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security for its restoration if and when required by the Court to do so.

In all the circumstances of the case I dismiss the appeal with costs, advocate's fee in this Court to be two gold mohurs.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

MA THEIN AND OTHERS

v.

E. G. NEPEAN AND OTHERS.*

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April 22.

Mortgage-decree for redemption—Mortgagor dying without redeeming—Heirs not brought on the record—Foreclosure order by mortgagee against executor—Revocation of probate for fraud—Heirs' suit to redeem mortgage—Heirs whether bound by foreclosure order against executor—Leave to appeal to Privy Council—Substantial question of law—Case concluded by authority.

A mortgagor died in 1899 without redeeming his property in respect of which he had obtained a decree in 1898 for redemption. The decree provided for foreclosure if the mortgagor failed to redeem by a certain date. None of his heirs ever took steps to be brought on the record as his legal representatives. In 1900 the mortgagees obtained an order for foreclosure and possession against a nephew of the deceased who had obtained probate of an alleged will of the deceased and who was brought on the record as his legal representative. In 1903 the grant of probate was revoked at the instance of the widow of the deceased as having been obtained by fraud. In 1928 the heirs sued the representatives of the original mortgagees for redemption of the property, but the suit was dismissed by the District Court and on appeal by the High Court. The heirs applied for leave to appeal to His Majesty in Council.

Held that the heirs were bound by the order of the Court made in 1900 for foreclosure as against the executor, and the subsequent revocation of probate did not affect that order. A certificate for leave to appeal to the Privy Council refused as the case being concluded by authority no substantial question of law was involved.

Allen v. Dundas, 3 T.R. 125; *Debendra Nalli Dutt v. Administrator-General of Bengal*, I.L.R. 35 Cal. 955; *Hewson v. Shelley*, (1914) 2 Ch.D. 13—referred to.

* Civil Miscellaneous Application No. 166 of 1930 arising out of Civil First Appeal No. 158 of 1929 of this Court.

D. C. Munsî for the appellants.

N. N. Burjorjee for the 3rd and 5th respondents.

Patel for the 4th respondent.

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PAGE, C.J.—This is an application for a certificate granting leave to appeal to His Majesty in Council.

It is common ground that the amount or value of the subject-matter of the suit and of the appeal to His Majesty in Council is over Rs. 10,000. It is also common ground that the decree against which it is sought to prefer an appeal to His Majesty in Council affirms the decision of the trial Court. It is, therefore, incumbent upon the applicants to satisfy this Court that the appeal to His Majesty in Council must involve a substantial question of law between the parties.

I am glad to think that it is the duty of the Court to refuse leave to appeal in this case, which appears to me to be speculative and misconceived.

This is a suit to redeem a mortgage which was created in 1871, and, inasmuch as a power of redemption may be exercised within sixty years, the suit which was instituted on 30th November 1928 is not barred by limitation. The plaint in the suit is founded simply upon the right of the plaintiff to redeem the mortgage created by his father, Kader Moideen, in 1871; but when the case was investigated at the trial a very different situation was disclosed. It was proved, or admitted, that in 1891, the plaintiff's father, Kader Moideen, had brought a suit in the District Court of Shwegyin for the purpose of redeeming the mortgage. That suit found its way to the Privy Council, and eventually on the 14th of December 1896, the Judicial Commissioner of Lower Burma passed a decree in favour of Kader Moideen for redemption of the mortgaged property on payment

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by him into Court within six months from the date of the decree of a sum of Rs. 1,90,785-13-4. It was further, *inter alia*, decreed that "in default of the plaintiff (appellant) paying into Court such principal, interest and costs as aforesaid by the time aforesaid, then it is ordered that the plaintiff (appellant) do stand absolutely debarred of all right to redeem the said mortgaged lands." Against that decree a further appeal was preferred to Her Majesty in Council, and on the 18th of July 1898, the Judicial Committee by their judgment advised Her Majesty "that the decree of the Court of the Judicial Commissioner of Lower Burma of the 14th December 1896, ought to be varied by disallowing so much of the sum of Rs. 25,200 for principal and Rs. 53,214, for interest charged against the appellant (being item No. 54 in the Account II of the respondents) as represents the allowance of Rs. 100 per mensem after the death of John Nepean and the interest thereon with consequential variations, and that in other respects the said last mentioned decree ought to be affirmed." A decree in that sense was drawn up, the sum payable by the plaintiff being capable of ascertainment by a simple mathematical calculation.

On the 2nd of January 1899, Kader Moideen died and during the thirty years that have elapsed since his death no attempt has been made by the plaintiff or the other heirs of Kader Moideen to substitute the legal representatives of Kader Moideen as the plaintiffs in that suit, and no steps have been taken from the 18th of July 1898 until the present time to give effect to, or to put into execution, the decree that had been passed in Kader Moideen's suit which would abate on his death if substitution of his legal representatives was not duly made.

On the 14th of March 1899, however, Kader Moideen's nephew, one Hyder Sahib, obtained a grant

of probate of the will of Kader Moideen from the District Court of Toungoo. Armed with the probate Hyder Sahib presented an application to the District Court of Hanthawaddy that he might be brought upon the record in Kader Moideen's suit as his legal representative, and an order to that effect was passed on the 6th of May 1899. On the 14th of June 1899, the District Court of Hanthawaddy further ordered that Hyder Sahib was entitled to redeem the property on payment of a sum of Rs. 2,12,531-1-8. Hyder Sahib made no payment pursuant to the decree of the District Court of Hanthawaddy of the 14th of June 1899, and on the 18th of December 1899, the defendants applied in Civil Execution Case No. 28 of 1899 to have the decree made absolute. On the 6th of January 1900, the District Judge of Hanthawaddy decreed that it should be declared that Kader Moideen and his representatives were for ever debarred from redeeming the mortgage and that the Receiver, the Deputy Commissioner of Pegu, should put the defendants in possession of the property. This was done, and no further steps were taken in connection with this mortgage until 1903 when Ma Baw U, the widow of Kader Moideen, applied to the District Court of Toungoo for an order revoking the grant of probate to Hyder Sahib. On the 19th of March 1903, the District Judge of Toungoo held that the execution of the will had been obtained by fraud, and that Kader Moideen was not of sound disposing mind when he executed it; and accordingly passed an order revoking the probate which had been granted to Hyder Sahib. An appeal was lodged against this order but it was dismissed by the late Chief Court of Lower Burma on the 3rd of March 1904. No steps were taken by Ma Baw U or the other heirs of Kader Moideen to have themselves substituted as plaintiffs in Kader Moideen's suit for redemption, and no further action

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was taken by the widow or the other representatives of Kader Moideen for twenty-four years, and it was not until the 30th of November 1928, that the present suit was filed against the representatives of the original mortgagees for redemption of the mortgage of 1871. That suit was dismissed by the learned District Judge as being barred by *res judicata*, and upon similar grounds an appeal to the High Court against the decree of the District Court of Pegu was dismissed. It is from the decree of the High Court dismissing the appeal from the District Court of Pegu that the applicants seek to present the present appeal to His Majesty in Council. Now, it is to be borne in mind that neither the plaintiff nor the widow or any other of the heirs of Kader Moideen have at any time applied to be substituted as plaintiffs in Kader Moideen's suit in 1891 to redeem the mortgage of 1871; that by the decree of 6th January 1900 it was declared that Kader Moideen and his representatives were for ever debarred from redeeming the mortgage and that against that decree no appeal was preferred. The defendants in that suit, who are now dead, obtained possession of the property pursuant to the decree and during the twenty-eight years that elapsed before the present suit for redemption was filed the validity of the decree of 6th January 1900 has never been challenged, and the property has been dealt with by the defendant mortgagees as their own. In these circumstances it appears to me that there is force in the respondents' contention that, assuming that the plaintiff in the present suit was not bound by the decree obtained against Hyder Sahib, it would not be competent for the plaintiff or the plaintiff's representatives as the successors in title of Kader Moideen to file a suit for the very purpose for which Kader Moideen filed his suit in 1891, namely, to redeem the

mortgage created by Kader Moideen in 1871. If a further appeal lay it may be that upon that ground the present suit in any event would be held to be misconceived. It is, however, unnecessary to decide this question for the purpose of disposing of the application now before us, for, in my opinion, the only question of law that the appellants contend is involved in the appeal to His Majesty in Council is concluded by authority against the appellants.

The appellants urge that a substantial question of law arises between the parties because they contend that, inasmuch as the grant of probate to Hyder Sahib was revoked, the decree passed by the District Court of Hanthawaddy on the 6th of January 1900 was null and void as against the representatives of Kader Moideen. My learned brothers Carr and Otter, JJ., decided that question adversely to the applicants, and, in my opinion, there is no substance in it.

The decree of 6th January 1900 was passed against Hyder Sahib as executor of the will and legal representative of the estate of Kader Moideen to whom probate had been granted, and the plaintiff as the son and one of the heirs of Kader Mohideen was bound by it.

In my opinion the question of law that has been raised is covered by the decisions in *Debendra Nath Dutt v. Administrator-General of Bengal* (1); *Hewson v. Shelley* (2), and *Allen v. Dundas* (3).

For these reasons, in my opinion, no substantial question of law is involved in this appeal and the certificate for leave to appeal is refused.

Advocates' fee ten gold mohurs for the advocate for respondent No. 4; and also for the advocate for respondents Nos. 3 and 5.

MYA BU, J.—I agree.

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(1) (1908) I.L.R. 35 Cal. 955. (2) L.R. (1914) 2 Ch. Div. 13. (3) 3 T.R. 125.