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party's case that the sale took place for the arrears of 1926 and it was, therefore, not open to the Munsif to set up a new case against the plaintiffs without giving them an opportunity to meet it. I may mention, however, that the plaintiff-respondents offered to tender in evidence in this Court a copy of the Collector's ledger to show that there was in fact no arrear in respect of the revenue payable in 1926 but we did not consider it necessary to admit any fresh evidence at the present stage.

As, in my judgment, all the contentions raised on behalf of the appellant fail, I would dismiss the appeal with costs.

LUBY, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Fazl Ali and Luby, JJ.

MAHANT HARIHAR GIR

v.

KARU LALL.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXII, rule 10—provision, whether enabling—defendant's interest devolving on third person pending litigation—failure to bring on record such person—effect—decree against original defendant, whether binding on such person.

The provision in Order XXII, rule 10, Code of Civil Procedure, 1908, is merely an enabling one and no penalty is prescribed under this rule for failure to substitute the person upon whom the interest of a plaintiff or a defendant devolves while a suit is pending.

The intention of Order XXII, rule 10, seems to be that though it is desirable that the party having a present interest in the litigation should be before the Court, yet the litigation is not to become infructuous if such a party is not brought before the Court.

*Appeal from Original Order no. 89 of 1934, from an order of Babu Dwarika Prashad, Subordinate Judge of Gaya, dated the 10th February, 1934.

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Therefore, in cases where the interest of the defendant devolves on another person during the pendency of the litigation, such person may himself come forward and ask the Court to allow the suit to be continued against him, or the plaintiff might move the Court to substitute him in place of the original defendant; but if the plaintiff fails to take such steps the assignee, or the person on whom the interest of the defendant devolves, would be bound by the decree passed against the original defendant.

Rai Charan Mandal v. Biswa Nath Mandal(1), followed.

Appeal by the objector.

The facts of the case material to this report are set out in the judgment of Fazl Ali, J.

Sarjoo Prasad, for the appellant.

Anand Prasad, for the respondents.

FAZL ALI, J.—It appears that in a suit brought by the respondent-decreeholders upon the basis of a mortgage bond a preliminary decree was passed on the 29th January, 1932, against the mortgagor and a number of other persons including one Mahant Krishna Dayal Gir who was one of the puisne mortgagees of the mortgaged properties. This decree was made final on the 5th September, 1932, but it is alleged that sometime before this date Mahant Krishna Dayal Gir had relinquished his right of mahantship and duly installed the appellant as his successor and gadinashin in respect of the Math presided over by him. According to the appellant the consequence of this transfer of interest is that the decree has become a nullity and incapable of execution against him and the property in which he is interested. This contention, however, has been negatived by the learned Subordinate Judge and the appellant, therefore, appeals to this Court.

The principal question which was argued before us was whether under Order XXII, rule 10, which is the provision applicable to cases where the interest of a party devolves on another person during the

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pendency of the suit, it was incumbent on the decreeholder to have made the appellant a party to the proceeding before the passing of the final decree. Order XXII, rule 10, runs thus:—

“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.”

This provision has been construed in the case of *Rai Charan Mandal v. Biswa Nath Mandal*(1) wherein it was decided that the person on whom the interest of the plaintiff devolves while the suit is pending may, if he so chooses, obtain leave of the Court under Order XXII, rule 10, to continue the suit; but if he does not do so, the original plaintiff may continue the suit and his successor will be bound by the result of the litigation. In that case Sir Ashutosh Mookerjee observes as follows:—

“This (rule) entitles the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest pendente lite to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon him to do so. If he does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record and yet.....he will be bound by the result of the litigation even though he is not represented at the hearing. But the legislature has not further provided that in the event of devolution of interest during the pendency of a suit, if the person who has acquired title does not obtain leave of the Court to carry on the suit, the suit would stand dismissed. It is also plain that if the person who has acquired an interest by devolution, obtains leave to carry on the suit, the suit in his hands is not a new suit..... It is the old suit carried on at his instance and he is bound by all proceedings up to the stage when he obtains leave to carry on the proceedings.....If

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this view were not maintained, what would be the result? The suit commenced by the plaintiff stands dismissed. The person who has acquired the right, title and interest of the plaintiff, commences a fresh suit. His cause of action is the original cause of action upon which the first plaintiff commenced his suit. It may consequently happen that while the plea of limitation would have been of no avail in answer to the claim of the original plaintiff, it may be very effective as an answer to the subsequent suit. It may also be asked if the contention of the appellants were to prevail, what would happen in the event of a devolution of the interest of the defendant? Would the suit be heard *ex parte*, because interest of the defendants had passed to a stranger to the litigation or would the suit stand dismissed because it was at that stage a suit against a person who had no interest in the litigation? If the contention of the appellant were upheld, there would obviously be endless litigation, and the substantial rights of litigants might be completely defeated”.

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It is conceded by the learned Advocate for the appellant that this decision has not been dissented from so far and in my opinion its authority cannot be questioned. It is clear from the language used in Order XXII, rule 10, that this provision is merely an enabling one and it is also to be noticed that no penalty is prescribed under this rule for failure to substitute the person upon whom the interest of a plaintiff or a defendant devolves while a suit is pending. This rule merely provides that should the interest of the plaintiff devolve upon another person by assignment or otherwise while the litigation is still proceeding such other person may obtain the permission of the Court to continue the litigation as if he were the plaintiff in the suit. It similarly provides that in those cases where the interest of the defendant devolves on another person during the

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pendency of the litigation, the litigation may be continued as against such other person with the permission of the Court. The language of this provision does not suggest that in the latter case the person upon whom the interest of the defendant has devolved cannot himself come forward and ask the Court to allow the suit to be continued against him, nor does it suggest that if the plaintiff fails to substitute the assignee or the person upon whom the interest of the defendant otherwise devolves, such a person would not be bound by the decree passed against the original defendant. It is interesting to compare this provision with the provisions relating to abatement which are more of a mandatory character and which also state clearly that in case the legal representative of a deceased party is not substituted, the suit or appeal shall abate against the party who is dead and whose legal representative has not been substituted. Thus the intention of Order XXII, rule 10, seems to be that though it is desirable that the party having a present interest in the litigation should be before the Court, yet the litigation is not to become infructuous if such a party is not brought before the Court. Indeed the provision that such a party can be brought before the Court only by the leave of the Court seems to suggest that there may be cases in which leave may be refused and the case allowed to proceed in the name of the original plaintiff or defendant. In the present case it is not denied that a preliminary decree had been passed against Mahant Krishna Dayal Gir by a Court of competent jurisdiction. I cannot conceive of any principle of law under which such a decree should be regarded as a nullity merely because Mahant Krishna Dayal Gir chose to relinquish his rights in favour of the appellants without informing the Court or the decreeholder. In any view this appeal appears to me to be entirely without merit and I would dismiss it with costs.

LUBY, J.—I agree.

Appeal dismissed.