The plaintiffs ask that the final mortgage decree of November 28, 1932, and the sale of May 12, 1934, be set aside as against them and that they be at liberty to redeem the mortgage debt.

The facts are not now challenged and the arguments of counsel have been wholly concerned with the legal validity of the proceedings subsequent to the death of Jamila.

On the plaintiffs' behalf it is submitted that a decree against a person who is dead at the time of making it is a nullity. As a general proposition of law this is not disputed. The cases which lay it down are conveniently collected in *Jungli Lall* v. *Laddu Ram Marwari* (1). That was a decision of a Full Bench of the Patna High Court, pronounced in 1919. There, also a mortgagor defendant died after the preliminary decree, and a final decree for sale was made without making his legal representatives parties to the suit. After the final decree, the representatives were entered on the record in the execution case as judgment-debtors. When the latter objected to the execution of the decree on the ground that it was a nullity, at any rate as against their predecessor-in-title, it was urged upon the authority of *Kalipada Sarkar* v. *Hari Mohan Dalal* (2) that the executing court could not consider this aspect of the matter but was bound to execute the decree as it stood. The Full Bench declined to accept

(1) (1919) 4 Pat. L. J. 240.

(2) (1916) I. L. R. 44 Cal. 627.

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this contention and emphasized the distinction between decrees that are voidable, that is to say valid until set aside, and decrees void *ab initio*. The Court further held that in a mortgage suit the preliminary decree was not "the conclusion of the hearing" within the meaning of Order XXII, rule 6 of the Code of Civil Procedure, in the sense that when a defendant dies in the interval between the preliminary and final decrees he can properly be said to have died between the conclusion of the hearing and the pronouncing of judgment.

I should mention that *Jungli Lall* v. *Laddu Ram Marwari* (1) is the only case to which my attention has been drawn, where, as in the case before me, a final mortgage decree has been made against a deceased defendant. The authority of *Jungli Lall* v. *Laddu Ram Marwari* (1) is said to be weakened by the subsequent judgment of the Judicial Committee in *Lachmi Narain Marwari* v. *Balmakund Marwari* (2). In that case the High Court, on appeal, had made an order by consent for a partition on certain terms and remitted the suit to the Subordinate Judge for disposal under the decree. It was held that the Subordinate Judge had no power to dismiss the suit under Order XVII, rule 2, Civil Procedure Code, on the plaintiff's failure to appear on the day appointed by the court. The passage relied on in the judgment of the Board delivered by Lord Phillimore is as follows :—.

> After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside.

With great respect to the learned Judges who have been parties to subsequent decisions of Indian courts, I am quite unable to understand how this

(1) (1919) 4 Pat. L. J. 240.

(2) (1924) I. L. R. 4 Pat. 61 (66); L. R. 51 I. A. 321 (325).

passage logically leads to the conclusions that appear to have been drawn from it.

In *Perumal Pillay* v. *Perumal Chetty* (1), the mortgagee plaintiff died after the passing of the preliminary decree; after the expiry of the period of limitation for such an application, the plaintiff's representative applied to set aside the abatement of the suit. The Full Bench overruling a previous decision of the Madras High Court, held there had been no abatement as Order XXII, rule 3 had no application to the case. Although rule 4 of the same Order was referred to, its terms were clearly irrelevant, as there was no question of the death of a defendant. Referring to *Lachmi Narain Marwari* v. *Balmakund Marwari* (2), Coutts Trotter C. J. observes :—

> Without discussing that case in detail, it seems clearly to proceed on the basis that a preliminary decree determines the rights of the parties and that the rest, whatever it be, assessment of damages, working out of accounts and so forth, is a mere subsequent defining of the effect that is to be given to the declaration of right which is contained and finally determined (subject, of course, to appeal) in the preliminary decree.

This decision was followed by a Division Bench of this Court, *Nazir Ahammad* v. *Tamijaddi Ahammad Howladar* (3). That also was a case of a plaintiff's death subsequent to preliminary decree. An application by the representative of the deceased plaintiff for a final decree after the necessary substitution was held to be in order, inasmuch as the suit had not abated under Order XXII, rule 3, although more than three months had elapsed from the date of the plaintiff's death.

I see nothing in either of these cases to compel me to decide that a final decree passed against a defendant who has died after the passing of the preliminary decree is valid.

(1) (1928) I. L. R. 51 Mad. 701, 710. (2) (1924) I. L. R. 4 Pat. 61 ; L. R. 51 I. A. 321.

(3) (1929) I. L. R. 57 Cal. 285.

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Muthiah Chettyar v. *Tha Zan Hla* (1) deals with the case of a deceased defendant. The report is inadequate, since it contains nothing but the judgments and the headnote. I think it can be inferred from the judgments, however, that no final decree had been made. The judgment of Das J. concludes :—

> The appeal must be allowed and the order of abatement set aside, and the legal representatives of the deceased defendant must be substituted in place of the deceased defendant.

The decision is admittedly at variance with that of the Allahabad High Court in *Anmol Singh* v. *Hari Shankar* (2), and to my mind the reasoning in the latter case is to be preferred. I think if a final decree is to be held binding on the estate of a dead man, although when it was passed his representatives had not been brought on the record, it must also be held that anything that is done in the suit subsequent to the preliminary decree is by way of execution. To regard the application for final decree as a step in execution is in my judgment inconsistent with the definition of "decree" in section 2 (*2*) of the Civil Procedure Code and with the explanation thereto.

Moreover, to extend Lord Phillimore's observations to mortgage suits seems to me to leave out of consideration the fact that it cannot be decided until the application of a final decree is made whether the mortgagor has effectively exercised his right to redeem or whether the mortgaged property is liable to be sold at the mortgagee's instance.

Whatever be the position with regard to abatement, a final decree is, in my opinion, a decree, and as such subject to the ordinary rule that a decree as against a defendant who was dead at the date it was made is a nullity.

(1) (1933) I. L. R. 11 Ran. 446, 448. (2) (1930) I. L. R. 52 All. 910.

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It only remains to consider what is the effect, if any, of the appointment of Rashbihari Pal as administrator *pendente lite* prior to the sale by the Registrar. It is suggested that, as the estate of Jamila was represented at that stage and as no objection was taken by the administrator in the execution proceedings, the question cannot be raised now. Alternatively, it is said that if the plaintiffs are aggrieved by the sale, their proper course is to have the appointment of the administrator set aside and themselves substituted. When this has been done, it will be open to them to take steps in the mortgage suit to have the sale of the mortgaged premises set aside.

I do not think that it is enough for the plaintiffs to reiterate that the final decree was a nullity and of no legal effect. This means no more than that it is not binding on the plaintiffs even although it is not set aside or reversed. This, however, is a question of law and is subject to the general principle that when a party has had a proper opportunity of raising an issue and has omitted to do so, he is precluded from raising that issue thereafter.

Jungli Lall v. *Laddu Ram Marwari* (1) shows that the question is one that can be raised by the legal representatives in the execution proceedings.

On the whole, I am of opinion that since the real question at issue is the validity and not the satisfaction of the decree, it can properly be raised in an independent suit, and that the plaintiffs should not be prejudiced by the fact that their interests were technically represented by the administrator in the execution proceedings.

In these circumstances, the plaintiffs are entitled to the reliefs claimed and I make a decree in accordance with prayers (a) and (e) of the plaint.

Learned counsel for the defendant has asked me to fix the time within which the plaintiffs will be at

(1) (1919) 4 Pat. L. J. 240.

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liberty to redeem. Counsel for the plaintiffs does not object to my fixing the time. Though I have some doubt whether such an order really falls within the scope of this suit, I fix the time at three months from to-day.

With regard to the costs, if the property is redeemed the plaintiffs will have the costs of the suit. If they fail to redeem within the time specified, there will be no order as to costs.

Suit decreed.

Attorney for plaintiffs: *J. K. Bose.*

Attorneys for defendant: *Kar Mehta & Co.*

S. M.