Ghulam Razzak their guardian *ad litem*. The order is on the record and it must be presumed, in the absence of evidence to the contrary, that everything was regularly and properly done.

The case that was referred to of *Walian* v. *Banke Behari Pershad Singh* (1) is really a much stronger case, because there the person who acted as guardian *ad litem* was not formally appointed, but he was recognised as guardian *ad litem* by the Court in the progress of the suit, and it was held by this Board that after that recognition it was too late to dispute his appointment.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed. The respondents must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants:—*Barrow, Rogers & Nevill.*

Solicitors for the respondents:—*T. L. Wilson & Co.*

J. V. W.

BRIJ NARAIN (DECREE-HOLDER) *v.* TEJBAL BIKRAM BAHADUR (JUDGEMENT-DEBTOR.)

P. C. 1910. *March* 2, *April* 19

[On appeal from the High Court of Judicature at Allahabad.]

*Decree—Amendment or alteration of decree—Amendment by Subordinate Judge of his decree after it had been affirmed by High Court on appeal—Future interest struck out of decree not being in accordance with judgement—Amendment limited to one decree-holder of joint decree on appeal to High Court—Civil Procedure Code (*1882*) sections* 206—209.

A joint and several mortgage decree passed by the court of a Subordinate Judge under section 88 of the Transfer of Property Act (IV of 1882), which gave future interest on the amount decreed, was affirmed on appeal by the High Court. Subsequently, on the application of the judgement-debtor (the respondent, who had deposited in the court the whole amount due under the decree, including future interest) the Subordinate Judge, notwithstanding objections by the decree-holders, amended his decree by striking out the future interest on the ground that such interest was not in accordance with the judgement on which the decree was based. The decree-holders (the appellant and another who was a transferee of the original decree-holders) made separate applications to the High Court for revision of the Subordinate Judge's order. On the application of the transferee decree-holder a Bench of the High Court held that the Subordinate Judge had no jurisdiction to amend a decree which had been affirmed by the High Court, and set aside his order, but only so far as it affected the transferee decree-holder. On

Present:—Lord MACNAGHTEN, Lord COLLINS, and Sir ARTHUR WILSON.

(1) (1903) I. L. R., 30 Calc., 1021; L. R., 30 I. A., 182.

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the appellant's application the same Bench held that under the circumstances it was not a case in which they ought to exercise their discretionary power of revision.

Held by the Judicial Committee that if the order of amendment was without jurisdiction as altering a decree after it had been amended on appeal, the alteration was equally ineffectual in the appellant's case as in the case of the other decree-holder, and should not have been allowed to stand; and the appeal was therefore decreed.

APPEAL from a judgement and decree (23rd Februray 1905) of the High Court at Allahabad which rejected an application made by the appellant for revision of an order (11th June 1904) passed by the Subordinate Judge of Moradabad amending a decree of his court of 30th January 1901.

The main facts necessary for the determination of this appeal are set out in the judgement of their Lordships of the Judicial Committee. The decree amended by the Subordinate Judge was a mortgage decree under section 88 of the Transfer of Property Act (IV of 1882). A decree absolute following thereon had been made on 5th October 1901 under section 89 of the same Act, and the decree of 30th January 1901 had been affirmed by the High Court on appeal on 1st December 1902.

The application for amendment was made by the respondent (the mortgagor and judgement-debtor in the litigation) on the ground that whereas the judgement of 30th January 1901 gave to the mortgagee no interest *pendente lite* or future interest, the decree based on it allowed such interest making the total amount due under the decree about Rs. 19,000 more than it should have been under the terms of the judgement.

On the application the Subordinate Judge held that section 209 of the Civil Procedure Code (which it was contended for the decree-holders allowed the awarding of interest in the decree notwithstanding that the judgement was silent about such interest) was not applicable on the ground that a mortgage decree was not a "decree for money," and that the cases deciding that "when a decree is affirmed on appeal the only decree which can be amended is the decree to be executed, and the decree to be executed is the decree of the appellate court," were distinguishable from the present case. He concluded as follows:—

"Unlike the above cases the decree-holders in the case before me applied for a decree under section 89 of Act IV of 1882 on the basis of the original decree

under section 88 of Act IV of 1882, dated 30th January 1901, and having obtained the decree under section 89 of the Act, they went on executing the decree of this Court until on account of the hypothecated property being ancestral the execution proceedings in connection with the sale of the said property were transferred to the Collector of Bijnor on 30th November 1901, and again on the 30th September 1902, while the appeals of the parties from the said original decree were still pending in the High Court. The High Court's judgements and decrees in appeal which were delivered and passed on the 1st December 1902, contained not the least mention of interest pending litigation or future interest, and it does not appear that the High Court's decree in appeal was ever executed or even mentioned in any proceeding connected with execution of decree. I therefore think that as the decree-holders in this case executed the original decree passed by this Court after obtaining a decree under section 89 of Act IV of 1882 on the basis of the said decree while the appeals from the said decree were pending in the High Court, and the High Court's decree was not executed by the decree-holders even after it was passed on the 1st December 1902, the judgement-debtors present application for amendment of the original decrees under sections 88 and 89 is maintainable in this Court, and I can amend them on the application of the judgement-debtor, and the abovementioned rulings cited by the decree-holders' pleader are not applicable to the present application for amendment of the decree."

The order was that "the decree be amended in this way, that the sums of money on account of interest *pendente lite* and future interest be struck out from the said decrees and deducted from the whole amount declared as due under them."

As the decree-holder Lachman Das was only a transferee of the original decree-holders, and not a party to the original decree, two separate applications were made by Brij Narain and Lachman Das to the High Court for revision of the Subordinate Judge's order.

The High Court (KNOX and AIKMAN, JJ.) in Lachman Das' application said :—

"The order, the revision of which is asked for, is an order passed by the Subordinate Judge of Moradabad amending a decree of his court. Previous to the order of amendment the decree had been affirmed on appeal by this court.

"The Subordinate Judge had therefore no jurisdiction to amend, *vide* the Full Bench decisions of this court *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (1) and *Muhammad Sulaiman Khan* v. *Fatima* (2). We therefore allow the application and set aside the order amending the decree, but only so far as it affects the interests of the applicant, Lachman Das."

In the matter of the application of the appellant Brij Narain they were of opinion that looking to all the circumstances of the

(1) (1888) I. L. R., 11 All., 267. (2) (1889) I. L. R., 11 All., 314.

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case it was not one in which they ought to exercise their discretionary power in revision: they therefore rejected the application.

On this appeal, which was heard *ex parte*—

DeGruyther, K. C., and *Ross* for the appellant contended that having found that the order of the Subordinate Judge was made without jurisdiction the High Court was wrong in setting it aside only so far as it concerned Lachman Das. That court should have declared it inoperative altogether, and against all persons whom it purported to affect. The order was one relating to a joint and several decree in favour of all the decree-holders, and could not properly remain valid as against the appellant, and at the same time be set aside so far as it affected the other decree-holders. Reference was made to Civil Procedure Code (Act XIV of 1882) sections 206 and 209; and Maxwell on Statutes, page 335.

1910, *April 19th.*—The judgement of their Lordships was delivered by LORD COLLINS:—

The story out of which the points involved in this appeal arise is rather intricate. On the 5th March 1898 the appellant and two persons named Kishori Lal and Sri Ram instituted a suit against the predecessor in title of the respondent before the Subordinate Judge of Moradabad, for the recovery of more than a lakh of rupees with future interest, by sale of property mortgaged under two documents dated respectively the 11th May and the 13th December 1894. On the 6th May 1898, the claim was decreed by the First Court, but on appeal to the High Court at Allahabad that Court took the view that the learned judge had placed undue pressure upon the defendant, who had asked for a postponement on the ground of illness, to go on with the case, and accordingly set aside the decree which he had made and remanded the case for determination according to law.

On the 30th January 1901, the case came again before the Subordinate Judge of Moradabad and resulted in a decree for Rs. 70,257-14-0, with future interest. Meanwhile Kishori Lal and Sri Ram had sold the whole of their interest in the decree to one Lachman Das, to whom the present appellant also transferred a part of his interest as a decree-holder, and the name of Lachman Das was added to the record. From this decree both parties appealed to the High Court. The High Court dismissed the

defendant's appeal, and with a slight modification affirmed the decree of the First Court on the cross appeal.

On the 5th October 1901, on the application of the original decree-holders, the First Court made an order absolute for sale of the mortgaged property under sections 89 and 93 of the Transfer of Property Act for the amount decreed, together with future interest. Thereafter the present appellant applied to the First Court for execution of the said decree, and after certain intermediate proceedings, which it is not necessary to refer to in detail, the judgement-debtor on the 21st November 1903, deposited the entire amount due under the decree, with future interest.

On the 9th February 1904, the present respondent, the judgement-debtor, applied to the First Court to amend the said decree by striking out so much of it as awarded future interest on the amount decreed. In March 1904, petitions objecting to the application of the judgement-debtor on various grounds were filed on behalf of the present appellant and Lachman Das. With reference to the allegations of the parties, the Subordinate Judge framed the following issues for trial :—

1. Whether the judgement-debtor's application for amendment of decrees is barred by limitation?
2. Whether the said application is barred by section 13 of the Civil Procedure Code?
3. Whether the decrees of this court under sections 88 and 89 of Act IV of 1882 can be amended by this court as requested by the judgement-debtor?
4. Whether the judgement-debtor has a right to apply for amendment of the said decrees?

On the 11th June 1904, the Subordinate Judge made an order granting the application of the judgement-debtor. He found the four issues in his favour, and amended the two decrees of the court made under sections 88 and 89 of the Transfer of Property Act by striking out of them the provision for future interest, the effect of such amendment or modification being to reduce the amount payable under the decrees by a sum of over Rs. 19,000.

Two applications were therefore presented to the High Court by the present appellant and the said Lachman Das for revision of the order of the Subordinate Judge, dated the 11th June 1904. They were heard by a Divisional Court, constituted by two learned judges of the High Court, who on the 23rd February

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1905, delivered separate judgements disposing of the two applications for revision in the following manner:

With regard to the application 24 of 1904, they observed that the order revision of which was asked for was an order passed by the Subordinate Judge of Moradabad amending a decree of his Court. Previous to the order of amendment the decree had been affirmed on appeal by the High Court. The Subordinate Judge therefore had no jurisdiction to amend. The learned judges therefore allowed the application and set aside the order amending the decree, but only so far as it affected the interests of the applicant Lachman Das. With regard to the application for revision 32 of 1904 of Brij Narain the learned judges delivered the following judgement:

"Looking to all the circumstances of the case, we do not think that this is a case in which we ought to exercise our discretionary power in revision. We reject the application, but make no order as to costs."

Dissatisfied with the judgement and decree of the High Court made on the said application 32 of 1904, the present appellant applied for leave to appeal therefrom to His Majesty in Council. His application was heard by The Honourable The Chief Justice and the Honourable Sir W. R. Burkitt.

When granting the application their Lordships, after referring to the facts of the case, made the following observations:—

"A Bench of this Court on the application by Lachman Das allowed the first application, holding that the Subordinate Judge had no power to modify his decree after it had been confirmed by the High Court and set aside the order complained of. In the other application No. 32 of Brij Narain, the Bench made an order rejecting it, holding that, under all the circumstances of the case, this was not a case in which they should exercise their discretionary power in revision. The consequence is that there are now two joint decree-holders, as to one of whom the decree contains a provision for future interest the value of which is Rs. 19,000 odd, whilst as to the other this provision does not exist. The provision of the decree therefore seems to be apparently inconsistent, as out of two joint decree-holders one can execute the decree *plus* future interest, whilst the other cannot. Under these circumstances we think this is a case which we should certify to be fit for appeal."

Their Lordships have not had the advantage of hearing the case argued for the respondent, but they think the High Court have themselves said enough to make it clear that if the decree of the First Court was made without jurisdiction as altering a decree after it had been affirmed on appeal in the case of

Lachmas Das, so also the alteration in Brij Narain's case was equally ineffectual, and ought not to have been allowed to stand.

Their Lordships will humbly advise His Majesty that this appeal should be allowed. The respondent will pay the costs.

Appeal allowed.

Solicitors for the appellant:—*Barrow, Rogers and Nevill* J. V. W.

APPELLATE CIVIL.

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February 1.

Before Mr. Justice Sir George Knox and Mr. Justice Richards.

IMAM-UD-DIN AND ANOTHER (JUDGMENT-DEBTORS) *v.* SADARATH RAI (DECREE-HOLDER)*

Abatement of appeal—Death of a respondent pending appeal—Representative not brought on record—Decree against all—Cause of action not surviving in favour of other respondents—Civil Procedure Code (1882), *section* 368—*Pre-emption.*

One of the defendants respondents in a suit for pre-emption died pending appeal. No application was made within limitation to bring his representatives on to the record, but the appeal was decreed as against all the respondents.

Held that the suit being one in which the cause of action did not survive against the other respondents, the decree must be set aside as a whole. *Raj Chunder Sen* v. *Ganga Das Seal* (1) referred to. *Imdad Ali* v. *Jagan Lal* (2) distinguished.

THE facts of this case were as follows:—

THE decree-holder plaintiff who had instituted a suit for pre-emption, obtained a decree on the 15th April, 1907, from the High Court in S. A. 588 of 1905. At the date of the above judgement the Court was in ignorance of the fact that Nanhu, one of the defendants respondents, had died on 28th October, 1906. The decree-holder paid into court the purchase money and applied in execution of his decree for possession on 24th August, 1907, and obtained possession on 3rd September, 1907. The present appellants, who were the two judgement-debtors other than the deceased, Nanhu, applied to the executing court on 25th September, 1907, for re-delivery of possession to them, on the ground that as the decree was passed after the death of Nanhu, it was

*Second Appeal No. 719 of 1908 from a decree of H. Dupernex, District Judge of Saharanpur, dated the 22nd of May 1908, confirming a decree of Sudarshan Dyal, Munsif of Deoband, dated the 3rd of February 1908.

(1) (1904) I. L. R., 31 Calc., 467. (2) (1895) I. L. R., 17 All., 478.