

APPELLATE CIVIL.

Before Mr. Justice Ayling and Mr. Justice
Venkatasubba Rao.

1921,
December
6.

DAKOJU SUBBARAYUDU (COUNTER-PETITIONER), APPELLANT,

v.

MUSTI RAMADASU (PETITIONER), RESPONDENT.*

*Civil Procedure Code (V of 1908), O. XXII, rs. 3 and 10—
Mortgagee dying after preliminary decree leaving a will—
Legatee's application to continue suit—Limitation.*

A mortgagee who had obtained a preliminary decree for sale died leaving a will bequeathing the mortgage decree to A.

Held that A was his "legal representative" within Order XXII, rule 3, Civil Procedure Code, that the "right to sue" continued up to obtaining a final decree and that an application by A to bring himself on record as legal representative must be filed within the time allowed for applications under rule 3 and not rule 10 of Order XXII, Civil Procedure Code. *Bhugwan Das Khettry v. Nilakanta Ganguli* (1904) 9 C.W.N., 171, distinguished.

APPEAL against the order of N. BALARAMDAS, Subordinate Judge of Cocanada, in Appeal Suit No. 37 of 1919, preferred against the order of P. NARAYANA RAO NAYUDU Garu, District Munsif of Cocanada, in E.A. No. 1528 of 1919, in Original Suit No. 392 of 1907, on the file of the Court of the District Munsif of Peddapur.

The facts are given in the Judgment.

C. Rama Rao for appellant.—The respondent is a legatee and as such is a legal representative within the meaning of Order XXII, rule 3. A mortgage suit continues until a final decree is obtained. Order XXII, rule 10, does not apply.

G. Lakshmana for respondent.—Rule 10 applies. Rule 3 does not apply. The words "right to sue" to be

* Appeal against Order No. 24 of 1921.

found in rule 3 cannot apply to stages after the passing of a preliminary decree for sale. See *Bhugwan Das Khettry v. Nilakanta Ganguli*(1).

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The JUDGMENT of the Court was delivered by

AYLING, J.—In this suit one Venkamma sued on a mortgage and obtained a preliminary decree. Subsequent to this she died on 28th April 1916, leaving a will by which the present petitioner claims to be entitled to succeed to her interests in the mortgage. The preliminary decree was passed on 30th March 1916 and the period for redemption expired on 30th July 1916. No action was taken by the petitioner till 26th March 1919, when he filed the present petition asking to be brought on record as the legal representative of Venkamma and to be given a final decree. The question is whether the application should be dismissed as time-barred.

The District Munsif held that it should on the ground that the suit has abated under Order XXII, rule 3. The Subordinate Judge on Appeal held that rule 10 of the same order applied and that the application was not time-barred. In our opinion the District Munsif is right and the Subordinate Judge wrong. Rule 10 of Order XXII admittedly only applies to cases which do not fall under the preceding rules of the same Order and the matter therefore turns on whether the case falls under rule 3. This runs as follows (omitting superfluous words):—

“Where a sole plaintiff dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Where within the time limited by law no application is made under sub rule 1, the suit shall abate.”

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 ———
 AYLING, J.

It seems to us that every one of these words applies to the present case. The plaintiff died after obtaining a preliminary decree and the respondent must contend that the right to sue survived to him: otherwise he has no locus standi in the matter at all. The right to sue obviously from the terms of the rule includes the right to proceed with the suit until the latter terminates, and in the case of a mortgage suit, where a preliminary decree and a final decree are both necessary, the right to sue must include the right to obtain a final decree after the passing of a preliminary decree. The case therefore clearly falls within the purview of the section, and, as the plaintiff admittedly did not apply to be made a party as provided in sub-rule (1) within the time allowed, the suit must be held to have abated under sub-rule (2).

We have been referred on respondent's behalf to the judgment in *Bhugwan Das Khettry v. Nilakanta Ganguli*(1). The facts of the case are distinguishable in that there a final decree had been passed and we need only say that, if any of the remarks in the judgment were intended to conflict with the view of the applicability of the rules which we have just enunciated, we must respectfully dissent from them.

We must therefore set aside the order of the Subordinate Judge and direct the dismissal of the application with costs throughout.

N.R.

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