APPELLATE CIVIL—FULL BENCH.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice*, *Mr. Justice Beasley and Mr. Justice Madhavan Nair.*

PERUMAL PILLAY (FIRST DEFENDANT), PETITIONER,

1928, February 9.

v.

PERUMAL CHETTY AND ANOTHER (PLAINTIFFS 2 AND 3), RESPONDENTS.*

Civil Procedure Code (V of 1908) O. XXII, rr. 3, 4 and 10 —Death of plaintiff after preliminary mortgage decree —No legal representative brought on record within three months—Petition to set aside abatement 35 months after death, maintainability of.

Order XXII, rules 3 and 4, Civil Procedure Code (V of 1908), do not apply to cases of death of parties after the passing of a preliminary decree; *Lachmi Narain Marwari* v. *Balmakund Marwari* (1925) I.L.R., 4 Pat., 61 (P.C.), applied; *Subbarayudu* v. *Ramadasu* (1922) I.L.R., 45 Mad., 872, and *Natesa Pillay* v. *Kannammal* (1924) 19 L.W., 173, overruled.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the Order of the Court of District Munsif of Palni in I.A. No. 159 of 1925 in O.S. No. 587 of 1920.

The necessary facts appear from the Order of Reference to the Full Bench. The case came on for hearing originally before WALLACE, J., who made the following

ORDER:—

The preliminary decree in a mortgage suit was passed on 18th November 1921. The plaintiff died on 25th February 1922. On 17th February 1925 the respondent in the Civil Revision Petition put in an application under section 151, Civil Procedure Code, and section 5 of the Indian Limitation Act,

* Civil Revision Petition No. 1216 of 1925.

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praying that the abatement of the suit be set aside. He claims the mortgage right by virtue of a registered will by the original plaintiff bequeathing it to him. The judgment-debtor's contention was the suit had abated three months after the plaintiff was dead and cannot now be revived. The District Munsif held that Order XXII, rule 3, did not apply, but Order XXII, rule 10, that the suit was still pending and that the respondent's application was in order and not barred by limitation. The first defendant has put in this Civil Revision Petition contending that the District Munsif has erred in law.

The respondent raised a preliminary objection that no civil revision petition would lie because the District Munsif has purported to act under Order XXII, rule 10, and orders under that rule are appealable and that since an appeal lies no right to come up in revision can be admitted. To this the petitioner rejoins that as the District Munsif's order is merely that there has been no abatement and does not purport to give or refuse to give leave to continue the suit, no appealable order has been passed. I think this contention must prevail. If the matter had been taken up on appeal, an Appellate Court might very well have refused to entertain it on the ground that no order of an appealable nature had been passed. I overrule the preliminary objection.

On the merits, the decision must turn on the question whether or not the suit did abate three months after the death of the plaintiff, or, as the question presents itself in this case, whether or not a suit can abate or will abate after a decree therein has been passed. There is a direct ruling of this Court on very similar facts, in *Subbarayudu* v. *Ramadasu*(1)—by a Bench which holds that when a preliminary decree in a mortgage suit has been passed and the plaintiff dies thereafter, an application by his legal representative to be brought on record must be made under rule 3 and not rule 10 of Order XXII. This ruling has been followed—without discussion—by another Bench in *Natesa Pillay* v. *Kannammal*(2). Respondent contends that this ruling requires reconsideration and requests me to refer the matter to a Bench. *Subbarayudu* v. *Ramadasu*(1) refers to a ruling in *Bhugwan Das Khetry* v. *Nilkanta Ganguli*(3), a ruling under the old Code where it was held that section 365 (corresponding to Order XXII, rule 3) applies only in the case of the death of a plaintiff before decree. I do not

(1) (1920) I.L.R., 45 Mad., 872. (2) (1924) 19 L.W., 173.
(3) (1904) 9 C.W.N., 171.

myself find that case of much assistance, since I am not able to accept the general principle there laid down that the right to sue may continue even after a final decree. I think it is difficult to maintain that a right to sue continues after a suit has come to an end by a final decree. After the final decree the right to sue has been transformed into a right to execute and by rule 12 of Order XXII, rule 3 does not apply to execution proceedings. To allow an application of rule 3 even after a final decree has been passed, would seem, under the new Code at least, if not under the old Code, to contradict rule 12. On the other side I have been referred to a ruling of the Nagpur Judicial Commissioner reported in *Tularam* v. *Tukaram*(1), and, as at present advised, I am inclined to agree with the arguments therein set out. An argument put forward by the respondent in support of that view is that rule 9 (1) of Order XXII implies that a cause of action does not ordinarily come to an end when a suit abates, since it was necessary to lay down specifically that no fresh suit on the same cause of action is maintainable when a suit has abated. Now a cause of action does not persist beyond the decree in that action, and therefore equally an abatement does not come into being after a decree has been passed. Now, if there is an abatement after decree, the cause of action is continuing after the decree and could be sued on in a separate suit. This would produce an anomalous result. To prevent this result, rule 9 had to be enacted. Beyond this, however, if the cause of action as such is terminated by the decree, it would follow that the right to sue on that cause of action likewise comes to an end, even though for certain purposes the suit continues. In that view Order XXII, rule 3, would not apply to a case in which a preliminary decree has been passed and the only rule applicable would be Order XXII, rule 10. Under the old Code that certainly would have been the position, and under the old Code the suit would never have abated since the one and only decree in it would have been passed.

It is further contended by the respondent that Order XXII, rule 3, cannot apply because he is not a legal representative, being merely a legatee, but that argument would hardly help him if the suit had abated because the true legal representative did not apply in time under rule 3. So this point is not different from the one already dealt with.

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(1) (1921) 64 I.C., 307.

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For the reasons I have given, I am of opinion that the ruling in *Subbarayudu* v. *Ramadasu*(1) does require some reconsideration and I comply with the request of the respondent and refer this case to a Bench for decision, or reference, if it thinks fit, to a Full Bench.

This Civil Revision Petition coming on for hearing, the Court (KUMARASWAMI SASTRI and WALLACE, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

The question for decision in this revision petition is whether Order XXII, rule 3, Civil Procedure Code, applies to a case where a preliminary decree has been passed in a mortgage suit and the decree-holder dies subsequent to the passing of the preliminary decree and before the final decree is passed. The facts are shortly these :—

The preliminary decree in the mortgage suit was passed on the 18th November 1921. The plaintiff died on the 25th of February 1922. On the 17th of February 1925 the respondent in the Civil Revision Petition put in an application under section 151, Civil Procedure Code, and section 5 of the Indian Limitation Act praying that the abatement of the suit be set aside. He claims the mortgage right by virtue of a registered will by the original plaintiff bequeathing it to him. The judgment-debtor's contention was that the suit had abated three months after the plaintiff died and cannot now be revived. The District Munsif held that Order XXII, rule 3, did not apply, but Order XXII, rule 10, that the suit was still pending and that the respondent's application was in order and not barred by limitation. The first defendant has put in this Civil Revision Petition contending that the District Munsif has erred in law. We are inclined to hold that Order XXII, rule 3, does not apply to cases where the law requires successive decrees to be passed and where the death of a party occurs after the passing of the preliminary decree.

The preliminary decree for sale in mortgage suit declares the amount due to the plaintiff on account of principal and interest and costs calculated up to the date of the decree and where interest is payable declares the rate of interest to be paid until realization. Then it says that if the defendant pays the amount

(1) (1922) I.L.R., 45 Mad., 872.

so decreed into Court on a particular date, the plaintiff should deliver the documents and if required, transfer the property to the defendant and if necessary, give possession. In default of such payment it directs the property to be sold. It then gives liberty to the plaintiff to apply for a personal decree for the balance, if any.

It will thus be seen that all the questions in issue between the parties are settled and after the preliminary decree is passed the only question at the time of the passing of the final decree is whether there has been payment as directed. As regards all other matters the cause of action has become merged in the preliminary decree. If the cause of action as such is terminated by the decree it follows that the right to sue on this cause of action likewise comes to an end, even though for certain purposes the suit continues. In this view, Order XXII, rule 3, would not apply to a case in which a preliminary decree has been passed and the only rule applicable will be Order XXII, rule 10.

Where a preliminary decree has been passed, it is difficult to see how the death of a party subsequent to the passing of the preliminary decree can wipe out the decree if a legal representative was not brought on record within time and enable the Court to dismiss the suit. In *Lachmi Narain Marwari* v. *Balmakund Marwari*(1) their Lordships of the Privy Council observe, "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."

The preliminary decree in that case for partition had been passed and the case was sent back to the Subordinate Judge by the High Court to pass a final decree. As the plaintiff failed to appear on the day appointed by the Subordinate Judge, he dismissed the suit. Their Lordships of the Privy Council set aside the order on the ground that as the preliminary decree had been passed, it could not be affected by any subsequent default of appearance. In *Bhatu Ram Modi* v. *Fogal Ram*(2) it was held following the decision of the Privy Council in *Lachmi Narain Marwari* v. *Balmakund Marwari*(1) that where a decree for mesne profits had been passed and an application was made for ascertainment of mesne profits, it was not competent to a Court at any stage to dismiss the application, it being beyond its

(1) (1925) I.L.R., 4 Pat., 61(P.C.). (2) (1926) I.L.R., 5 Pat., 223.

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power to dismiss a claim which has already been decreed. In *Chandra Shekhar* v. *Amir Beyam*(1) the learned Judges observe that after the decision of the Privy Council in *Lachmi Narain Marwari* v. *Balmakund Marwari*(2) they are bound to hold that the provisions of Order IX, rule 3, could not apply after the passing of the preliminary decree so as to entail the dismissal of the whole suit.

It seems to us difficult in principle to distinguish the dismissal of a suit after a preliminary decree has been passed for default of appearance under Orders IX and XVII and abatement by not bringing a party on record under Order XXII in so far as the effect of such an order on the preliminary decree is concerned. We think where a cause of action has been merged wholly or in part by a decree, it follows that the right to sue on that cause of action comes to an end to the extent to which it has merged in the decree even though the suit may continue for certain other purposes. It is difficult to see how the suit can be said to continue in so far as it relates to that portion of the claim which has been adjudicated upon and in respect of which a decree has been passed. Any abatement can only apply to such part of the cause of action as has still to be adjudicated upon and in respect of which a separate decree has to be passed. In this view it seems to us rule 3 could not apply to cases where successive decrees are required to be passed by the Court and the death of a party occurs at a stage subsequent to the passing of the preliminary decree. We think rule 3 contemplates the usual class of cases where matters in dispute are adjudicated upon once for all by a decree and where prior to that date one of the parties dies. In *Subbarayudu* v. *Ramadasu*(3), it was held by AYLING and VENKATASUBBA RAO, JJ., that Order XXII, rule 3 applies to mortgage suits even after the passing of the preliminary decree on the ground that the suit should be treated as pending till the final decree is passed and rule 3 in terms applies to a pending suit. This decision was followed without discussion by SPENCER and ODGERS, JJ., in *Natesa Pillay* v. *Kannammal*(4). In *Manujendra Dutt Chowdhury* v. *Juan Ranjan Somaddar*(5), it was held that the provisions of Order XXII, rule 4, apply both before and after the passing of the preliminary decree. The learned Judges were of opinion that although under the old Code it was held that where a preliminary decree had been passed and one of the parties subsequently died, the matter did

(1) (1927) I.L.R., 49 All., 592.
(2) (1925) I.L.R., 4 Pat., 61 (P.C.).
(3) (1922) I.L.R., 45 Mad., 872.
(4) (1924) 19 L.W., 173.
(5) (1925) 87 I.C., 818.

not fall under section 368 but under section 372, still as the words "before decree" are omitted in rule 4 it made a difference in the present Code. GREAVES, J., observed that though he was first inclined to the view that the first four rules of order XXII apply to deaths occurring before a preliminary decree had been passed, yet he was constrained to follow *Bhutnath Jana* v. *Tara Chand Jana*(1). In *Bhutnath's* case, the learned Judges were of opinion that until the final decree was passed following the preliminary decree in a mortgage suit, the proceedings must be treated as proceedings in a pending suit and that the consequence was that though a decree-holder can apply within three years for making a preliminary decree final, yet if a judgment-debtor dies, he will have to come in within six months (it is now 90 days under the new Code) to make his heirs liable. In *Ali Bahadur Beg* v. *Rafiullah*(2), the view of the Madras High Court was followed. As the decision of the Privy Council in *Lachmi Narain Marwari* v. *Balmakund Marwari*(3), was passed subsequent to the decisions of this Court in *Subbarayudu* v. *Ramadasu*(4) and *Natesa Pillay* v. *Kannammal*(5), we are of opinion that these cases require reconsideration.

We refer the following for the decision of a Full Bench ;—"Whether Order XXII, rules 3 and 4, Civil Procedure Code, apply to cases of death after the passing of a preliminary decree."

ON THIS REFERENCE—

S. Varada Acharya with *B. V. Viswanatha Ayyar*, for *N. Swaminathan* for petitioner.—This case is governed by Order XXII, rule 3, Civil Procedure Code. As there was no petition filed within six months as provided by article 176 of the Limitation Act after the death of the plaintiff in 1922, to bring on record his legal representative, this suit had abated. Petition under Order XXII, rule 9, to set aside the abatement should have been presented within sixty days as provided by article 171 of the Act. As no such petitions to bring on record the legal representatives, and to set aside the abatement of the suit, were filed in time, no fresh suit can be brought and the plaintiff has no remedy. That is the present law. The rule under the English law is that the petition for revivor should be filed within a reasonable time ; see Order XVII, rules 1 and 4 of the

(1) (1920) 25 C.W.N., 595. (2) (1927) I.L.R., 49 All., 310.
(3) (1925) I.L.R., 4 Pat., 61 (P.C.). (4) (1922) I.L.R., 45 Mad., 872.
(5) (1924) 19 L.W., 173.

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Supreme Court Rules and *Swindell* v. *Bulkeley*(1). Section 102 of the Civil Procedure Code of 1859 gave an option either to revive or to proceed by an independent suit. The same was the case under sections 364, 365 and 371 of the Code of 1877 and the corresponding sections of the Code of 1882. All this was altered as stated before by the present Code V of 1908 which abolished the optional remedy by suit; see also Order XXII, rules 6 and 12. This case is not governed by Order XXII, rule 10. The question of abatement is not the same thing as merger of the cause of action in a decree. Abatement is like the bar of limitation. Under the Code of 1882 the preliminary decree was the final decree and the subsequent proceedings were in execution; but under the present Code the subsequent proceedings are taken as in a pending suit; see Order XXII, rule 12 which suggests the applicability of Order XXII, rule 3 to such a case. There can be no intermediate stage. The preliminary decree fixes only the relative rights of the parties and leaves the most important matters to be dealt with only afterwards. See Order XXXIV. This is especially so after a preliminary decree in the case of a usufructuary mortgage, where elaborate accounts have to be taken between the parties to fix the exact amount due; similarly in the case of preliminary decrees made under Order XX, rules 13, 15 and 16. See also Daniell's Chancery Practice, 8th Edition, Vol. II, page 226. *Subbarayudu* v. *Ramadasu*(2), is correctly decided. *Lachmi Narain Marwari* v. *Balmakund Marwari*(3), is not a case under Order XXII. Besides, there, the Court had passed an order dismissing the suit.

C. S. Venkata Achariyar (with *P. N. Appuswami* and *P. R. Srinivasan*) for respondents.—The rules of the Supreme Court are different from Order XXII and they do not contain a provision like that contained in rule 10 of Order XXII. In England a new suit can be brought under the circumstances. After a right of action becomes merged in a decree (as in this case, in a preliminary decree), there can be no abatement of the suit. See *Chapman* v. *Day*(4), *Gopal* v. *Ramchandra*(5), *Gocool Chunder Gossamee* v. *Administrator-General of Bengal*(6). Compare *Ramanada Sastri* v. *Minatchi Ammal*(7). See *Lachmi Narain Marwari* v. *Balmakund Marwari* (3), *Bhatu Ram Modi* v. *Fogal Ram*(8). *Subbarayudu* v. *Ramadasu*(2) is wrong.

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(1) (1887) 18 Q.B.D., 250 (C.A.).
(2) (1922) I.L.R., 45 Mad., 872.
(3) (1925) I.L.R., 4 Pat., 61 (P.C.).
(4) (1883) 48 L.T., 907.
(5) (1902) I.L.R., 26 Bom., 597.
(6) (1880) I.L.R., 5 Calc., 726.
(7) (1881) I L.R., 3 Mad., 236, 237.
(8) (1926) I.L.R., 5 Pat., 223.

B. V. Viswanatha Ayyar in reply.—After a preliminary decree in a mortgage suit, the right to sue does not become extinguished and an assignee of the parties can be added; *Krishna Iyer* v. *Subramania Iyer* (1). Abatement is only a suspension of the right; *Manujendra Dutt Chowdhury* v. *Jnan Ranjan Somaddar*(2).

The OPINION of the Court was delivered by

COUTTS TROTTER, C.J.

COUTTS TROTTER, C.J.—The short point in this case arises in this way. The plaintiff obtained a preliminary decree in a mortgage suit on the 18th November 1921. He then died on the 25th February 1922 before a final decree had been passed. No application had been made or acceded to within three months of the plaintiff's death to add his legal representatives to the record. It is contended that in the circumstances the suit must be deemed by the provisions of Order XXII, rule 3, to have abated. The question referred to us is whether on a proper construction of the authorities that is the true position. The most illuminating principle which should guide us appears to me to be contained in the case of *Chapman* v. *Day*(3) tried before POLLOCK, B., and LOPES, J., and the passage that appears to put it very shortly is contained in the judgment of LOPES, J.—

> "It is said that, the defendant having died, the maxim *Actio personalis moritur cum personâ* applies. I think it does not apply in such a case as this. I think 'action' means 'right of action' and if that is the true way of looking at it, the right of action here had been determined before the death of the defendant."

Applying that principle, it would appear that the right of action as there defined by the learned Judge is determined by a preliminary decree, because the final decree is only by way of working out in detail the principles laid down and determined in the preliminary

(1) (1924) 46 M.L.J., 368. (2) (1925) 87 I.C., 818.
(3) (1883) 48 L.T., 907.

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decree. The decision in *Chapman* v. *Day*(1) has been followed and applied in this country in the case of *Gopal* v. *Ramchandra*(2). There was a difference of opinion at the outset, then CROWE, J., was called in, and he based his judgment on the decision in *Chapman* v. *Day*(1). In Madras, a contrary view seems to have been taken and there is no doubt that, *Subbarayudu* v. *Ramadasu*(3), is a definite position adverse to the respondents in this reference. The learned Judges who referred this case to us thought that by implication the authority of *Subbarayudu* v. *Ramadasu*(3) had been very much shaken by the Privy Council's decision in *Lachmi Narain Marwari* v. *Balmakund Marwari*(4). Without discussing that case in detail, it seems clearly 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 (subject, of course, to appeal) in the preliminary decree. We think that the principle underlying that case, where after preliminary decree the plaintiff did not appear when the case came on for final decree and the case was struck out, a course which the Privy Council disapproved on the grounds we have mentioned, applies by analogy just as much to a case where a man does not appear, because he cannot appear since he is dead. In our opinion all that is really important in these matters is to have a settled rule of practice. The present case is obviously a *casus omissus* from the Code of Civil Procedure and probably nobody had thought of providing for it. In these circumstances all that is important is that we should

(1) (1888) 48 L.T., 907.
(2) (1902) I.L.R., 26 Bom., 597.
(3) (1922) I.L.R., 45 Mad., 872.
(4) (1925) I.L.R., 4 Pat., 61 (P.C.).

endeavour to formulate the most logical rule we can and follow as best we may the nearest analogies. We therefore think that 45 Madras is no longer good law and we must answer this reference by saying that in our opinion Order XXII, rules 3 and 4 do not apply to the present state of circumstances. The case will be referred back to the Division Bench with that opinion.

N.R.

APPELLATE CIVIL.

Before Sir Murray Coutts Trotter, Kt., *Chief Justice, and Mr. Justice Srinivasa Ayyangar.*

BONTHI DAMODARAM CHETTY (FOURTH DEFENDANT), APPELLANT,

1926, December 21.

v.

BANSILAL ABEERCHAND AND OTHERS (PLAINTIFF AND DEFENDANTS 1 TO 3), RESPONDENTS.*

Hindu Law—Family trade—Purchase of goods by father for the trade on credit for a period—Debt, whether exists during period of credit—Antecedent debt—Liability of son—Father's power to mortgage family property including son's share as for antecedent debt during the credit period—Floating account—Subsequent payments in, whether to be appropriated to discharge of amount already advanced—Trade recommenced after being stopped for a few years—Whether it ceases to be ancestral trade—Family trade or speculation, test of.

If a Hindu father purchased goods on credit for a period, there is a debt due and payable by him even within the credit period, though the debt may not be demandable by the creditor during that period; such a debt constitutes an antecedent debt, and the father is competent during that period to sell or

* Original Side Appeal No. 126 of 1925.