notice of amendment was as a matter of fact sent to the appellants and if not whether the amended decree can be relied on to save limitation.

In the result I set aside the decision of the lower Court and restore that of the District Munsif with costs here and in the Court below.

K.W.R.

APPELLATE CIVIL.

Before Mr. Justice Madhavan Nair and Mr. Justice Jackson.

1932, December 15.

TADIKONDA SREERAMAMURTHI (LEGAL REPRESENTATIVE OF THE LEGAL REPRESENTATIVE OF PLAINTIFF), APPELLANT,

v.

JAYARAJALAKSHMIAMMA, MINOR BY HER FATHER MOTTAMARRI SUBBA RAO AND FIFTEEN OTHERS (LEGAL REPRESENTATIVE OF FIRST DEFENDANT AND DEFENDANTS THREE TO SEVEN AND NINE TO EIGHTEEN), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), *O. XXII, r.* 10—*Plaintiff—Mortgagee from—Representative character of, for being allowed to continue suit and appeal.*

Under Order XXII, rule 10, of the Code of Civil Procedure, a mortgagee from the plaintiff of his interests in a suit can come on the record as his representative and be allowed to continue the suit and appeal.

Maharaja Sir Manindra Chandra Nandi v. *Ram Lal Bhagat,* (1922) I.L.R. 1 Pat. 581 (P.C.), distinguished.

APPEAL against the decree of the Court of the Subordinate Judge of Masulipatam in Original Suit No. 4 of 1925.

Ch. Raghava Rao for appellant.

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* Appeal No. 246 of 1928 and Civil Miscellaneous Petition No. 995 of 1932.

SREERAMA-MURTHI v. JAYARAJA-LAKSHMI-AMMA.

The Advocate-General (Sir *A. Krishnaswami Ayyar*) and *K. Umamaheswaran* for third respondent. *V. Govindarajachari* for second respondent. *V. Pattabhirama Sastri* for fourth and fifth respondents. *V. Krishna Mohan* for seventh, eighth, ninth and fourteenth respondents. *K. Kameswara Rao* for tenth respondent. First, sixth, eleventh to thirteenth, fifteenth and sixteenth respondents were unrepresented.

Cur. adv. vult.

MADHAVAN NAIR J.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR J.—

[His Lordship, after coming to the conclusion that the appeal should be dismissed, proceeded as follows :—]

In considering whether, while dismissing the appeal, the appellant should be made to pay the costs of the successful respondents, we have to decide the question whether the appellant is competent to prosecute this appeal. The present appellant is a mortgagee of the rights of the plaintiff in the suit. The suit having been dismissed, the plaintiff's widow filed an appeal to this Court against the decree, the plaintiff having died in the meanwhile. His widow is now dead, and the mortgagee has filed an application to this Court to be allowed to continue the appeal. Under Order XXII, rule 10 (1),

> "in other cases of an assignment, 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."

In *Maharaja Sir Manindra Chandra Nandi* v. *Ram Lal Bhagat*(1) it was held by the Privy Council that

> "where a decree for possession and mesne profits has been obtained there is not power under Order XXII, rule 10, or section 47 of the Code of Civil Procedure, 1908, to join as

(1) (1922) I.L.R. 1 Pat. 581 (P.C.).

defendant to the suit a tenant to whom during the pendency of the suit the defendant has let the property, so as to compel the tenant to account for profits which he has received from the land."

On the reasoning of their Lordships contained in this decision it is argued that the mortgagee of the plaintiff's interests in this case should not be allowed to continue this appeal.

The decision in *Maharaja Sir Manindra Chandra Nandi* v. *Ram Lal Bhagat*(1) was passed in appeal from the judgment of the High Court of Patna reported as *Ram Kumar Lal Bhagat* v. *Raja Mukund Sahi*(2). Their Lordships reversed the decision of the High Court. The facts of the case were briefly these. The respondents before the Privy Council instituted as plaintiffs a suit against one Raja Mukund Sahi to recover possession of six villages and a jungle which they claimed. The Court of first instance dismissed the suit. Just one year after the dismissal, the Raja gave a lease for a term of years of the right of mining for mica, and otherwise exploiting the jungle, to the appellant before the Privy Council. On appeal by the unsuccessful plaintiffs the High Court reversed the decision of the first Court and made a decree in favour of the plaintiffs and remitted the case to the lower Court to take an account of the mesne profits to which the appellants were entitled for three years prior to the institution of the suit and for the period thereafter till the delivery of possession. In inquiring into the mesne profits the amin not only ascertained the rents which the Raja had received from the appellant before the Privy Council and the other tenants, but also proceeded to inquire what the profits were which the various lessees might be taken to have made from the mica which

(1) (1922) I.L.R. 1 Pat. 581 (P.C.). (2) (1916) 1 P.L.J. 596.

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they had extracted during the terms of their leases, pending the somewhat protracted litigation. It is clear, as pointed out by the Privy Council, that in ascertaining such mesne profits the successful plaintiffs would not be entitled to the actual rents which the trespassing defendant had received, nor could the lessees be rendered liable for damages in that suit to which they were not parties in respect of the mica that they had removed. On the receipt of the amin's report the plaintiffs (that is, the respondents before the Privy Council) relying on the statements with regard to the profits obtained from the mines made an application that the several lessees from the Raja should be made parties to the proceedings. The appellant before the Privy Council raised various objections and said that since he knew of the plaintiffs' claim to the property he had surrendered his leases and that he should not be made a party. The Subordinate Judge accepting his contentions dismissed the plaintiffs' application. The High Court in appeal from his order held, basing their order on the language of Order XXII, rule 10, of the Code of Civil Procedure, that

"the appellants are entitled to have the persons in question added as parties to the proceedings, and compel them to account for any profits which they may have received from the land." (page 586).

Their Lordships of the Privy Council set aside this order, and in doing so they considered the scope of Order XXII, rule 10, of the Code of Civil Procedure.

Its scope is thus described:

"The order contemplates cases of devolution of interest from some original party to the suit, whether plaintiff or defendant, upon some one else. The more ordinary cases are death, marriage, insolvency, and then come the general provisions of rule 10 for all other cases. But they are all cases of devolution." (page 587).

Then, after referring to section 372 and noting that the words "in addition to" in the earlier Code have disappeared in the present Code, their Lordships state this:

"But the matter does not rest upon this change. The liability, if any, of the appellant to pay damages for removal of the mica is not a liability which has devolved to him from the defendant Raja. They were both liable, if liable at all, as trespassers, and a case, if any, against the appellant must rest upon his action and the direct relation established thereby between him and the plaintiffs." (page 588).

And then they point out that serious injustice would be done if any other view was taken. The reasoning contained in the last extract we have quoted from the judgment affords the real basis of their Lordships' decision. Order XXII, rule 10, relates to cases of devolution, and, as the liability of the appellant in that case was the liability of a trespasser which cannot be said to have devolved upon him from the defendant Raja, their Lordships held that he cannot be made liable in that suit and therefore refused to make him a party, the provisions of Order XXII, rule 10, in such a case being absolutely inapplicable. This is the reasoning of their Lordships and it is not affected, if we may say so with great respect, by the change in the language of the present rule. We may also point out that there is nothing in their Lordships' observations to justify the view that the devolution of interest contemplated in rule 10 is a devolution of the entire interest. The terms of the rule which speaks of a devolution of "*any* interest" do not support such a view. For the above reasons it appears to us that the reasoning of their Lordships in the Patna case cannot be relied upon for the view that the mortgagee of the plaintiff's interests in the suit should not be substituted in the place of the mortgagor and be allowed to continue the suit on his

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death. For the same reasons we regret we are unable to accept as correct the contrary view enunciated by KRISHNAN PANDALAI J. in Civil Miscellaneous Appeal Nos. 69 and 70 of 1929, etc. The decision in *Srinivasa Aiyangar* v. *Pratapa Simha Rajah Saheb*(1) has no application to the case before us, as in that case a mortgagee was sought to be brought on the record after the termination of the suit.

In the present case the petitioner being a mortgagee of the deceased plaintiff's share in the suit properties, an "interest" as contemplated by Order XXII, rule 10, has devolved on him and he may therefore be allowed to continue this appeal. We would therefore allow his petition. He being thus declared competent to conduct the appeal, it must follow, the appeal having been dismissed, that he should pay the costs of the respondents. It is argued by Mr. Raghava Rao on his behalf that the costs should be limited to the costs incurred by the respondents since the date of his application. We see no reason to limit the order in this manner. The appeal is dismissed with costs—one set.

The petitioner in Civil Miscellaneous Petition No. 995 of 1932 will get his costs of the application.

G.R.

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(1) (1925) 49 M.L.J. 704.