

ORIGINAL CIVIL.

Before Mc Nair J.

KAMESHWAR SINGH

v.

ANATH NATH BASU.*

1937

Feb. 2.

Parties—Substitution—“Pending suit,” Meaning of—Assignee of decree, if can be substituted for assignor decree-holder—Execution—Code of Civil Procedure (Act V of 1908), O. XXII, r. 10 ; O. XXI, r. 16.

After a final decree is made in a suit for sale upon a mortgage, the suit is no longer “pending” within the meaning of O. XXII, r. 10 of the Code of Civil Procedure, 1908, and an assignment by the decree-holder of his interest in such decree does not enable the assignee to be substituted, under the rule, in place of the assignor.

Bhugwan Das Khettry v. Nilkanta Ganguli (1) dissented from.

Hemendra Lal Singh Deo v. Fakir Chandra Datta (2) relied upon.

Sircar v. Stephens (3) followed.

The assignee of the decree may, however, apply for execution of the decree under O. XXI, r. 16 of the Code of Civil Procedure, 1908.

APPLICATION in chambers.

The facts material for the purpose of this report and arguments of counsel appear from the judgment.

S. R. Das for the applicant.

S. B. Sinha and *S. C. Mitra (Jr.)* for the respondent.

McNAIR J. This is an application by the transferee from the plaintiff under O. XXII, r. 10 of the Code of Civil Procedure to be substituted in the suit as plaintiff.

*Application in Original Suit No. 1618 of 1919.

(1) (1904) 9 C. W. N. 171.

(2) (1923) I. L. R. 50 Cal. 650.

(3) (1929) I. L. R. 57 Cal. 1143.

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The suit was a suit on a mortgage in which the plaintiff obtained a preliminary decree on July 3, 1923, and a final decree on June 12, 1935. The assignment under which the present applicant claims title was dated September 17, 1936.

Order XXII, r. 10, is as follows :—

“In other cases of an assignment” (which means cases other than those dealt with in the preceding rules) “creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.”

The only question which is argued before me is whether the applicant has the right to obtain the relief which he seeks under O. XXII, r. 10 in face of the contention by the opposite party that the suit is no longer pending.

Mr. Das, for the applicant, relies more particularly on *Bhugwan Das Khettry v. Nilkanta Ganguli* (1) where the facts appear to have been very similar to those now before this Court. Woodroffe J. in his judgment says :—

It is next said that there has been no devolution of interest “pending the suit,” but that such devolution occurred after the suit had come to an end, *viz.*, . . . after the passing of the order absolute for sale. I cannot accept the contention that absolutely and in every case after decree no suit is pending It is, however, urged that in the present case there was a final decree when the order absolute was made. In my opinion, however, the suit cannot be said to have come to an end until the actual sale under that order takes place—up to which time as has been recently held by this Court, the mortgagor has the right to pay and redeem.

That reasoning does not appear to have been followed in other cases that have come before this Court and before the Courts in other provinces. In the case of *Hemendra Lal Singh Deo v. Fakir Chandra Datta* (2) a mortgage suit was decreed in the Court at Bankura and the defendant was allowed six months for payment of the decretal amount. There was an appeal and the suit was eventually compromised. The compromise provided that, in default of payment within two years, the amount

(1) (1904) 9 C. W. N. 171, 173-4. (2) (1923) I. L. R. 50 Cal. 650, 656.

due should be realised by sale of the mortgaged properties. A decree was passed in terms of the compromise. More than three years later the plaintiff applied for substitution and that application was opposed on the ground of limitation. The Subordinate Judge held that the suit was no longer pending, but made an order that the plaintiffs were at liberty to execute the decree by making a proper substitution in the application for execution. The matter came before the High Court when C. C. Ghose and Pantou JJ. upheld the decision of the lower Court. In giving judgment, the learned Judges said:—

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The question really depends upon the view which may be taken of the nature of the decree made by this Court on January 10, 1918 (the compromise decree). "If it was merely a preliminary decree in a mortgage suit, then obviously it follows that before execution can be levied, an order "under O. XXXIV, r. 5, C. P. C., making the preliminary decree final had to "be obtained. . . . If, however, the ingredients of a preliminary decree in a "mortgage suit are absent. . . . then does it lie in the mouth of the present "appellant to argue that, without more, a compromise decree is incapable "of execution?"

They held that the intention of the compromise decree was to entitle the plaintiffs to realise their money forthwith by sale and that, therefore, it was unnecessary to apply for substitution of the heirs of the deceased plaintiff since the suit had come to an end.

In *Sircar v. Stephens* (1) there was similarly a consent decree which the plaintiff applied to amend and substitute a new trustee in place of the trustees who had resigned during the pendency of the suit. Lord-Williams J. in delivering judgment said:—

I am not satisfied that substitution after final decree in a suit can be made under O. XXII, r. 10, even in execution proceedings, but I am quite sure that there is no such power to make a substitution under that rule at a time after a final decree has been made, and before any question of execution proceedings has arisen.

Again, in *Perumal Pillay v. Perumal Chetty* (2) there was a preliminary decree in a mortgage suit. Thereafter the plaintiff died and an application was

(1) (1929) I. L. R. 57 Cal. 1143, 1146. (2) (1928) I. L. R. 51 Mad. 701, 710.

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made praying that the abatement might be set aside. It was held that the suit was still pending and that the application was in order and not barred by limitation. In the order of reference it was pointed out that on the making of a decree the parties have acquired rights or incurred liabilities which are fixed unless or until the decree is really set aside, and the same principle was formulated in the opinion of the Full Bench which was delivered by Coutts Trotter, C.J. After referring to several cases the learned Chief Justice said that they seem—

to proceed on the basis that a preliminary decree determines the rights of the party 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 in the preliminary decree.

Mr. Das seeks to distinguish these cases from the decision in *Bhugwan Das Khettry v. Nilkanta Ganguli* (1) on the ground, that they refer to the procedure in mortgage suits in the *mofussil* which differs from the procedure on the Original Side of this Court. The principle, however, is unaffected by the procedure that is observed, either on the Original Side or in the *mofussil*, and it appears to me quite clear that, on the final decree being passed, the suit cannot be said to be any longer pending. The applicant could apply for execution of the decree as a transferee under O. XXI, r. 16, and that is the order which it seems to me proper to make on this application. The opposite party does not object to this course. It is ordered accordingly. Each party will bear their own costs of this application. Certified for counsel.

Attorneys for applicant: *Mullick & Palit.*

Attorney for respondent: *A. K. Sircar.*

(1) (1904) 9 C. W. N. 171.