

## APPELLATE CIVIL.

*Before Sir Louis Stuart, Kt., Chief Judge, and Mr. Justice  
Wazir Hasan.*

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February, 26.

MUSAMMAT LAKHPATI KUAR (DEFENDANT-APPELLANT)  
v. DAULAT SINGH (PLAINTIFF-RESPONDENT).\*

*Civil Procedure Code, order XXII, rule 4, sub-rule (3), and rule 10, and order XXXIV, rules 7 and 8—Death of a decree-holder after passing of a preliminary decree and before the passing of the final decree, effect of—Abatement of suit—Limitation for an application for substitution.*

*Held*, that the provisions of sub-rule (3) of rule 4 of order XXII of the Code of Civil Procedure do not apply to a suit in which a decree of the court preliminary in its legal characteristics has come into existence and death occurs in the rank of the defendants subsequent to such a decree. The said sub-rule has no application to such a case. The word "suit" in order XXII must be given a restricted meaning. It means only such proceedings as are antecedent to the passing of a decree, preliminary or otherwise.

Where mortgagors obtain a preliminary decree for redemption under order XXXIV, rule 7 of the Code of Civil Procedure, and some of them die and the rest of them are their representatives in interest by survivorship, the proper rule applicable is rule 10 and not rule 4 of order XXII of the Code of Civil Procedure and the right for substitution of the representatives of the deceased accrues from day to day and is not barred by any prescribed period of limitation. [*Lachmi Narain Marwari v. Balmakund Marwari* (1), *Kedarnath Dutt v. Harra Chand Dutt* (2), *Ram Nath Bhattacharjee v. Charan Sircar* (3), and *Surrendra Keshub Roy v. Khettar Krishno Mitter* (4), relied upon.]

Mr. Niamatullah, for the appellant.

Mr. A. P. Sen, for the respondent.

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\* Second Civil Appeal No. 366 of 1926, against the decree of M. Humayun Mirza, Subordinate Judge of Sultanpur, dated the 2nd of July, 1926, confirming the decree of Pandit Krishna Nand Panday, Munsif of Amethi at Sultanpur, dated the 9th of February, 1926.

(1) (1924) 51 L.A., 321.

(2) (1881) I.L.R., 8 Calc., 420.

(3) (1898) 3 C.W.N., 756.

(4) (1903) I.L.R., 30 Calc., 609.

STUART, C. J., and HASAN, J. :—This is the defendant's appeal from the decree of the Subordinate Judge of Sultanpur, dated the 2nd of July, 1926, affirming the decree of the Munsif of Amethi, dated the 9th of February, 1926.

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The decree under appeal is a final decree in terms of order XXXIV, rule 8, sub-rule (1) of the Code of Civil Procedure, in favour of the plaintiff mortgagor in a claim for redemption. The facts are as follows :—

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The respondent Daulat Singh and two others, Nakched Singh and Chauharja Bakhsh Singh, brought a suit for redemption of a certain mortgage against one Hanoman. They obtained a preliminary decree in pursuance of rule 7 of order XXXIV of the Code of Civil Procedure on the 4th of September, 1916. Under that decree the court declared the amount due at the date of the decree to be Rs. 977 and directed the plaintiffs to pay into court the amount so due and the costs of the defendant within six months from the date of the decree, and further directed that if the plaintiffs failed to pay the aforesaid amount they shall lose all right to redeem the property. The payment was not made within the time fixed by the decree. Two of the plaintiffs, that is Nakched Singh and Chauharja Bakhsh Singh, have since died, and it is now agreed that the respondent, Daulat Singh, is their representative in interest by right of survivorship. Hanoman has also since died and the appellant, Musammāt Lakhpati Kuar, is his representative in interest.

On the 7th of November, 1925 and afterwards on the 4th of January, 1926 Daulat Singh made applications to the trial court asking for the relief

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of a final decree under rule 8, sub-rule (1) of order XXXIV of the Code of Civil Procedure. In these applications he stated the fact of the deaths of the other two plaintiffs and of his status as their legal representative. He further stated the fact of the death of Hanoman and of Musammat Lakhpati Kuar's succession to his estate. The objection taken by Musammat Lakhpati Kuar to these applications of Daulat Singh is that they are barred by time, and this is the only matter with which we are concerned in the present appeal.

The objection taken by the appellant is founded on the admitted fact that Hanoman, the defendant in the suit for redemption, had died more than three years previous to the applications of Daulat Singh. The line on which the argument has proceeded before us is that inasmuch as the suit for redemption must be deemed to have been pending at every moment of the time previous to the making of the final decree, it must abate in virtue of the provision of sub-rule (3) of rule 4 of order XXII of the Code of Civil Procedure, and consequently no final decree could be passed.

Decisions of almost all the High Courts in India were cited in support of the view that proceedings after the preliminary decree and before the final decree are proceedings in the suit. We are of opinion that the precise question which arises for determination in the present case is not answered on the view of the rule of procedure taken in those decisions. The question which we have to decide is whether the provision of sub-rule (3) of rule 4 of order XXII of the Code of Civil Procedure applies to a suit in which a decree of the court preliminary in its legal characteristics has come into existence and death occurs in the rank of the defendants subsequent to such a decree.

According to our judgment the said sub-rule has no application to such a case. The word "suit" in order XXII must be given a restricted meaning. We think it means only such proceedings as are antecedent to the passing of a decree, preliminary or otherwise. This interpretation is supported by the language and import of the several rules of the said order. The first rule is that the death of a plaintiff or a defendant shall not cause the suit to abate if the right to sue survives. Obviously no question of "the right to sue" can subsist in a suit after a decree is delivered by the court in that suit. As soon as the court pronounces judgment the plaintiff's original right to sue disappears if he has failed and it merges in the decree if he has won: *transit in rem judicatum*.

It is on this foundation of the effect of a decree that a second suit is barred. The same conclusion follows from the language of rules 2, 3 and 4 of order XXII of the Code.

It appears to us that the provision of rule 6 clearly supports the interpretation which we have adopted in the foregoing paragraph of this judgment. It will be noticed that in rule 6 the words used are "the cause of action" and not "the right to sue." From this we infer that the two expressions are intended to be synonymous. There can be no question of the surviving of a cause of action in a suit when a judgment has been pronounced in respect of that cause of action. By the effect of the judgment the decree takes the place of the cause of action either by affirming it or by rejecting it, and therefore according to rule 6 no abatement takes place by reason of the death of either party between the conclusion of the hearing and the pronouncing of the

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judgment. Indeed, rule 6 for the purposes of order XXII limits the meaning of the word "suit" to the conclusion of the hearing" of a suit.

The acceptance of the argument in support of the appeal for an order of abatement unquestionably involves the dismissal of the suit by setting aside the preliminary decree of the 4th of September, 1916.

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It is clear to our mind that we cannot do so. We base this opinion on the principle of a recent judgment of their Lordships of the Judicial Committee in the case of *Lachmi Narain Marwari v. Balmakund Marwari* (1). In that case a preliminary decree by consent had been passed by the High Court on appeal in a suit for partition. The suit was thereupon remitted to the Subordinate Judge in order that the necessary steps for effecting the partition might be taken. The Subordinate Judge fixed a day for hearing the parties and gave them notice, but when the day came neither the plaintiff nor his pleader appeared. Eventually the Subordinate Judge dismissed the suit for want of further prosecution. The order of the Subordinate Judge was set aside by the High Court on an application for revision and the order of the High Court was the subject-matter of appeal before their Lordships of the Judicial Committee.

Their Lordships founded their judgment on the following observation:—

"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. After a decree any party can (as already stated) apply to have it enforced."

(1) (1924) L.R., 51 I.A., 321.

In the present case the respondent asks the court to do no more and no less than to enforce the decree of the 4th of September, 1916, and it is not suggested that in the way of granting his prayer there is any obstacle other than the one which is being considered in this judgment. By accepting the argument we shall be putting the respondent, as remarked by their Lordships of the Judicial Committee in the case just now quoted, "into an intolerable position, not able to go on with his suit, and yet not in a position to bring a fresh suit." It may be observed that the consequences of a dismissal of a suit for default under order IX, rule 8, are the same as of order of abatement of a suit under sub-rule (3) of rule 4 of order XXII, that is to say, no fresh suit shall be brought on the same cause of action. See rule 9 of order IX and rule 9 of order XXII of the Code.

It was argued on behalf of the plaintiff-respondent that the proper rule applicable to the circumstances of this case is rule 10 and not rule 4 of order XXII of the Code of Civil Procedure, and the right to apply for substitution of the representatives of a deceased party on the record of the case accrues from day to day and is consequently not barred by any prescribed period of limitation. The argument finds support from certain decisions of the Calcutta High Court. *Kedarnath Dutt v. Harra Chand Dutt* (1), *Ram Nath Bhuttacharjee v. Charan Sircar* (2) and *Surrendra Keshub Roy v. Khettar Krishto Mitter* (3).

We therefore dismiss this appeal with costs.

*Appeal dismissed.*

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